No. 20-___

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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December 30, 2020

QUESTIONS PRESENTED

Since the 1980s, the Wisconsin Legislature has authorized absentee voting but explicitly commanded it must be "carefully regulated to prevent the potential for fraud and abuse." Wis. Stat. § 6.84(1). During the 2020 Presidential election, however, the Wisconsin Elections Commission (WEC) and local election officials implemented unauthorized, illegal absentee voting drop boxes, compelled illegal corrections to absentee ballot witness certificates by poll workers, and encouraged widespread voter misuse of "indefinitely confined" status to avoid voter ID laws, all in disregard of the Legislature's explicit command to "carefully regulate" the absentee voting process.

After Election Day, Respondents encouraged the counting of, and did count, tens of thousands of invalid absentee ballots received in violation of the "mandatory" requirement of Wis. Stat. § 6.84(2) that absentee ballots "in contravention of the [specified statutory absentee balloting] procedures…may not be counted."

The foregoing raises the following questions:

1. Whether WEC and local election officials violated Art. II, § 1, cl. 2 of the United States Constitution and the Fourteenth Amendment's guarantee of Equal Protection during the 2020 Presidential election by implementing unauthorized absentee voting practices in disregard of the Wisconsin Legislature's explicit command that absentee voting must be "carefully regulated" and absentee ballots cast outside of the Legislature's authorized procedures "may not be counted"?

2. Whether this Court should declare the Wisconsin election unconstitutional and void under Article II and thus failed under 3 U.S.C. § 2 and allow the Wisconsin Legislature to appoint its electors?

3. Whether federal courts may rely on the doctrine of laches to avoid reviewing Electors Clause or Equal Protection claims arising after absentee balloting began or which could not have reasonably been brought before absentee balloting commenced?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings include the Petitioner Donald J. Trump and the following Respondents:

- Ann S. Jacobs, Wisconsin Elections Commission ("WEC" or the "Commission") member
- Mark L. Thomsen, WEC member
- Marge Bostelmann, WEC member
- Dean Knudson, WEC member
- Robert F. Spindell, Jr., WEC member
- Scott McDonell, Dane County Clerk
- George L. Christenson, Milwaukee County Clerk
- Julietta Henry, Milwaukee Election Director
- Claire Woodall-Vogg, Executive Director of the Milwaukee Election Commission
- Tom Barrett, Mayor of the City of Milwaukee
- Jim Owczarski,City Clerk of the City of Milwaukee
- Satya Rhodes-Conway, Mayor of the City of Madison
- Maribeth Witzel-Behl, Clerk of the City of Madison
- Cory Mason, Mayor of the City of Racine
- Tara Coolidge, Clerk of the City of Racine
- John Antaramian, Mayor of the City of Kenosha
- Matt Krauter, Clerk of the City of Kenosha
- Eric Genrich, Mayor of the City of Green Bay
- Kris Teske, Clerk of the City of Green Bay
- Douglas J. La Follette, Wisconsin Secretary of State

- Tony Evers, Governor of Wisconsin

No party is a nongovernmental corporation.

LIST OF ALL PROCEEDINGS DIRECTLY RELATED

Trump v. *Wisconsin Elections Commission*, *et al*. No. 2:20-cv-01785, U.S. District Court for the Eastern District of Wisconsin. Judgment entered Dec. 12, 2020.

Trump v. *Wisconsin Elections Commission*, *et al*. No. 20-3414, U.S. Court of Appeals for the Seventh Circuit. Judgment entered Dec. 24, 2020.

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The Seventh Circuit's opinion (Pet.App. 1a–11a)[1] is reported at 2020 WL 7654295 (7th Cir. 2020). The opinion of the district court (Pet.App. 13a–46a) is published at 2020 WL 7318940.

JURISDICTION

The Seventh Circuit entered its judgment on December 24, 2020. Pet.App. 12a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I § 4 of the United States Constitution states in relevant part:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

Article II, § 1, cl. 2 of the United States Constitution (the "Electors Clause") states in relevant part:

> Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the

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[1] References to the attached Appendix are styled: "Pet.App. __a." References to Petitioners' Appendix filed with the Seventh Circuit as Document No. 51 are styled: "7th Cir. App. __." References to ECF filings in the district court are preceded by "ECF." Electronically filed Seventh Circuit documents are referred to as "7th Cir. Doc. __."

> whole number of Senators and Representatives to which the State may be entitled in the Congress…

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution state:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pertinent provisions from Title 3 of the U.S. Code and Chapters 5, 6, and 7 of the Wisconsin Statutes are reprinted beginning at Pet. App. 49a.

STATEMENT OF THE CASE

This Court has long recognized that, "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national in-

terest." *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983).

The framers of the United States Constitution entrusted state legislatures with determining the manner in which Presidential electors are chosen. Art. II, § 1, cl. 2. The framers' choice of state legislatures to undertake this role is unambiguous. Consequently, this Court has uniformly held that the power of the state legislatures to set the rules for selecting electors is plenary and exclusive. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). "Art. II, § 1, cl. 2, 'convey[s] the broadest power of determination' and 'leaves it to the legislature exclusively to define the method' of appointment." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (per curiam) (Rehnquist, C.J., concurring), quoting *McPherson*, 146 U.S. at 27. "The state legislature's power to select the manner for appointing electors is plenary," *Bush v. Gore*, 531 U.S. at 104.

"[I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam). Consequently, federal courts have previously understood that they are called upon to "respect…the constitutionally prescribed role of state *legislatures*" while enforcing against other state ac-

tors, whether they be courts,[2] executives[3] or election officials,[4] the "responsibility to enforce the explicit requirements of Article II." *Bush v. Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

The reason for identifying a single actor to set the rules for choosing Presidential electors is evident. Without a decisive bright line, the rules themselves will become the object of a tug-of-war leading inevitably to confusion and an un-level playing field, inviting disparate treatment of voters and candidates and creating a huge opportunity for partisan manipulation.

The framers' choice of state legislatures to set both the rules for federal elections, in Art. I, § 4 (the "Elections Clause") and the manner in which Presidential electors are chosen is consistent with the framers' view that state legislatures are the bodies closest to the people and that best represent the will of the people.[5] The choice also has separation of pow-

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[2] *See, e.g.*, *Bush v. Gore*, *supra*, (court infringed on legislative authority).

[3] *See*, *e.g.*, *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020) (executive branch official invaded exclusive authority of state legislature).

[4] *See*, *e.g.*, *Democracy N Carolina v. N. Carolina State Bd. of Elections*, 2020 WL 6589362, at *1–2 (M.D.N.C. Oct. 2, 2020), amended on reconsideration, 2020 WL 6591367 (M.D.N.C. Oct. 5, 2020) (district court considered whether directive of State Board of Elections conflicted with Election Code in violation of Article II).

[5] *See*, *e.g.*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J.

ers ramifications, ensuring neither federal power nor powerful holders of executive office at the state level will hold sway over the manner in which the President is chosen.[6] Nor are un-elected bureaucrats to wield that power. Pursuant to Article II, only state legislatures directly accountable to the people through regular elections are chosen.

As *McPherson*, *Bush v. Gore* and *Bush v. Palm Beach Cty.* make clear, this Court has consistently protected the constitutional role of state legislatures to set Presidential election rules. This Court has shown an analogous concern that state legislatures remain in charge of federal elections under the Elections Clause. *Democratic Nat'l Comm. v. Wisconsin State Legislature* (hereafter, "*DNC II*"), 141 S. Ct. 28, 29 (Oct. 26, 2020) ("The Constitution provides that state legislatures—not federal judges, not state judg-

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Const. L. 1, 31 (2010) (collecting ratification documents expressing state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing electoral regulations "ought to be left to the state legislatures, they coming far nearest to the people themselves").

[6] State legislatures are also recognized to have special competence "concerning the number of persons affected by a change in the law, the means by which information concerning the law is disseminated in the community, and the likelihood that innocent persons may be harmed by the failure to receive adequate notice." *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982). All are topics relevant to changing election procedures.

es, not state governors, not other state officials—bear primary responsibility for setting election rules.") (Gorsuch, J., concurring in denial of application to vacate stay). Here, Wisconsin officials violated these rules.

The current reported official vote difference between Petitioner and former Vice President Biden in Wisconsin is 20,682 votes. However, those "official" totals include hundreds of thousands of unlawful votes stemming from *ultra vires* acts which usurped the Legislature's authority over the election.

For example, the constitutional violations discussed below, relating solely to illegal drop boxes, render unlawful and invalid *more than 91,000 ballots which flowed through these illegal devices in the heavily Democrat cities of Milwaukee and Madison alone*. Given these locations had the highest percentage totals of Biden votes, these illegal, not countable ballots represent far more than the margin of victory.

As Electors Clause violations involved far more unlawful ballots than the margin of victory, it is impossible to determine which candidate received the most lawful votes. This renders the election void pursuant to Article II. Upon a judicial determination the election is failed, the Legislature is authorized by Article II (as confirmed by 3 U.S.C. § 2) to appoint electors in a different manner, given Wisconsin failed to make a choice in the election held November 3, 2020.

I. The Wisconsin Legislature's Stringent Regulation of Absentee Ballots

Long-standing policy of the Wisconsin Legislature is that absentee voting "is a privilege exercised whol-

ly outside the traditional safeguards of the polling place" that "must be *carefully regulated* to prevent the potential for fraud and abuse." Wis. Stat. § 6.84(1) (emphasis added). The Legislature prescribed a statutory absentee voting procedure, declaring "[b]allots cast in contravention of the procedures… may not be counted." Wis. Stat. § 6.84(2).

The Legislature's careful approach toward absentee voting is well justified and squarely within its authority. In *Crawford v. Marion County Election Board,* 553 U.S. 181, 195-96 (2008), this Court recognized fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that it could affect the outcome of a close election." *Id.* (emphasis added).

The bipartisan Commission on Federal Election Reform co-chaired by former President Jimmy Carter and former Secretary of State James Baker concluded "[a]bsentee ballots remain the largest source of potential voter fraud." CARTER-BAKER COMMISSION ON FEDERAL ELECTION REFORM, *Building Confidence In U.S. Elections*, at 46 (Sept. 2005).[7] The Commission noted, "absentee balloting in other states has been a major source of fraud" and recommended: "States… need to do more to prevent…absentee ballot fraud." *Id*. at 35.

Yet in the November 2020 election, WEC implemented absentee voting procedures directly contrary to precisely drawn provisions in the Wisconsin Elec-

[7] *Available at*: https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf.

tion Code meant to limit and "carefully regulate" absentee balloting.

II. The Wisconsin Legislature's Absentee Ballot Laws Were Violated in the 2020 Presidential Election

A. Illegal Unmanned and Human Drop Boxes Were Used in the Election

1. Legislature Rejected Drop Boxes in April

On Friday April 3, 2020, Wisconsin Governor Tony Evers issued an Executive Order relating to the April primary election purporting to: 1) extend the election to May 19, 2020; 2) eliminate the absentee ballot witness requirement; and 3) allow absentee ballots to be delivered to a "**drop box location publicly noticed by the municipal clerk as an acceptable depository**."[8] The executive order also called the Legislature into special session Saturday, April 4, 2020 to consider and act upon the Governor's order. The Legislature met on Saturday but did not approve the executive order.[9]

On Monday, April 6, 2020, Governor Evers issued a second executive order purporting to move the April primary to June 9, 2020, suspend all in-person vot-

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[8] Wisconsin Gov. Executive Order No. 73, *available at*: https://evers.wi.gov/Documents/COVID19/EO073-SpecialSessionElections%20searchable.pdf.

[9] *See* https://www.jsonline.com/story/news/2020/04/04/wisconsin-legislature-adjourns-special-session-monday-voting-track-tuesday-election/2948444001/.

ing, and change absentee ballot deadlines.[10] He called a special session for Monday, April 6, 2020 to consider and act upon the new election date and laws. The Legislature met on Monday but did not approve the Governor's order.[11]

With the primary election scheduled to begin the next day, April 7, 2020, the Legislature asked the Wisconsin Supreme Court to exercise original jurisdiction and enjoin the Governor's April 6 executive order. The court did so, stating, "the failure to enjoin this action would irrevocably allow the Governor to invade the province of the Legislature by unilaterally suspending and rewriting laws without authority." *Wisconsin Legislature v. Evers*, No. 2020AP608-OA (Wis. April 6, 2020).[12]

2. In June Five Democrat Mayors Coordinate to Illegally Implement Drop Boxes With Private Funding

On June 15, 2020, the Democrat Mayors of Madison, Milwaukee, Racine, Kenosha and Green Bay submitted a grant request to a not-for-profit organization, "Center for Tech & Civic Life," ("CTCL"), that the Mayors called "Wisconsin Safe Voting Plan 2020." Despite the name of the plan, it did not apply to all of

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[10] *Available at*: https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession2.pdf.

[11] *See* https://wkow.com/2020/04/06/wisconsin-special-session-to-stop-in-person-voting-resumes-monday/.

[12] *Available at*: https://www.wicourts.gov/news/docs/2020AP608_2.pdf.

Wisconsin, but only to their five cities, and it attempted to leverage private funding, unauthorized by the Wisconsin Legislature or any federal entity, to bring about mass absentee voting to favor Democrats, the very form of voting the Legislature had expressly stated was a "privilege" not a "right" and charged should be "carefully regulated."

The five Mayors agreed that, "[a]s mayors in Wisconsin's five biggest cities" they would "work collaboratively" in relation to upcoming 2020 elections, including the Presidential election. Although the Legislature rejected Governor Evers' drop box plans, the five Mayors sought funding from CTCL to "[e]ncourage and [i]ncrease [a]bsentee [v]oting ([b]y [m]ail and [e]arly [i]n-person," to "**[u]tilize secure drop-boxes to facilitate return of absentee ballots**" and to "[e]xpand…[c]urbside [v]oting." Ultimately, the Mayors received the entire $6,324,567 they sought from CTCL.[13]

CTCL provided at least $250 million to jurisdictions administering elections,[14] which by CTCL's own

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[13] *See* "The 5 Mayors' Voting Plan") *available at*: https://www.techandciviclife.org/wp-content/uploads/2020/07/Approved-Wisconsin-Safe-Voting-Plan-2020.pdf. at 4 (emphasis added); CTCL Press Release: *CTCL Partners with 5 Wisconsin Cities to Implement Safe Voting Plan*, July 7, 2020, *available at*: https://www.techandciviclife.org/wisconsin-safe-voting-plan/.

[14] "CTCL Receives $250M Contribution to Support Critical Work of Election Officials," Sept. 1, 2020, a*vailable at*: https://www.techandciviclife.org/open-call/.

admission originated from one or two wealthy donors, the largest being Facebook CEO Mark Zuckerberg.[15] CTCL funding not only paid for programs which undermined state election law and allowed municipalities to circumvent clear policies of the Legislature, it also injected partisan politics into these illegal practices. The funding in the "Safe Voting Plan" deliberately went to five municipalities in which Democrat Presidential Candidate Hillary Clinton won far more votes than Republican Presidential Candidate Donald Trump in the 2016 Presidential Election.[16]

3. WEC Illegally Endorsed Drop Boxes in August

Despite the Legislature's earlier rejection of Governor Evers' plan for drop boxes, WEC endorsed unmanned absentee ballot drop boxes in official guidance to local Wisconsin election officials on August 19, 2020, less than one month prior to the start of absentee balloting. WEC's guidance contained no analysis of the legality of drop boxes under Wisconsin law.

WEC lacks authority to prescribe the manner of conducting elections. Rather, it merely administers and enforces Wisconsin's election laws. Wis. Stat. §§ 5.05(1), (2m). While WEC may "[p]romulgate rules…for the purpose of interpreting or implementing the laws regulating the conduct of elections…" Wis. Stat. § 5.05(1)(f), WEC did not exercise rulemaking authority to issue its drop box guidance. "[WEC's] guidance documents do not have the force of law."

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[15] *Id.*

[16] *See* ECF-1 (Complaint, p. 54, ¶ 229).

Wis. Stat. § 227.112(3). Such guidance documents are merely "communications about the law – they are not the law itself." *Serv. Employees Int'l Union, Local 1 v. Vos*, 946 N.W.2d 35, 67 (Wis. 2020).

4. Unmanned Drop Boxes Are Not Authorized in the Election Code

The Wisconsin Election Code does not authorize unmanned absentee ballot drop boxes. They do not remotely satisfy Wisconsin laws for handling absentee ballots.

In a "mandatory" section detailing the absentee voting procedure, the Code identifies only two ways an absentee ballot may be returned to the clerk: "The envelope [containing the absentee ballot] shall be *mailed* by the elector, or *delivered in person*, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1; *see Olson v. Lindberg*, 85 N.W.2d 775, 781 (Wis. 1957) (failure to properly deliver ballots rendered them uncounted). As explained below, the Legislature specified these two methods of returning absentee ballots to create a clear of chain of custody and to reduce opportunities for voter coercion and fraud.

Although the Legislature prescribed a process for establishing alternate absentee voting sites, election officials implemented drop boxes without following these procedures and without addressing other fundamental aspects of the voting process under Wisconsin law, which include requirements for bipartisan oversight,[17] public notice[18] and public access.[19] A fed-

[17] *See*, *e.g.*, Wis. Stat. §§ 6.855(1), 6.875(4)(a), 6.875(7), 6.88(3)(b), 7.15(1)(k), 7.20(2), 7.30(2), 7.41(4).

eral fact sheet on which WEC's guidance was based likewise recommends "bipartisan teams to be at every ballot drop-off location precisely when polls close,"[20] but WEC deleted this recommendation from its guidance.[21] Thus, drop boxes in the 2020 Presidential election collided with the Legislature's starting point for absentee balloting in Wisconsin, that it "must be carefully regulated to prevent the potential for fraud or abuse." Wis. Stat. § 6.84(1).

The WEC's guidance contained no standards for local election officials, such as ballot chain of custody and openness to the public.[22] Nor did WEC attempt to "[p]romulgate rules...applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections" relating to drop boxes. Wis. Stat. § 5.05(1)(f).

5. The Massive Illegal Use of Unmanned Drop Boxes

Over 500 unmanned, absentee ballot drop boxes were used haphazardly across Wisconsin in the 2020 presidential election. (7th Cir. App. B032 ¶ 28.). For example, the City of Oshkosh implemented a "drop box" with a sign that it was "for tax bills, water bills, parking tickets, and absentee ballots." (7th Cir. App. B108.) Such multi-use slots were employed through-

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[18] *See*, *e.g.*, Wis. Stat. §§ 6.875(4)(a), 7.41, 7.515(3)(a).

[19] *Id.*

[20] ECF 117-15, p. 5.

[21] ECF 117-13.

[22] *See*, *e.g.*, Wis. Stat. §§ 6.855, 6.86, 6.87, 6.875, 6.88.

out the State and particularly in locations that did not receive the early CTCL funding.[23]

Likewise, in many locations library book returns doubled as absentee ballot drop boxes.[24] Implementation of multi-use collection facilities gave non-election workers in libraries and other government offices direct access to ballots. The unmanned drop boxes opened absentee balloting up to the very concerns about fraud and abuse the Legislature identified, including the illicit practice of ballot harvesting and a greater potential for "overzealous solicitation of absent electors who may prefer not to participate in an election" as well as the possibility of "undue influence on an absent elector…or…similar abuses." Wis. Stat. § 6.84(1). Unmanned ballot drop boxes are more vulnerable to all such concerns.

The WEC did not require records be kept concerning how many ballots flowed through drop boxes. However, the heavily Democrat Cities of Madison collected at least 9,346, and Milwaukee approximately 65,000–75,000, absentee ballots from unmanned drop boxes for the November election. (7th Cir. App. B028-B029 ¶¶ 12–14.). Thus, absentee ballot drop boxes were a significant factor in the Wisconsin Presidential election affecting far more ballots than the margin between the candidates.

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[23] ECF Nos. 117-18, -19, -20, -21, -22, -23, -48, -71, p. 37 (Repurposing Options).

[24] ECF 18.

6. The Illegal "Human Drop Boxes"

Another problem created by WEC's drop box program was the so-called "Democracy in the Park" events held by the City of Madison on September 26 and October 3, well outside the two-week period before Election Day when in-person absentee voting is permitted by Wis. Stat. § 6.86(1)(b).[25] These events, primarily involved election day poll workers (not clerk's office employees) being paid to collect absentee ballots at 206 city parks in Madison, and were justified through the fiction that poll workers collecting the ballots (while clearly not promptly placing them in the carrier envelopes provided for in Wis. Stat. § 6.88(1), as video from the event shows[26]) were allegedly "human drop boxes."[27] A total of 17,271 absentee ballots were collected in this non-statutory manner.[28]

7. Potential for Partisan Advantage

As the Legislature did not direct an orderly rollout of absentee ballot drop boxes, and the largest cities in the State got a substantial head start, there was significant potential to use this new voting method for partisan advantage in Democrat areas, to the detriment of Republican areas of the State that may not have been adequately funded or alerted as early to the new vote casting method.

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[25] ECF 117-71, p. 103.

[26] ECF 117-55.

[27] ECF 127, p. 5, ¶ 16.

[28] ECF 127, p. 5, ¶ 15.

The "human drop box" events in Madison also illustrate the risk that newly introduced voting methods not sanctioned by the Legislature can be turned for partisan ends. Public service announcements for these events, which were proudly "created by, planned by, staffed by and paid for by the @CityofMadison Clerk's Office,"[29] were paid for by the Biden for President Campaign and included Vice President Biden's voice and tag line.[30]

B. Alteration of Absentee Ballot Witness Certificates

There are two widely used methods which seek to prevent absentee ballot fraud. Some states use signature verification, matching the signature of the voter on the outside of the ballot envelope against the voter's signature on file. The other method, used by Wisconsin, requires a witness to verify on the ballot envelope that they witnessed the absentee voter complete the ballot and that the voter is who they say they are.

1. Wisconsin Law Mandates That An Incomplete Witness Certificate Address Invalidates the Absentee Ballot

In 2015, the Wisconsin Legislature passed a law requiring "[i]f a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d).

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[29] ECF 117-49.

[30] ECF 117-64.

2. WEC Instructed Clerks to Illegally Tamper with Witness Certificates

Just three weeks before the 2016 election, WEC issued new guidance relating to this statute, stating:

> The WEC has determined that clerks *must* take corrective actions in an attempt to remedy a witness address error. If clerks are reasonably able to discern any missing information from outside sources, clerks are not required to contact the voter before *making that correction directly* to the absentee certificate envelope.

(7th Cir. App. B052) (first emphasis in original, second emphasis added). WEC issued this guidance despite "concern some clerks have expressed about altering information on the certificate envelope, especially in the case of a recount." (B053.) WEC summed up its guidance, stating "municipal clerks shall do all that they can reasonably do to obtain any missing part of the witness address," including supplying information based on the clerk's own personal knowledge or extraneous research. (B053.)

3. The Seventh Circuit and Supreme Court Decisions Regarding Absentee Ballot Witnessing and Ballot Counting Deadline

In late March 2020, *before Governor Evers' own unilateral effort to suspend the witness requirement by Executive Order*, the Democratic National Committee and Democratic Party of Wisconsin sought to enjoin enforcement of the witness requirement for

absentee voting. *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 958 (W.D.Wis. 2020).

On April 2, 2020, the district court in *Bostelmann* enjoined WEC from enforcing the statutory requirement for an absentee ballot to be witnessed, provided the voter signed a written statement that they could not safely obtain a witness despite reasonable efforts to do so. *Id.* at 983. The very next day, the Seventh Circuit stayed that part of the injunction, expressing "concern[s] with the overbreadth of the district court's order, which categorically eliminates the witness requirement applicable to absentee ballots and gives no effect to the state's substantial interest in combatting voter fraud." *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 3619499, *2 (7th Cir. Apr. 3, 2020).

The Seventh Circuit did not stay part of the district court's order allowing ballots to be mailed and postmarked after Election Day. On April 6, 2020, this Court stayed that additional "unusual" aspect of the district court injunction. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) ("*DNC I*").

4. WEC Withdraws First Instruction to Tamper with Witness Certificates

In light of the Seventh Circuit's decision, on April 5, WEC issued new guidance, retreating from its October 2016 instruction for clerks to fill in missing witness information. (7th Cir. App. B060 (see header on B061 identifying guidance as "Post Appeals Court Decision Absentee Signature Requirement").)

5. WEC Issues New Illegal Instruction to Clerks to Tamper with Witness Certificates

However, on October 19, 2020, just two weeks before the Presidential election, the WEC issued new guidance stating:

> Please note that ***the clerk should attempt to resolve any missing witness address information*** prior to Election Day if possible, ***and this can be done through…personal knowledge*** [or] voter registration information. The witness does not need to appear to add a missing address

(7th Cir. App. B085, emphases added.)

Consequently, in the November 2020 Wisconsin election, election workers added information to witness addresses on envelopes for an unspecified number of absentee ballots, and these ballots were counted as valid votes. (7th Cir. App. B029 ¶ 17.) At Milwaukee Central Count on Election Day, Respondent Woodall-Vogg announced that ballot counters who happened on a ballot without a witness address could go to a computer, look up the address and insert it on the ballot. (B037-B038 ¶ 11.)

C. Violating Photo ID Law Through Purposeful Non-Enforcement of the "Indefinitely Confined" Exception

In 2014 the Legislature added a requirement an "elector" present one of ten acceptable forms of photo identification to vote. Wis. Stat. § 5.02(6m) (a)–(g). Exempt from the photo ID requirement are those "in-

definitely confined" or "disabled for an indefinite period") due to one or more of four (4) limiting physical conditions: age, physical illness, infirmity or disability. Notably absent is a *fear* of illness or infirmity.

An indefinitely confined voter may vote absentee if "in lieu of providing proof of identification, [the voter] submit[s] with his or her absentee ballot a statement signed by the same individual who witnesses voting of the ballot which contains the name of the elector and verifies that the name and address are correct." Wis. Stat. § 6.87(4)(b)2. Once a voter qualifies for indefinitely confined status they will generally no longer have to present photo identification to vote absentee.

1. Illegal Social Media Posts from Dane and Milwaukee Clerks

On March 25, 2020, the Dane and Milwaukee County Clerks issued social media statements that any voter who wished to circumvent the photo ID requirements of Wisconsin law should apply for an absentee ballot claiming indefinite confinement. Two days later the Wisconsin Republican Party filed an original action with the Wisconsin Supreme Court seeking clarification regarding the indefinitely confined exception.

2. WEC's Illegal Guidance Guts Enforcement of Indefinitely Confined Rules

On March 29, 2020, WEC issued guidance noting that "indefinitely confined" status should not be used solely to avoid Photo ID requirements but also purporting to limit the authority of clerks to inquire

about the basis for a voter's claim to be indefinitely confined, saying:

> Statutes do not establish the option to require proof or documentation from indefinitely confined voters. *Clerks* may tactfully verify with voters that the voter understood the indefinitely confined status designation when they submitted their request but they *may not request or require proof*.

(7th Cir. App. B054). WEC contended clerks could only passively receive evidence relating to indefinite confinement but were barred from actively seeking such proof.

WEC's guidance is inconsistent with Wis. Stat. § 6.86(2)(b) which provides:

> The clerk shall remove the name of any other elector from the list upon request of the elector or upon receipt of reliable information that an elector no longer qualifies of the service. The clerk shall notify the elector of such action not taken at the elector's request within 5 days, if possible.

A clerk's duty to remove individuals from the indefinitely confined list is *mandatory* upon receipt of reliable information the voter no longer qualifies. Removing an elector from the list can be undertaken unilaterally, subject to notice within five days after removal. There is no requirement a clerk only receive such information *passively* as erroneously claimed by WEC.

3. Wisconsin Supreme Court's Failure to Promptly Rule Locks WEC's Illegal Guidance In Place

On March 31, 2020, the Wisconsin Supreme Court reprimanded the Dane County Clerk for his recommendation about circumventing Wisconsin's Photo ID law and ordered him to comply with two paragraphs of the WEC's March 29 guidance *not* set forth above. The court did not reference the above paragraph in WEC's guidance regarding investigating voters claiming to be indefinitely confined and retained jurisdiction to consider other issues related to "indefinitely confined" status. Despite the importance of these issues to the 2020 election, the Wisconsin Supreme Court allowed the case to linger, only issuing a decision on December 14, 2020. *Jefferson v. Dane County*, 2020 WL 7329433 (Wis. Dec. 14, 2020). As a consequence, the WEC's erroneous advice to clerks was insulated from review for a nine-month period during 2020.

Predictably, the number of voters who claimed indefinitely confined status and avoided the photo identification requirements of the law ballooned following the guidance restricting clerks from exercising their statutory authority to oversee compliance with the law. While approximately 66,611 voters took advantage of indefinitely confined status in 2016, that number increased to some 240,000 voters in 2020. (7th Cir. App. B029, ¶¶ 18-19).[31]

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[31] The foregoing highlights ways WEC's infidelity to the Wisconsin Election Code impacted the Presidential election in Wisconsin. There are more examples. For instance,

III. The Decisions Below

A. District Court

The Petitioner invoked the district court's federal question jurisdiction by raising claims arising under Art. II, § 1, cl. 2 of the United States Constitution and the Equal Protection Clause. ECF 1 (Complaint). The district court held an expedited bench trial on December 10, 2020, and entered judgment for Respondents two days later. *Trump v. Wisconsin Elections Comm'n*, 2020 WL 7318940 (E.D.Wis. Dec. 12, 2020). On threshold issues, the district court held the President had standing and his claims were not moot and were not barred by the 11th Amendment. While the court noted concern with bringing these challenges post-election, it expressly declined to apply the doctrine of laches. *Id.* Pet.App. 45a n.10.

On the merits, the district court based its decision on two alternative holdings. First, the court narrowly construed the term "manner" in the Electors Clause as limiting the choice of state legislatures either to appoint electors directly or to submit it for a popular vote, but the term does not include "the administration of the election." Pet.App. 41a. Since Wisconsin

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in September Wisconsin Supreme Court Justice Bradley chastised WEC for its "tactic[al]" maneuver that excluded the Green Party candidates for President and Vice President from the November ballot. *Hawkins v. Wisconsin Elections Comm'n*, 948 N.W.2d 877, 884-897 (Wis. 2020) (Bradley, J., dissenting). Based on the 2016 election results, this maneuver likely resulted in a 30,000 vote swing to Democrat candidate Biden.

chose electors by general ballot, there was no violation of the Electors Clause, the court held.

Second, under an alternatively broad construction of "manner," the court held WEC was a statutory creature of the Legislature's own making, authorized to administer the election and issue guidance; thus, the court reasoned, WEC *could not* violate the Legislature's directed "manner" of conducting the election. Pet.App. 43a-44a.

B. Seventh Circuit

Although the district court expressly declined to apply the doctrine of laches, the Seventh Circuit affirmed primarily on untimeliness grounds, whether labeled as "laches" or some other doctrine:

> The President had a full opportunity before the election to press the very challenges to Wisconsin law underlying his present claims. Having foregone that opportunity, he cannot now—after the election results have been certified as final—seek to bring those challenges.

(Pet.App. 8a-9a.)

The Seventh Circuit then addressed the merits but failed to reverse the district court's holding that "Manner" as used in the Electors Clause limits the legislature's choice either to appoint electors directly or to submit to a popular vote. Instead, the Seventh Circuit said:

> [b]y its terms, the [Electors] Clause could be read as addressing only the manner of appointing electors [i.e.,

> whether they are selected by popular vote or not] and thus nothing about the law that governs the administration of an election…. On this reading of the Electors Clause, the President has failed to state a claim.

(Pet.App. 9a–10a.)

Without fully endorsing or rejecting that reasoning, the court merely noted that "perhaps" the better construction of "Manner" includes the conduct of the election. (Pet.App. 10a.) The Seventh Circuit then determined that in the context of a Presidential election questions pertaining to administration of the election are "matters of state law [that]…belong…in the state courts. (Pet.App. 11a.) In this regard, the Seventh Circuit adopted the district court's reasoning that, as a creature of the Legislature, WEC could not deviate from the Legislature's directions, because "whatever actions the Commission took here, it took under color of authority expressly granted to it by the Legislature." (Pet.App. 11a.)

REASONS FOR GRANTING THE WRIT

This Court should address the Seventh Circuit's departure from Article II precedents and affirm that, no less than the Florida Supreme Court in *Bush v. Gore*, non-legislative executive branch and administrative officials, such as the WEC and local election administrators, must defer to the state legislature's rules for a Presidential election.

First, Petitioner has demonstrated that failure of state officials to respect the lines drawn by Article II resulted in large numbers of invalid ballots being un-

lawfully counted which far exceeded the margin of victory between the candidates. It is not possible to determine who received the most lawful votes.

Second, Petitioner is entitled to a declaration the Wisconsin Presidential election was unconstitutional and is void. Under Article II and pursuant to 3 U.S.C. § 2, this relief will permit the Legislature to choose electors by a different means.

Finally, this Court should further clarify that laches is not available to bar an Article II claim, particularly where bringing suit before the election would create the sort of disruption discussed in *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

Wisconsin represented one among serial efforts around the country to usurp legislative authority and unlawfully change election laws for partisan advantage in the lead up to the Presidential election. These unconstitutional efforts have provoked growing skepticism and concern which if left unaddressed will only ripen into cynicism and disillusionment.

I. The Lower Courts' Decisions Allow the Wisconsin Executive Branches to Violate the Electors Clause in Conflict with this Court's Decisions

As Justice Gorsuch recently explained, "[i]t does damage to faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures" to usurp the legislature's role in setting the rules for an election. *DNC II*, 141 S.Ct. at 30 (concurring in denial of application to vacate stay). This is as true for bureaucratic or executive branch overreach as for judicial

overreach. "No one doubts that conducting a national election amid a pandemic pose[d] serious challenges. But none of that means [unelected administrators could] improvise with their own election rules in place of those the people's representatives have adopted." *Id*.

A voter's right in a Presidential election is "the right to vote *as the legislature has prescribed*." *Bush v. Gore*, 531 U.S. at 104 (emphasis added). There is no free standing, untethered right to vote in a manner inconsistent with Article II or other provisions of the Constitution.

Public opinion polls suggest a significant percentage lack faith in the outcome of the most recent election. As Justice Gorsuch presciently observed pre-election, this could certainly be the result of widespread understanding that the rules of the election were undermined at the last minute in ways that cast doubt upon its legitimacy. *DNC II*, 141 S.Ct. at 30 ("Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.").

Judicial intervention is necessary when Constitutional lines have been transgressed in a presidential election. Such intervention does not undermine constitutional democracy, it preserves it.

A. Wisconsin Election Officials Violated Article II

One of the two questions presented in *Bush v. Gore* was "whether the Florida Supreme Court established new standards for resolving Presidential elec-

tion contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution." *Bush v. Gore*, 531 U.S at 103. While the majority decided the case on Equal Protection grounds, three justices[32] joined the concurring opinion by Chief Justice Rehnquist and answered the foregoing question in the affirmative, reasoning that "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Id*. at 113. None of the Justices in *Bush v. Gore* appeared to take issue with the basic principle that Article II requires non-legislative state actors to comply with the legislative scheme for appointing Presidential electors.

The logical force of this interpretation of Article II has led to cases recognizing Article II as a bulwark against intrusion upon the state legislature's authority to set the rules for Presidential elections. *See, e.g.*, *Republican Party v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Statement of Alito, J., joined by Thomas and Gorsuch, JJ.) ("[T]he constitutionality of the [Pennsylvania] Supreme Court's decision [extending the statutory date for receipt of mail-in ballots beyond Election Day]…has national importance, and there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution."); *Carson*, 978 F.3d at 1059–1060 ("Secretary's actions in altering the deadline for mail-in ballots likely violates the Electors Clause…it is not the province of a state executive official to re-write the state's election code"); *Democracy N. Carolina*, 2020 WL 6589362, *2 ("[T]his court intends to address whether the North Carolina State

[32] Justices Scalia and Thomas joined the Chief Justice.

Board of Elections…has … unconstitutionally modified the North Carolina legislative scheme for appointing Presidential electors"); *Baldwin v. Cortes*, 2008 WL 4279874, *4 (M.D.Pa. Sept. 12, 2008), *aff'd,* 378 F. App'x 135 (3d Cir. 2010) ("At trial on the merits, Plaintiffs may establish that the August 1 date fundamentally impairs or changes the order of elections and access to the ballot so as to undermine a carefully crafted legislative scheme."); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1012 (S.D.Ohio 2008) ("the Directive issued by the Secretary of State…establishes a new structure for minor party ballot access, a structure not approved by the Ohio legislature").

1. The Legislature Did Not Authorize Drop Boxes

"[D]rop boxes are not found anywhere in the absentee voting statutes [and] are nothing more than another creation of WEC to get around the requirements of Wis. Stat. § 6.87(4)(b)1." *Trump v. Biden*, 2020 WL 7331907, *20 (Roggensack, C.J, dissenting). That's because the Wisconsin Election Code provides no options for returning an absentee ballot other than by mail or "*deliver[y] in person*, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1 (emphasis added). Delivery in one of these two manners is mandatory and non-compliance means the absentee ballot "***may not be counted.***" Wis. Stat. § 6.84(2) (emphasis added). This process ensures the security of ballot delivery and provides for a clear chain of custody.

First, upon receipt of an absentee ballot a clerk has two options. "If a municipal clerk receives an ab-

sentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector" if there is sufficient time for the elector to correct the defect and return the ballot before 8 p.m. on election day." Wis. Stat. § 6.87(9). If the clerk does not return the absentee ballot for correction of the certificate(s) by the voter, "the clerk **shall** enclose it, unopened, in a carrier envelope which shall be securely sealed and endorsed with the name and official title of the clerk, and the words "This envelope contains the ballot of an absent elector and must be opened in the same room where votes are being cast at the polls during polling hours on election day or, in municipalities where absentee ballots are canvassed under s. 7.52, stats., at a meeting of the municipal board of absentee ballot canvassers under s. 7.52, stats." Wis. Stat. § 6.88(1) (emphasis added).

Second, the formality of the statutory absentee ballot receipt and securing process to occur in the clerk's office or at an alternate absentee ballot site is striking, making clear the Legislature intended that absentee ballots, whether mailed or delivered in person, be received in a brick-and-mortar office, staffed by trained employees who immediately place ballots in a "securely sealed" "carrier envelope" to be further "endorsed with the name and official title of the clerk" and a statement that the envelope will only be opened at the place where votes are counted on election day.

The Legislature has provided only a single means of establishing a site for collecting absentee ballots outside the Clerk's office, and it requires a fully staffed brick-and-mortar location approved by the

governing body of the municipality. Such an alternate absentee ballot site "***shall be staffed*** by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners." Wis. Stat. § 6.855(3) (emphasis added). Moreover, an alternate site "shall be located as near as practicable to the office of the municipal clerk or board of election commissioners," and "no site may be designated that affords an advantage to any political party." Wis. Stat. § 6.855(1). Likewise, Wis. Stat. § 7.15(2m) provides, "[i]n a municipality in which the governing body has elected to an establish an alternate absentee ballot site under s. 6.855, ***the municipal clerk shall operate such site as though it were his or her office*** for absentee ballot purposes and shall ensure that such site is ***adequately staffed***." (Emphasis added).

Third, not only does the Election Code make clear that unmanned absentee ballot drop boxes are not authorized, the Legislature's explicit rejection of the Governor's effort in April to impose drop boxes makes this doubly clear. If the Governor believed drop boxes were permitted under the Election Code, there would have been no reason to include them in his April 3, 2020, Executive Order. Therefore, it is clear that WEC's drop box guidance was *ultra vires* and a significant departure from the legislative scheme for absentee balloting, "thereby violating Art. II, § 1, cl. 2, of the United States Constitution." *Bush v. Gore*, 531 U.S at 103.

Finally, just as unmanned absentee ballot drop boxes violate the Election Code, so too did the so-called "human drop boxes" used by the Madison Clerk

to harvest over 17,000 ballots well in advance of the start date for in-office absentee voting. *See* Wis. Stat. § 6.86(1)(b); ECF 117-71, p. 103 (in-office voting guidance).

2. The Legislature Did Not Authorize Clerks to Alter Witness Certificates

WEC's election eve instruction to alter or add addresses on witness certificates was another serious departure from the Legislature's plan to protect against absentee ballot fraud. The intent to protect the integrity of absentee voting is why a witness certificate must be completed "subject to the penalties of s. 12.60(1)(b), Wis. Stats., for false statements." Wis. Stat. § 6.87(2).

The certificate is part of the evidentiary basis for a poll inspector's decision whether to allow a ballot envelope to be opened so that the absentee ballot can be counted. Wis. Stat. § 6.88(3)(a). An absentee ballot may be opened only if "the inspectors find that the certification has been properly executed." *Id.*

"When…inspectors find…a certification is insufficient…the inspectors shall not count the ballot." Wis. Stat. § 6.88(3)(b). In fact, the only time the Election Code authorizes an election worker to write on an absentee ballot envelope is when the ballot is *not counted*. *Id*. Only after that determination, "[t]he inspectors shall endorse [the] ballot not counted on the back, 'rejected (giving the reason)'." *Id.* Only uncounted envelopes are to be written on, and even then only "on the back," never on the witness certificate itself.

These statutes confirm the witness certificate is a key link in the evidentiary chain designed by the Legislature to protect the integrity of absentee balloting. That is why Wis. Stat. § 6.87(6d) states unequivocally, "[i]f a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.84(2) underscores the Legislature's unambiguous message that alteration of a witness certificate is forbidden. A ballot missing the address of a witness "may not be included in the certified result of any election." Wis. Stat. § 6.84(2).

WEC's instructions to alter witness addresses and count ballots in the recount where election workers had added witness addresses were significant departures from the legislative directive for protecting the integrity of absentee balloting.

3. WEC's "Indefinitely Confined" Instruction

As explained above, WEC's indefinitely confined guidance interfered with clerks performing their statutorily assigned duty to supervise the list of indefinitely confined voters and remove voters who did not qualify. This also was a significant departure from the Legislature's plan to protect the integrity of absentee balloting.

B. The Seventh Circuit's "Manner" and "Mode" Distinction Contravenes Article II, *Bush v. Palm Beach Cty.*, and *Bush v. Gore*

The Seventh Circuit allowed the district court's narrow construction of "manner" to stand, creating a direct conflict with this Court's prior decisions in

Bush v. Palm Beach Cty., 531 U.S at 76 and *Bush v. Gore*, 531 U.S. at 104, 113, and with the Eighth Circuit's recent decision in *Carson*, 978 F.3d at 1060-62, all of which recognize the Electors Clause is not confined to whether a State selects electors by popular vote. *Bush v. Gore* obviously did not deal with *who* selected electors, but *how* they were selected.

C. Contrary to the Seventh Circuit, Federal Courts Have the Power to Independently Interpret State Election Law in the Context of Presidential Elections

The Seventh Circuit also determined that in the context of a Presidential election questions pertaining to administration of the election are "matters of state law [that]…belong…in the state courts." *Trump v. WEC*, Pet.App. 11a. This holding also conflicts with both *Bush* cases. For instance, in *Bush v. Palm Beach Cty.*, 531 U.S at 76, this Court observed that:

> in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § I, cl. 2, of the United States Constitution.

Given that laws enacted by the Legislature and applicable to a Presidential election are adopted via authority conferred by the Constitution, those laws are subject to interpretation by federal courts. As Chief Justice Rehnquist observed, by virtue of the

Electors Clause "*the text of the election law itself*, and not just its interpretation by the courts of the States, takes on independent significance." *Bush v. Gore*, 531 U.S. at 113.

If not reversed, these erroneous holdings of the Seventh Circuit would sap all vitality from the Electors Clause.

II. Wisconsin Violated Equal Protection Through the Standardless Implementation of Absentee Ballot Drop Boxes Without Meaningful Protections Against Vote Dilution and Fraud

The requirement that a state "grant[ ] the right to vote on equal terms," *Bush v. Gore*, 531 U.S. at 104, includes protecting the public "from the diluting effect of illegal ballots." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). The State must employ "minimum procedures" to "protect the fundamental right[s] of each voter" and those procedures should be "calculated to sustain the confidence that all citizens must have in the outcome of elections." *Bush v. Gore*, 531 U.S. at 109. This requires establishing "necessary safeguards." *Id.*

Here, when WEC unilaterally adopted a new method of collecting absentee ballots which the Legislature has warned are particularly susceptible to fraud, no necessary safeguards were established. Implementing absentee ballot drop boxes without adopting any uniform standards and safeguards to protect the security of the ballot and prevent vote dilution violates Equal Protection.

Furthermore, as the district court found in *Moore*, a "state cannot uphold its obligation to ensure equal treatment" if the state's election administrator "is permitted to contravene the duly enacted laws of the [Legislature] and to permit ballots to be counted that do not satisfy the fixed rules or procedures the state legislature has deemed necessary to prevent illegal voting." *Moore*, *17. In this way as well, failure to follow the Legislature's instructions violated Equal Protection.

III. The Seventh Circuit's Laches Decision Contravenes Article II and *Purcell v. Gonzalez*

Laches should not bar review in a case founded upon Article II, let alone on the facts of this case. Laches is a judge-made, equitable doctrine that should not control when important public rights are at stake. It is not just Petitioner who has an interest in the Constitution being upheld. A constitutional outcome in this case is in the interest of every American. The application of laches also places an intolerable burden upon exercise of the First Amendment right to run for public office. *See Arizona Free Enterprise Club's Freedom Club Pac v. Bennett*, 564 U.S. 721, 735-40 (2011); *Randall v. Sorrell*, 548 U.S. 230, 261-63 (2006).

First, by invoking laches after the district court expressly declined, the Seventh Circuit disregarded long-standing, uniform precedent within the Circuit, and the practice in many other Appellate Courts. In the Seventh Circuit, "a decision on laches rests within the sound discretion of the trial judge." *Lingenfelter v. Keystone Consol. Indus., Inc.*, 691 F.2d 339,

341 (7th Cir. 1982). It had been the rule that the Seventh Circuit "will not disturb [the trial court's findings on laches] on appeal 'unless it is so clearly wrong as to amount to an abuse of discretion.'" *Id*. Application of laches in this case was also inconsistent with this Court's general approach to "caution[] against invoking laches to bar legal relief." *Petrella v. Metro Goldwyn-Mayer, Inc.*, 572 U.S. 663, 678 (2014).

Second, the Seventh Circuit applied laches not recognizing that several of Petitioner's claims (most notably those concerning WEC's October 19 change in guidance on absentee witness certifications and August 19 guidance on absentee ballot drop boxes) either arose after absentee balloting began, or so close to the September 17 date when it began, it was not reasonable to expect Petitioner could have initiated a lawsuit and obtained relief prior to September 17.

Third, under *Purcell v. Gonzalez*, 549 U.S. 1 (2006), as previously applied in the Seventh Circuit, a lawsuit after September 17 would have almost certainly been dismissed as too disruptive of an election already in progress. *See*, *e.g.*, *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (district court's September 21 order stayed on October 8); *Tully v. Okeson*, 977 F.3d 608, 612 (7th Cir. 2020) ("Given that voting is already underway in Indiana, we have crossed *Purcell*'s warning threshold and are wary of turning the State in a new direction at this late stage."); *see also Andino v. Middleton*, 141 S.Ct. 9, 10 (2020) (Kavanaugh, J., concurring in grant of stay) ("By enjoining South Carolina's witness requirement shortly before the election, the District Court defied [the *Purcell*] principle."); *DNC II*, 141 S.

Ct. at 30 (Kavanaugh, J., concurring in denial of application to vacate stay) ("This Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle.").

Fourth, the Seventh Circuit's decision on laches leaves the Electors Clause without teeth. It will mean unconstitutional changes to election processes implemented near the start of absentee balloting will not be subject to federal court review. Challenges brought before the election would be barred by *Purcell* and challenges brought after will be barred by the Seventh Circuit's new laches rule. This puts candidates in an untenable position.

For example, although WEC issued its drop box guidance on August 19, Petitioner could not have reasonably anticipated that by Election Day, just two-and-a-half months later, more than 500 drop boxes would spring up. Indeed, drop boxes were only installed in Madison on October 16, and Milwaukee adopted new boxes on October 27.

Further, Petitioner could not have reasonably been expected to foresee prior to September 17 that the nascent drop box concept would be used to justify "human drop boxes" or depositing absentee ballots in multi-use utility bill payment slots or library book returns, and involve ballots being handled by numerous individuals outside elections clerk offices without any safeguards or procedures to protect the security of the ballots.

Finally, the Seventh Circuit's application of laches also creates a perverse "protection zone" for sinister partisans to exploit by introducing unconstitutional election practices when it is too late under *Purcell* to prevent them from impacting an upcoming election but leaves candidates and voters without a remedy after-the-fact. Nor is laches a satisfying reason for decision in a case of this magnitude and involving public rights. Public faith in the robustness of the judicial process is not enhanced through application of a discretionary doctrine allowing a decision on the merits to be side-stepped.

For all these reasons, the Seventh Circuit's decision is a significant departure from existing law which could create havoc in future Presidential elections by insulating from review actions of non-legislative state actors who seek to thwart or undermine the Legislature's direction regarding administration of the election.

IV. This Court Should Hold the Wisconsin Election Void and the Legislature May Appoint Electors Under 3 U.S.C. § 2 and Article II

Petitioner has stated a cognizable claim for relief under Article II as *Bush v. Gore* and the Eighth Circuit's decision in *Carson* confirm. The Seventh Circuit recognized as much, stating

> the President's complaint can be read as…requesting a declaration that the defendants' actions violated the Electors Clause and that those violations tainted enough ballots to "void" the election.

> Were we to grant the President the relief he requests and declare the election results void, the alleged injury—the unlawful appointment of electors—would be redressed. True, our declaration would not result in a new slate of electors. But the fact that a judicial order cannot provide the full extent or exact type of relief a plaintiff might desire does not render the entire case nonjusticiable. See *Church of Scientology v. United States*, 506 U.S. 9, 12–13 (1992). A favorable ruling would provide the opportunity for the appointment of a new slate of electors. From there, it would be for the Wisconsin Legislature to decide the next steps in advance of Congress's count of the Electoral College's votes on January 6, 2021. See 3 U.S.C. § 15.

Trump v. WEC, Pet.App. 6a.

Petitioner seeks a declaratory judgment that the election was not conducted in accordance with the Constitution and is therefore void. Following a declaration that the November 3, 2020 election was invalid, Wisconsin is not left without any electoral votes. Federal law contains a savings provision permitting a state legislature to appoint electors in the event its state fails to make an election (or when the election was unconstitutional and void):

> Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be

> appointed on a subsequent day in such a manner as the legislature of such State may direct.

3 U.S.C. § 2.

Petitioner seeks a remedy specifically authorized by 3 U.S.C. § 2 and Article II of the United States Constitution. Federal courts have intervened in state electoral processes to ensure that constitutional standards are met. *See*, *e.g.*, *Baker v. Carr*, 369 U.S. 186, 197 (1962); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Bush v. Gore*, 531 U.S. at 111. There is ample historic endorsement for the principle that judicial intervention to maintain constitutional boundaries is healthy for democracy, not antithetical to it.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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DECEMBER 2020

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-3414

DONALD J. TRUMP,

Plaintiff-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 2:20-cv-1785 — Brett H. Ludwig, *Judge.*

SUBMITTED DECEMBER 21, 2020* –
DECIDED DECEMBER 24, 2020

Before FLAUM, ROVNER, and SCUDDER, *Circuit Judges.*

SCUDDER, *Circuit Judge.* Two days after Wisconsin certified the results of its 2020 election, President Donald J. Trump invoked the Electors Clause of the U.S. Constitution and sued the Wisconsin Elections

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* We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Commission, Governor, Secretary of State, and several local officials in federal court. The district court concluded that the President's challenges lacked merit, as he objected only to the administration of the election, yet the Electors Clause, by its terms, addresses the authority of the State's Legislature to prescribe the manner of appointing its presidential electors. So, too, did the district court conclude that the President's claims would fail even under a broader, alternative reading of the Electors Clause that extended to a state's conduct of the presidential election. We agree that Wisconsin lawfully appointed its electors in the manner directed by its Legislature and add that the President's claim also fails because of the unreasonable delay that accompanied the challenges the President now wishes to advance against Wisconsin's election procedures.

I

A

On November 3, the United States held its 2020 presidential election. The final tally in Wisconsin showed that Joseph R. Biden, Jr. won the State by 20,682 votes. On November 30, the Wisconsin Elections Commission certified the results, the Governor signed an accompanying certification, and Wisconsin notified the National Archives that it had selected Biden's ten electors to represent the State in the Electoral College.

Two days later, the President brought this lawsuit challenging certain procedures Wisconsin had used in conducting the election. The President alleged that the procedures violated the Electors Clause of the U.S. Constitution:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number

> of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .

U.S. CONST. art. II, § 1, cl. 2.

To implement the obligation imposed by the Electors Clause, Wisconsin's Legislature has directed that the State's electors be appointed "[b]y general ballot at the general election for choosing the president and vice president of the United States." WIS. STAT. § 8.25(1). It has further assigned "responsibility for the administration of . . . laws relating to elections and election campaigns" to the Commission. *Id.* § 5.05(1). Municipalities run the election, and each municipality's own clerk "has charge and supervision of elections and registration in the municipality." *Id. §* 7.15(1).

The President alleges that the Commission and municipal officials so misused the power granted to them by the Legislature that they had unconstitutionally altered the "Manner" by which Wisconsin appointed its electors. His allegations challenge three pieces of guidance issued by the Commission well in advance of the 2020 election. (Each guidance document is available on the Commission's website, https://elections.wi.gov.)

First, in March 2020, the Commission clarified the standards and procedures for voters to qualify as "indefinitely confined" and therefore be entitled to vote absentee without presenting a photo identification. See WIS. STAT. §§ 6.86(2)(a), 6.87(4)(b)2. The Commission explained that many voters would qualify based on their personal circumstances and the COVID-19 pandemic, adding that Wisconsin law established no method for a clerk to demand proof of a voter's individual situation. The Wisconsin Supreme Court endorsed the

Commission's interpretation when it enjoined the Dane County Clerk from offering any contrary view of the law. See *Jefferson v. Dane County,* 2020 WI 90 In 8-9 (Dec. 14, 2020).

Second, the Commission issued guidance in August 2020 endorsing the use of drop boxes for the return of absentee ballots. The Commission explained that drop boxes could be "staffed or unstaffed, temporary or permanent," and offered advice on how to make them both secure and available to voters during the pandemic.

Third, four years ago, before the 2016 election, the Commission instructed municipal clerks on best practices for correcting a witness's address on an absentee ballot certificate. See Wis. STAT. § 6.87(2), (6d), (9). Clerks were able, the Commission explained, to contact the voter or witness or use another source of reliable information to correct or complete address information on an absentee ballot.

The President's complaint alleges that the Commission, in issuing this guidance, expanded the standards for "indefinitely confined" voters, invited voter fraud by authorizing the use of unstaffed drop boxes, and misled municipal clerks about their powers to complete or correct address information on absentee ballots, all contrary to Wisconsin statutory law. The President sought declaratory and injunctive relief on the view that these alleged misinterpretations of state law "infringed and invaded upon the Wisconsin Legislature's prerogative and directions under [the Electors Clause of] Article II of the U.S. Constitution."

B

After an evidentiary hearing, the district court rejected the President's claims on the merits and entered judgment for the Commission and other defendants.

The Electors Clause, the court determined, addressed the "Manner"—the "approach, form, method, or mode" —by which Wisconsin appointed its electors. For Wisconsin, that meant only by "general ballot at the general election," WIS. STAT. § 8.25(1), with the court further observing that any mistakes in administering the election did not change that the electors were appointed by general election.

Even if the Electors Clause was read more broadly to address the "Manner" in which Wisconsin conducted the election, the district court determined that the Legislature had authorized the Commission to issue the guidance now challenged by the President. None of that guidance, the district court reasoned, reflected such a deviation from the Wisconsin Legislature's directives as to violate the Electors Clause.

The President promptly appealed, and we expedited the case for decision.

II

We begin, as we must, by assessing whether the President has presented a Case or Controversy over which we have jurisdiction. The inquiry turns on the doctrine of standing and, more specifically, whether the President has alleged an injury traceable to the actions of the defendants and capable of being redressed by a favorable judicial ruling. See *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560-61 (1992). The district court answered the question in the President's favor. We do too.

On the injury prong of standing, the President has alleged "concrete and particularized" harm stemming from the allegedly unlawful manner by which Wisconsin appointed its electors. *Id.* at 560. As a candidate for elected office, the President's alleged injury is one that

"affect[s] [him] in a personal and individual way." *Id.* at 560 n.1; see also *Carson v. Simon,* 978 F.3d 1051, 1058 (8th Cir. 2020) ("An inaccurate vote tally is a concrete and particularized injury to candidates."). The alleged injury-in-fact is likewise "fairly traceable" to the challenged action of the defendants, see *Allen v. Wright,* 468 U.S. 737, 751 (1984), all of whom played some role in administering the election.

The final requirement for Article III standing—that the alleged injury "likely" would be redressed by a favorable decision—presents a closer question. *Lujan,* 504 U.S. at 561. The difficulty is attributable to the gap between what the President ultimately desires (to be declared the victor of Wisconsin) on one hand, and what a court can award him on the other. But the President's complaint can be read as more modestly requesting a declaration that the defendants' actions violated the Electors Clause and that those violations tainted enough ballots to "void" the election. Were we to grant the President the relief he requests and declare the election results void, the alleged injury—the unlawful appointment of electors—would be redressed. True, our declaration would not result in a new slate of electors. But the fact that a judicial order cannot provide the full extent or exact type of relief a plaintiff might desire does not render the entire case nonjusticiable. See *Church of Scientology v. United States,* 506 U.S. 9, 12-13 (1992). A favorable ruling would provide the opportunity for the appointment of a new slate of electors. From there, it would be for the Wisconsin Legislature to decide the next steps in advance of Congress's count of the Electoral College's votes on January 6, 2021. See 3 U.S.C. § 15. All of this is enough to demonstrate Article III standing.

We also conclude that the President's complaint presents a federal question, despite its anchoring in alleged violations of state law. The Eleventh Amendment and principles of federalism bar federal courts from directing state officials to follow state law. See *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 121 (1984). But we can decide whether their interpretation of state law violated a provision of the federal Constitution, here the Electors Clause. This distinction alleviates any federalism concerns that might otherwise preclude our consideration of the President's claims.

III

On the merits, the district court was right to enter judgment for the defendants. We reach this conclusion in no small part because of the President's delay in bringing the challenges to Wisconsin law that provide the foundation for the alleged constitutional violation. Even apart from the delay, the claims fail under the Electors Clause.

A

The timing of election litigation matters. "[A]ny claim against a state electoral procedure must be expressed expeditiously." *Fulani v. Hogsett,* 917 F.2d 1028, 1031 (7th Cir. 1990) (citing *Williams v. Rhodes,* 393 U.S. 23, 34-35 (1968)). The Supreme Court underscored this precise point in this very election cycle, and with respect to this very State. See *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* 140 S. Ct. 1205, 1207 (2020). The Court's direction was clear: federal courts should avoid announcing or requiring changes in election law and procedures close in time to voting. Doing so risks offending principles of federalism and reflects an improper exercise of the federal judicial

power. Even more, belated election litigation risks giving voters "incentive to remain away from the polls." *Purcell v. Gonzalez,* 549 U.S. 1, 5 (2006); see also *Crookston v. Johnson,* 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."). On this reasoning, we have rejected as late claims brought too close in time *before* an election occurs. See *Democratic Nat'l Comm. v. Bostelmann,* 977 F.3d 639, 642 (7th Cir. 2020); *Jones v. Markiewicz-Qualkinbush,* 842 F.3d 1053, 1060-62 (7th Cir. 2016); *Navarro v. Neal,* 716 F.3d 425, 429 (7th Cir. 2013).

The same imperative of timing and the exercise of judicial review applies with much more force on the back end of elections. Before a court can contemplate entering a judgment that would void election results, it "*must* consider whether the plaintiffs filed a timely pre-election request for relief." *Gjersten v. Bd. of Election Comm'rs,* 791 F.2d 472, 479 (7th Cir. 1986) (emphasis added) (footnote omitted).

These very considerations underpin the doctrine of laches. At its core, laches is about timing. "Lathes cuts off the right to sue when the plaintiff has delayed 'too long' in suing. 'Too long' for this purpose means that the plaintiff delayed inexcusably and the defendant was harmed by the delay." *Teamsters & Emps. Welfare Tr. of Ill. v. Gorman Bros. Ready Mix,* 283 F.3d 877, 880 (7th Cir. 2002).

The President had a full opportunity before the election to press the very challenges to Wisconsin law underlying his present claims. Having foregone that opportunity, he cannot now—after the election results have been certified as final—seek to bring those

challenges. All of this is especially so given that the Commission announced well in advance of the election the guidance he now challenges. Indeed, the witness-address guidance came four years ago, before the 2016 election. The Commission issued its guidance on indefinitely confined voters in March 2020 and endorsed the use of drop boxes in August.

Allowing the President to raise his arguments, at this late date, after Wisconsin has tallied the votes and certified the election outcome, would impose unquestionable harm on the defendants, and the State's voters, many of whom cast ballots in reliance on the guidance, procedures, and practices that the President challenges here. The President's delay alone is enough to warrant affirming the district court's judgment.

B

The President would fare no better even if we went further and reached the merits of his claims under the Electors Clause.

Defining the precise contours of the Electors Clause is a difficult endeavor. The text seems to point to at least two constructions, and the case law interpreting or applying the Clause is sparse. This case does not require us to answer the question, as the Commission's guidance did not amount to a violation under the two most likely interpretations.

Recall that the Electors Clause requires each State to "appoint, in such Manner as the Legislature thereof may direct," presidential electors. U.S. CONST. art. II, § 1, cl. 2. By its terms, the Clause could be read as addressing only the manner of appointing electors and thus nothing about the law that governs the administration of an election (polling place operations, voting procedures, vote tallying, and the like). The

word "appoint" is capacious, "conveying the broadest power of determination," including but not limited to the "mode" of popular election. *McPherson v. Blacker,* 146 U.S. 1, 27 (1892). Historically, the states used a variety of manners for appointing electors, such as direct legislative appointment. See *id.* at 29-33. For its part, the Wisconsin Legislature has consistently chosen a general election to appoint its electors. See WIS. STAT. § 8.25(1) (2020); WIS. STAT. §§ 6.3, 7.3 (1849). The complaint does not allege that the Commission's guidance documents shifted Wisconsin from a general election to some other manner of appointing electors, like those used in other states in the past. On this reading of the Electors Clause, the President has failed to state a claim. See FED. R. CIV. P. 12(b)(6).

But perhaps the better construction is to read the term "Manner" in the Electors Clause as also encompassing acts necessarily antecedent and subsidiary to the method for appointing electors—in short, Wisconsin's conduct of its general election. Even on this broader reading, the President's claims still would fall short. In his concurring opinion in *Bush v. Gore,* Chief Justice Rehnquist suggested that the proper inquiry under the Electors Clause is to ask whether a state conducted the election in a manner substantially consistent with the "legislative scheme" for appointing electors. 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). We would not go further and ask, for example, whether Wisconsin's officials interpreted perfectly "[i]solated sections" of the elections code. *Id.* at 114.

The Wisconsin Legislature expressly assigned to the Commission "the responsibility for the administration of . . . laws relating to elections," WIS. STAT. § 5.05(1), just as Florida's Legislature had delegated a similar

responsibility to its Secretary of State. See *Bush,* 531 U.S. at 116 (Rehnquist, C.J., concurring). Florida's legislative scheme included this "statutorily provided apportionment of responsibility," *id.* at 114, and three Justices found a departure from that scheme when the Florida Supreme Court rejected the Secretary's interpretation of state law. See *id.* at 119, 123. And it was the Minnesota Secretary of State's lack of a similar responsibility that prompted two judges of the Eighth Circuit to conclude that he likely violated the Electors Clause by adding a week to the deadline for receipt of absentee ballots. See *Carson,* 978 F.3d at 1060. By contrast, whatever actions the Commission took here, it took under color of authority expressly granted to it by the Legislature. And that authority is not diminished by allegations that the Commission erred in its exercise.

We confine our conclusions to applications of the Electors Clause. We are not the ultimate authority on Wisconsin law. That responsibility rests with the State's Supreme Court. Put another way, the errors that the President alleges occurred in the Commission's exercise of its authority are in the main matters of state law. They belong, then, in the state courts, where the President had an opportunity to raise his concerns. Indeed, the Wisconsin Supreme Court rejected his claims regarding the guidance on indefinitely confined voters, see *Trump v. Biden,* 2020 WI 9118 (Dec. 14, 2020), and declined to reach the rest of his arguments on grounds of lathes.

For our part, all we need to say is that, even on a broad reading of the Electors Clause, Wisconsin lawfully appointed its electors in the manner directed by its Legislature.

For these reasons, we AFFIRM.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604
Office of the Clerk
Phone: (312) 435-5850 www.ca7.uscourts.gov

No. 20-3414

DONALD J. TRUMP,
Plaintiff-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,
Defendants-Appellees.

Before: JOEL M. FLAUM, Circuit Judge
ILANA DIAMOND ROVNER, Circuit Judge
MICHAEL Y. SCUDDER, Circuit Judge

Originating Case Information:
District Court No: 2:20-cv-01785-BHL
Eastern District of Wisconsin
District Judge Brett H. Ludwig

December 24, 2020

FINAL JUDGMENT

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Filed 12/12/20]

Case No. 20-cv-1785-BHL

DONALD J. TRUMP,

Plaintiff,

v.

THE WISCONSIN ELECTIONS COMMISSION, *et al.*,

Defendants.

DECISION AND ORDER

This is an *extraordinary* case. Plaintiff Donald J. Trump is the current president of the United States, having narrowly won the state of Wisconsin's electoral votes four years ago, through a legislatively mandated popular vote, with a margin of just over 22,700 votes. In this lawsuit, he seeks to set aside the results of the November 3, 2020 popular vote in Wisconsin, an election in which the recently certified results show he was defeated by a similarly narrow margin of just over 20,600 votes. Hoping to secure federal court help in undoing his defeat, plaintiff asserts that the defendants, a group of some 20 Wisconsin officials, violated his rights under the "Electors Clause" in Article II, Section 1 of the Constitution.[1] Plaintiff seizes upon

[1] Plaintiff's complaint also refers to the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. At the December 9, 2020 final pre-hearing confer-

three pieces of election guidance promulgated by the Wisconsin Elections Commission (WEC)—a creation of the Wisconsin Legislature that is specifically authorized to issue guidance on the state election statutes—and argues that the guidance, along with election officials' conduct in reliance on that guidance, deviated so significantly from the requirements of Wisconsin's election statutes that the election was itself a "failure."

Plaintiff's requests for relief are even more *extraordinary*. He seeks declarations that defendants violated his Constitutional rights and that the violations "likely" tainted more than 50,000 ballots. Based on this declaratory relief, his complaint seeks a "remand" of the case to the Wisconsin Legislature to consider and remedy the alleged violations. Plaintiff's ask has since continued to evolve. In his briefing, he says he wants "injunctive relief" requiring the Governor "to issue a certificate of determination consistent with, and only consistent with, the appointment of electors by the Wisconsin legislature." In argument, counsel made plain that plaintiff wants the Court to declare the election a failure, with the results discarded, and the door thus opened for the Wisconsin Legislature to appoint Presidential Electors in some fashion other than by following the certified voting results.

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ence, plaintiff disclaimed reliance on any First Amendment or Due Process claims. While counsel purported to reserve the Equal Protection claim, the complaint offers no clue of a coherent Equal Protection theory and plaintiff offered neither evidence nor argument to support such a claim at trial. It is therefore abandoned. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (undeveloped arguments and arguments unsupported by pertinent authority are waived).

Defendants want plaintiff's claims thrown out, arguing his complaint fails to state a claim and raising several knotty issues of federal jurisdiction. With the Electoral College meeting just days away, the Court declined to address the issues in piecemeal fashion and instead provided plaintiff with an expedited hearing on the merits of his claims. On the morning of the hearing, the parties reached agreement on a stipulated set of facts and then presented arguments to the Court. Given the significance of the case, the Court promised, and has endeavored, to provide a prompt decision. Having reviewed the caselaw and plaintiff's allegations, the Court concludes it has jurisdiction to resolve plaintiff's claims, at least to the extent they rest on federal law, specifically the Electors Clause. And, on the merits of plaintiff's claims, the Court now further concludes that plaintiff has not proved that defendants violated his rights under the Electors Clause. To the contrary, the record shows Wisconsin's Presidential Electors are being determined in the very manner directed by the Legislature, as required by Article II, Section 1 of the Constitution. Plaintiff's complaint is therefore dismissed with prejudice.[2]

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

1. THE PARTIES

Plaintiff Donald J. Trump is the current, properly elected, President of the United States. In 2016, after a statewide recount, plaintiff won Wisconsin's Presidential Electors by 22,748 votes. *Certificate of Ascer-*

[2] This decision constitutes the Court's findings of fact and conclusions of law under Federal Rule of Civil Procedure 52.

tainment for President, Vice President and Presidential Electors General Election – November 8, 2016, seal affixed by Governor Scott Walker, National Archives https://www.archives.gov/electoral-college/2016. Plaintiff went on to win the 2016 Electoral College with 304 electoral votes. 2016 Electoral College Results, National Archives, https://www.archives.gov/electoral-college/2016. He was a candidate for reelection to a second term as President in the November 3, 2020 election.

Defendant Wisconsin Elections Commission is a creation of the Wisconsin Legislature. *See* 2015 Wis. Act 118 §4, Wis. Stat. §5.05. It is a bi-partisan, six-person commission that has "responsibility for the administration" of the state election laws in Chapters 5 to 10 and 12 of the Wisconsin Statutes.[3] Wis. Stat. §15.61. Any action by the commission requires the affirmative vote of at least two-thirds of its members. Wis. Stat. §5.05(1e). Defendants Ann S. Jacobs, Mark L. Thomsen, Marge Bostelmann, Dean Knudson, and Robert F. Spindell, Jr. are five of the six members of the commission.[4]

Defendant Scott McDonnell is sued in his official capacity as the Dane County Clerk. As the county clerk, McDonnell has a host of election-related responsibilities, including providing ballots and elections supplies to the municipalities, preparing ballots, educating voters, and training election officials. *See* Wis. Stat. §7.10. Additionally, McDonnell serves on the county board of canvassers, which is responsible for

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[3] Chapter 11 of the Wisconsin Statutes contains the state's campaign finance laws, which are outside of the WEC's authority.

[4] For reasons not explained, plaintiff did not name Commissioner Julie M. Glancey as a defendant.

examining election returns and certifying the results to the WEC. Wis. Stat. §7.60.

Defendants Maribeth Witzel-Behl, Tara Coolidge, Matt Krauter, and Kris Teske are sued in their official capacities as the City Clerks of Madison, Racine, Kenosha, and Green Bay. As city clerks, they supervise both voter registration and elections. Wis. Stat. §7.15. They provide training for voters and election officials and equip the polling places. *Id.* Additionally, they are part of each respective city's board of canvassers. Wis. Stat. §7.53.

Because of their substantial populations, Milwaukee County and the City of Milwaukee have additional "election boards." Milwaukee County has a county board of election commissioners and the City of Milwaukee has a municipal board of election commissioners. Wis. Stat. §7.20(1). These boards have the same powers and duties assigned to the municipal and county clerks in other parts of the state. Wis. Stat. §7.21. Defendant George L. Christiansen is sued in his official capacity as the Milwaukee County Clerk. As the county clerk, he serves as the executive director of the county board of election commissioners, *id.*, but he is not on the county board of canvassers. *See* Wis. Stat. §7.60. Jim Owczarski is sued in his official capacity as the Milwaukee City Clerk. Like Defendant Christiansen, Owczarski maintains some election-related responsibilities, but he is not on the city's board of canvassers. Wis. Stat. §7.53.

Julietta Henry is sued in her official capacity as Milwaukee County Elections Director. The record in unclear on Henry's duties as Elections Director. Claire Woodall-Vogg is sued in her official capacity as the Executive Director of the City of Milwaukee Election Commission. She has the same powers and duties

assigned to city clerks throughout the rest of the state. *See* Wis. Stat. §7.21.

Defendants Tom Barrett, Satya Rhodes-Conway, Cory Mason, John Antaramian, and Eric Genrich are sued in their official capacities as the Mayors of Milwaukee, Madison, Racine, Kenosha, and Green Bay. Plaintiff contends that these five mayors unlawfully promoted the expansion of mail-in voting in their cities by adopting practices that were banned by the Wisconsin Legislature. Under Wisconsin's election statutes, mayors play no formal role in presidential elections.

Defendants Tony Evers and Douglas La Follette are sued in their official capacities as the Governor and Secretary of State of Wisconsin. As governor, in accordance with Wis. Stat. §7.70, Defendant Evers signed the certificate of ascertainment prepared by the WEC, affixed the state seal, and forwarded the certificate to the U.S. administrator of general services. Wis. Stat. §7.70(5)(b). Defendant La Follette also signed the certificate of ascertainment.

2. WISCONSIN'S MANNER OF CHOOSING PRESIDENTIAL ELECTORS

Article II, Section 1, Clause 2 of the United States Constitution (the "Electors Clause") states, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . ." U.S. CONST. art. II, §1, cl. 2. Pursuant to this federal Constitutional command, the Wisconsin Legislature has directed that Wisconsin choose its Presidential Electors through a general election. *See* Wis. Stat. §8.25. Specifically, the Wisconsin Legislature has directed:

> (1) Presidential electors. By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress. A vote for the president and vice president nominations of any party is a vote for the electors of the nominees.

Wis. Stat. §8.25(1). The statutes define "general election" as "the election held in even-numbered years on the Tuesday after the first Monday in November to elect United States . . . presidential electors." Wis. Stat. §5.02(5).

The Wisconsin Legislature has also established laws detailing the particulars of election administration; these details are set forth in Chapters 5 to 12 of the Wisconsin Statutes. For the last five years, responsibility for the administration of Wisconsin elections has rested with the WEC. The Wisconsin Legislature created the WEC in 2015 specifically to "have the responsibility for the administration of . . . laws relating to elections and election campaigns." 2015 Wis. Act 118 §4; Wis. Stat. §5.05. To carry out these duties, the legislature has delegated significant authority to the WEC. The Wisconsin Legislature directed the WEC to appoint an administrator to "serve as the chief election officer" of the state. Wis. Stat. §5.05(3d), (3g). The Wisconsin Legislature has authorized the WEC to conduct investigations, issue subpoenas, and sue for injunctive relief. Wis. Stat. §5.05(b), (d). The legislature also directed the WEC to receive reports of "possible voting fraud and voting rights violations," Wis. Stat. §5.05(13), and to "investigate violations of laws administered by the

commission and . . . prosecute alleged civil violations of those laws." Wis. Stat. §5.05(2m)(a).

The Wisconsin Legislature has also assigned powers and duties under the state election laws to municipal and county clerks, municipal and county boards of canvassers, and in Milwaukee, the municipal and county boards of election commissioners. Wis. Stat. §§7.10, 7.15, 7.21. The Wisconsin Legislature has directed that these officials, along with the WEC, administer elections in Wisconsin. *See* Wis. Stat. chs. 5 to 10 and 12. When the polls close after an election, these officials make sure that "all ballots cast at an election . . . be counted for the person . . . for whom . . . they were intended." Wis. Stat. §7.50(2). Once all the votes have been counted, the WEC chairperson "shall publicly canvass the returns and make his or her certifications and determinations on or before . . . the first day of December following a general election." Wis. Stat. §7.70(3)(a). For the determination of Presidential Electors, the Wisconsin Legislature has directed the WEC to "prepare a certificate showing the determination of the results of the canvass and the names of the persons elected." Wis. Stat. §7.70(5)(b). The legislature has further directed that "the governor shall sign [the certificate], affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services." *Id.* At noon on the first Monday after the second Wednesday in December, the Presidential Electors meet to vote for the presidential candidate from the political party which nominated them. Wis. Stat. §7.75.

In addition to logistically administering the election, the Wisconsin Legislature has directed the WEC to issue advisory opinions, Wis. Stat. §5.05(6a), and "[p]romulgate rules . . . applicable to all jurisdictions

for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns." Wis. Stat. §5.05(1)(f). The WEC is to "conduct or prescribe requirements for educational programs to inform electors about voting procedures, voting rights, and voting technology." Wis. Stat. §5.05(12).

Finally, the Wisconsin Legislature has provided detailed recount procedures. Wis. Stat. §9.01. After requesting a recount, "any candidate . . . may appeal to circuit court." Wis. Stat. §9.01(6). The legislature has also directed that "[Wis. Stat. §9.01] constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process." Wis. Stat. §9.01(11).

3. WEC'S GUIDANCE IN ADVANCE OF THE 2020 PRESIDENTIAL ELECTION IN WISCONSIN

Consistent with its statutory mandate, since the start of the year, the WEC has published more than 175 messages to County and Municipal elections officials in anticipation of the November 2020 general election. *See Recent Clerk Communications*, Wisconsin Elections Commission, https://elections.wi.gov/clerks/recent-communications. In addition to notifying elections officials of training opportunities, relevant court decisions, and upcoming deadlines, these messages provided detailed guidance on how to prepare for the election and count the resulting votes. *See id.* As stipulated by the parties, the WEC issued specific guidance on three specific issues flagged by plaintiff: missing or incorrect absentee ballot witness certificate addresses, voters claiming indefinitely confined

status, and absentee ballot drop boxes. (Stipulation of Proposed Facts and Exhibits, ECF No. 127 ¶11.)

WEC's guidance on at least one of these issues dates back even further. More than four years ago, on October 18, 2016, the WEC issued written guidance to city and county elections boards providing guidance on the topic of witness addresses provided in connection with absentee balloting. (Stipulation, ECF No. 127 ¶4.)[5] This guidance explained to elections officials how to handle missing or incorrect witness addresses on absentee certificate envelopes. (Pl. Ex. 73, ECF No. 117-72.) The memo highlighted Wis. Stat. §6.87, which states "[i]f a certificate is missing the address of a witness, the ballot may not be counted." (*Id.*) Since the statute does not provide any additional details, the WEC defined "address" as a "street number, street name and name of municipality." (*Id.*) The memo then provided guidance for situations where a voter may have left off the certificate one or more components of the witness address. In the memorandum, the WEC states "clerks must take corrective actions in an attempt to remedy a witness address error." (*Id.*) The guidance allowed clerks to contact the voter to notify them of the address requirement; however, the clerk only had to contact the voter if the clerk could not "remedy the address insufficiency from extrinsic sources." (*Id.*) The WEC stated "clerks shall do all that they can reasonably do to obtain any missing part of the witness address." (*Id.*) The purpose of the guidance was to "assist voters in completing the absentee

[5] The parties' stipulation describes this as an October 19, 2016 memorandum. (Stipulation of Proposed Facts and Exhibits, ECF No. 127 ¶4.) The memo itself is dated October 18, 2016, however. (ECF No. 117-72.) The Court will use the date on the actual document.

certificate sufficiently so their votes may be counted." (*Id.*) This has been the unchallenged guidance on the issue for more than four years.

In September 2020, as directed in Wis. Stat. §7.08(3), the WEC updated the Wisconsin Election Administration Manual. The updated manual states "[c]lerks may add a missing witness address using whatever means are available." *Wis. Election Admin. Manual*, 99 (September 2020). Finally, on October 19, 2020, the WEC issued "Spoiling Absentee Ballot Guidance," reaffirming the previous guidance, and stating "the clerk should attempt to resolve any missing witness address information prior to Election Day if possible, and this can be done through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness). The witness does not need to appear to add a missing address." (Pl. Ex. 35, ECF No. 117-35.)

On March 29, 2020, in the early stages of the COVID-19 pandemic, the WEC issued "Guidance for Indefinitely Confined Electors COVID-19" to election officials across the state. (Pl. Ex. 2, ECF No. 117-2.) Through the published guidance, the WEC stated that "many voters of a certain age or in at-risk populations" may meet the standard of indefinitely confined due to the ongoing pandemic. (*Id.*) The Guidance also stated:

> 1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.

> 2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness or infirmity, or disability.

(*Id.*) The WEC issued this guidance after the Dane County Clerk issued a statement advising that the pandemic itself was sufficient to establish indefinite confinement for all voters. (*See* Stipulation, ECF No. 127 ¶23.) The statement was challenged in court, and the Wisconsin Supreme Court granted a temporary injunction against the Dane County Clerk. *See Jefferson v. Dane County*, 2020AP557-OA (March 31, 2020). In concluding that the Dane County guidance was incorrect, the Wisconsin Supreme Court expressly confirmed that the WEC guidance quoted above provided "the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." *Id.*

On August 19, 2020, the WEC sent all Wisconsin election officials additional guidance that, among other things, discussed absentee ballot drop boxes. (Pl. Ex. 13, ECF No. 117-13.) Wisconsin law provides that absentee ballots "shall be mailed by the elector, or delivered in person, to the municipal clerk." Wis. Stat §6.87(4)(b). The WEC memorandum provided advice on how voters could return their ballots to the municipal clerk, including "information and guidance on drop box options for secure absentee ballot return for voters." (Pl. Ex. 13, ECF No. 117-13.) Citing to a resource developed by the U.S. Cybersecurity and Infrastructure Security Agency (CISA), the guidance states the "drop boxes can be staffed or unstaffed, temporary or permanent." (*Id.*) The memorandum

stated that the "drop boxes . . . allow voters to deliver their ballots in person" and will allow voters "who wait until the last minute to return their ballot." (*Id.*) The memorandum lists potential types of drop boxes, along with security requirements, chain of custody, and location suggestions for the drop boxes. (*Id.*)

As stipulated by the parties, election officials in Milwaukee County, the City of Milwaukee, Dane County, and the City of Madison relied on the above WEC guidance when handling absentee ballots with missing or incorrect witness address, using absentee ballot drop boxes, and handling voters that had claimed indefinitely confined status. (Stipulation, ECF No. 127 ¶11.) Because they relied on the guidance, election workers added missing information to the witness address on at least some absentee ballots, more than five hundred drop boxes were used throughout the state, and approximately 240,000 "indefinitely confined" voters requested absentee ballots. (*Id.* ¶¶ 17, 18, 28.)

4. THE 2020 PRESIDENTIAL ELECTION IN WISCONSIN

On November 3, 2020, nearly 3.3 million Wisconsin voters cast their ballots in the general election for the President and Vice President of the United States. (Stipulation, ECF No. 127 ¶7.) At 8:00 p.m., all polls in Wisconsin closed. Wis. Stat. §6.78. The respective boards of canvassers began to publicly canvass all the votes received at the polling place. Wis. Stat. §7.51.

Voting officials in Milwaukee dealt with an unprecedented number of absentee ballots during this election. (Pl. Ex. 62, ECF No. 117-61.) In Milwaukee and Dane Counties, and likely other locations, election officials processed the absentee ballots in accordance

with guidance published by the WEC. (Stipulation, ECF No. 127 ¶11.) The WEC received the last county canvass on November 17, 2020. (*Id.* ¶8.) On November 18, 2020, the deadline for requesting a recount, plaintiff sought a recount under Wis. Stat. §9.01 of only Dane and Milwaukee Counties.[6] (*Id.* ¶9.) The Milwaukee County recount was completed on November 27, 2020 and the Dane County recount was completed on November 29, 2020. (Id. ¶10.) Once the recount was complete, the WEC prepared the Certificate of Ascertainment for the Governor's signature. *See* Wis. Stat. §7.70(5)(b). On November 30, 2020, Governor Evers signed the certificate and affixed the state seal. (Def. Ex. 501, ECF No. 119-1.)

On December 1, 2020, the day after Wisconsin certified its election results, Donald Trump, Michael Pence, and the Trump campaign filed a petition in the Wisconsin Supreme Court against Governor Tony Evers, the Wisconsin Elections Commission, and other state election officials. *Trump v. Evers*, No. 2020AP001971 (Wis. S. Ct.). The issues presented by the plaintiffs included whether absentee ballots should be excluded due to various alleged deviations from legislated election procedures. As a remedy, they asked the Court to decertify the state's election results

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[6] After receiving a recount petition and $3 million payment from the Trump campaign, the six-member, bipartisan commission conducted a meeting on November 18, 2020, at which the commission unanimously approved the recount order. The WEC ordered a partial recount of the presidential election results in Dane and Milwaukee Counties on November 19, 2020. The recount order required Dane and Milwaukee Counties' boards of canvassers to convene by 9 a.m. Saturday, November 21, and complete their work by noon on Tuesday, December 1. Wis. Elections Comm'n Order for Recount, Recount EL 20-01, https://elections.wi.gov/node/7250.

and exclude 221,000 votes in Milwaukee and Dane Counties from the count. On December 3, 2020, the Wisconsin Supreme Court denied the petition for leave to commence an original action in the state Supreme Court, but noted that, as an aggrieved candidate, plaintiff could refile at the circuit court level.

That same day, plaintiff filed his complaint in this Court. Additionally on that day, plaintiff, along with Michael R. Pence, and Donald J. Trump for President, Inc. filed complaints in Dane and Milwaukee County Circuit Courts against Joseph R. Biden, Kamala D. Harris, and several Wisconsin election officials, some of whom are defendants in this case. *Trump v. Biden*, No. 2020CV007092 (Milw. Co. Cir. Ct.), No. 2020CV002514 (Dane Co. Cir. Ct.). Chief Justice Roggensack of the Wisconsin Supreme Court combined the cases and appointed Racine County Reserve Judge Stephen A. Simanek to hear it. The suits are substantially similar and both allege irregularities in the way absentee ballots were administered. In the Milwaukee County case, the plaintiffs allege the ballots were issued without the elector having first submitted a written application; there were incomplete and altered certification envelopes; and there was a massive surge in indefinitely confined absentee ballot voters. The Dane County case included the same claims, plus one involving an allegation that absentee ballots were improperly completed or delivered to City of Madison employees at a public event, "Democracy in the Park." The plaintiffs asked the state court to set aside the county board of canvassers' legal

determinations that certain absentee ballots should be counted due to deviations in state elections laws.[7]

LEGAL CONCLUSIONS AND ANALYSIS

Plaintiff claims that defendants violated his rights under the Electors Clause by "deviating from the law, substituting their 'wisdom' for the laws passed by the State Legislature and signed by the Governor." (Pl. Br., ECF No. 109.) In the complaint, plaintiff contends three specific pieces of guidance issued by the WEC, and followed by the named defendants, contradict Wisconsin's election statutes, and that the WEC lacked the authority to issue any guidance in contravention of Wisconsin law. (Compl., ECF No. 1.) Invoking the Court's federal question jurisdiction under 28 U.S.C. §1331, plaintiff asserts claims for the violation of his federal Constitutional rights under 42 U.S.C. §1983. (*Id.*) Among other remedies, he seeks declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §2201, and asks this Court to declare the Wisconsin general election void under the U.S. Constitution. (*Id.*)

I. This Court Has Limited Jurisdiction to Resolve Plaintiff's Electors Clause Challenge.

Before addressing the merits of plaintiff's claims, this Court has the obligation of confirming that it has jurisdiction even to consider them. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (federal district courts "possess only that power

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[7] On December 11, Judge Simanek affirmed the recount and ruled against plaintiff in the state court proceeding. *Trump v. Biden*, No. 2020CV007092, Doc. 101 (Milw. Co. Cir. Ct. Dec. 11, 2020). Plaintiff has since filed an appeal in the Wisconsin Supreme Court.

authorized by Constitution and statute"). Defendants offer a host of arguments related to the justiciability of plaintiff's claims. They insist that plaintiff lacks standing to assert his claims, that his claims are barred by the Eleventh Amendment, and that they are moot. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.) Finally, they contend that even if this Court could resolve plaintiff's claims, it should abstain from doing so. (Defs. Brs., ECF No. 70, 81, 87, 95, 101, and 120.) Despite the tricky questions of federal jurisdiction implicated by plaintiff's claims and requests for relief, the Court concludes plaintiff's claims are justiciable, at least in part. Given the importance of the issues at stake and the need for a prompt resolution, the Court will not abstain from ruling on whether defendants violated plaintiff's federal rights under the Electors Clause.

A. Plaintiff Has Standing to Seek an Adjudication of the Alleged Violation of His Rights under the Electors Clause.

Defendants insist that plaintiff lacks standing to assert claims and obtain declaratory relief based on the Electors Clause. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.) That plaintiff seeks primarily declaratory relief does not remove his obligation to establish standing. The Declaratory Judgment Act permits the Court to "declare the rights and other legal relations of any interested party," but only when there is "a case of actual controversy within its jurisdiction." 28 U.S.C. §2201(a). "A 'controversy' in this sense must be one that is appropriate for judicial determination," *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937), and "the core component of standing is an essential and unchanging part of the

case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

To establish standing, plaintiff bears the burden of proving that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016). An injury in fact is one in which plaintiff claims to have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Lujan*, 504 U.S. at 560).

Plaintiff asserts that he suffered an injury in fact when he "was denied the Constitutional right to have electors appointed in a lawful manner in an election in which he was a candidate." (Pl. Br., ECF No. 109.) The Court agrees. The Eighth Circuit and the Eleventh Circuit have concluded that losing candidates likely have standing to bring a claim under the Electors Clause, because such a candidate has suffered a "personal, distinct injury." *Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, at *4 (11th Cir. Dec. 5, 2020); *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) ("An inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors."). That is the situation here: plaintiff, a candidate for election, claims he was harmed by defendants' alleged failure to comply with Wisconsin law. Assuming he could prove his claims, he has suffered an injury. Plaintiff, as a candidate for election, has a concrete, particularized interest in the actual results of the general election. *Carson*, 978 F.3d at 1057; *see Carney v. Adams*, ___ S. Ct. ___, 2020 WL 7250101 (Dec. 10, 2020) (holding plaintiff had not proved injury

in fact sufficient to establish standing where plaintiff was merely potential candidate and had not yet applied for judicial position). Plaintiff has therefore established injury in fact.

Based on the allegations in his complaint, plaintiff also meets the other requirements for standing. He contends that defendants' failure to comply with Wisconsin law has resulted in a failed election, one in which he was one of the two major-party candidates for President. (Compl., ECF No. 1.) As administrators of the election, defendants implemented the Wisconsin election statutes and WEC's guidance. His harms are therefore traceable to defendants. And as redress, he seeks a declaration that defendants violated the Electors Clause by failing to follow the directions of the Wisconsin Legislature during the 2020 Presidential Election. [8] (*Id.*)

Redressability is established because "plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 n.5 (1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)). Thus, his alleged injury is fairly traceable to the challenged conduct of

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[8] The complaint alleges the exclusive remedy for a failed election resides in the Wisconsin Legislature. (Compl., ECF No. 1.) That allegation brought strongly into question whether this Court could redress Plaintiff's injury, a point raised by the Court at the initial hearing with the parties. Plaintiff has since explained that he seeks a declaration that the Wisconsin general election was a failed election under 3 U.S.C. §2, a declaration he argues is a predicate to allowing the Wisconsin Legislature to take action to determine the manner in which the state should appoint its Presidential Electors now that the originally chosen method has "failed." (Transcript, ECF No. 130.) While this explanation is tenuous, it sufficiently ties the relief requested to a potential remedy to establish standing.

the defendants and would be redressed by a favorable judicial decision.

Defendants' arguments against standing are largely premised on their challenges to the merits of plaintiff's claims. For example, defendants complain that "[p]laintiff offers no proof whatsoever of how many votes were affected in the three categories of alleged state election law violations he identifies." (Def. Br., ECF No. 98.) But that argument puts the cart before the horse. A court must determine standing based on the allegations in the complaint, not based on its final resolution of the veracity of those allegations. *Spokeo*, 136 S. Ct. at 1547 ("Where, as here, a case is at the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element."). If plaintiff were to succeed in proving that defendants violated the Electors Clause, causing Wisconsin's Presidential Electors to be appointed in a manner inconsistent with the Wisconsin Legislature's directives, and depriving plaintiff of his opportunity to win those Presidential Electors, he should have the ability (and the standing) to enforce the Constitution's plain terms in federal court.

B. The Eleventh Amendment and *Pennhurst* Do Not Apply to Plaintiff's Unique Article II Claims.

Defendants next argue that plaintiff's claims are barred by the Eleventh Amendment and the Supreme Court's decision in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). (Defs. Brs., ECF No. 75, 81, 98, 101, and 120.) They contend that plaintiff is complaining that defendants failed to comply with state law such that the Eleventh Amendment bars this Court from entertaining such claims. (*Id.*)

The Eleventh Amendment provides that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Defendants are correct that, as a general matter, the Eleventh Amendment bars litigation in federal courts against a state.[9] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 336 (7th Cir. 2000) ("[The Eleventh] Amendment bars federal jurisdiction over suits brought against a state . . . [and] extends to state agencies as well."). But the Supreme Court has long held that suits against state agents, rather than against the state itself, based on those agents' violations of federal law, can be maintained in federal court without running afoul of the Eleventh Amendment. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). A federal court thus may adjudicate and order relief against state officers based on allegations of ongoing unconstitutional conduct. *Id.*; *MCI Telecommunications Corp.*, 222 F.3d at 345.

In *Pennhurst*, the Supreme Court clarified that the rule in *Ex parte Young* does not extend to claims based merely on alleged violations of state law. 465 U.S. at 106 ("[I]t is difficult to think of a greater intrusion on

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[9] The Eleventh Amendment precludes a federal suit against state agencies, and this likely includes the Wisconsin Elections Commission. *See* Wis. Stat. §5.05; *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 336 (7th Cir. 2000); *Feehan v. Wisconsin Elections Commission*, No. 20-cv-1771, 2020 WL 7250219 (E.D. Wis. Dec. 9, 2020). The WEC has not made this argument. Even if it had, plaintiff's claims against the individual commission members would survive.

state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). Thus, under the Eleventh Amendment and state sovereign immunity, a federal court "cannot enjoin a state officer from violating state law." *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999).

The *Pennhurst* exception to *Ex parte Young* does not apply here, because plaintiff's claims are based on federal law—the Electors Clause of Article II, Section 1 of the U.S. Constitution. *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *75 (W.D. Pa. Oct. 10, 2020) (holding that claims under the Electors Clause are not barred by the Eleventh Amendment); *cf. Dean Foods Co.*, 187 F.3d at 614 ("the question at the heart of this jurisdictional matter is what is the source of the regulations' potential invalidity"). While plaintiff also cites provisions of Wisconsin's election statutes, he does so in an attempt to show that defendants violated not merely those statutes, but rather the Electors Clause itself. In this unique context, alleged violations of state laws implicate and may violate federal law. *See Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("[I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution."). This is the opposite of what the Eleventh Amendment forbids; here, a truly federal cause of action is being articulated. Because plaintiff's claims and request for relief are premised on a federal Constitutional violation, not merely a violation of state law, *Pennhurst* does not

apply, and the Eleventh Amendment does not bar plaintiff's claims.

C. Plaintiff's Claims Are Not Moot.

Defendants also contend plaintiff's claims are moot. (Defs. Brs., ECF No. 70, 75, 95, 120.) They insist that because plaintiff waited until after Wisconsin certified the election results to file suit, his suit is too late. (*Id.*) They further maintain that plaintiff's claims are moot because Governor Evers has already signed a "Certificate of Ascertainment For President, Vice President, and Presidential Electors General Election - November 3, 2020" (2020 Electoral College Results, National Archives, https://www.archives.gov/electoral-college/2020) on November 30, 2020, an act they contend makes this action irrelevant. (*Id.*)

The final determination of the next President and Vice President of the United States has not been made, however, and the issuance of a Certificate of Ascertainment is not necessarily dispositive on a state's electoral votes. *See Bush v. Gore*, 531 U.S. 98, 144 (2000) (Ginsburg J., dissenting) (noting none of the various Florida elector deadlines "has ultimate significance in light of Congress' detailed provisions for determining, on 'the sixth day of January,' the validity of electoral votes").

Under the federal statute governing the counting of electoral votes, a state governor may issue a certificate of ascertainment based on the canvassing and then a subsequent certificate of "determination" upon the conclusion of all election challenges. 3 U.S.C. §6. The certificate of "determination" notifies the U.S. Congress of the state decision when Congress convenes on January 6 to count the electoral votes. Indeed, the WEC acknowledged that plaintiff's claims are not

moot in a filing with the Wisconsin Supreme Court. (Response of Respondents Wisconsin Elections Commission and Commissioner Ann Jacobs, *Trump v. Evers*, No. 20AP1971-OA, filed Dec. 1, 2020, ECF No. 109-1.) At this time, it is also unclear whether the litigation commenced in state court, *Trump v. Biden*, No. 2020CV007092 (Milw. Co. Cir. Ct.), No. 2020CV002514 (Dane Co. Cir. Ct.), is coming to a final resolution sufficient to resolve plaintiff's challenges. Given plaintiff's pending appeal and the limited time available should that appeal succeed on the state law issues, this Court will proceed to decide the merits of the federal law claims. The Court concludes this case is not yet moot.

D. This Court Is Not Required to Abstain from Deciding Plaintiff's Challenge under the Electors Clause.

Defendants also contend that even if this Court could adjudicate plaintiff's claims, it should abstain from doing so. (Defs. Brs., ECF No. 70, 81, 87, 95, 101, and 120.) They focus on three different abstention doctrines: (1) *Wilton/Brillhart* abstention; (2) *Pullman* abstention; and (3) *Colorado River* abstention. (*Id.*) After reviewing the law under all three forms of abstention, this Court will decline defendants' invitation to abstain.

Defendants first invoke the *Wilton/Brillhart* abstention doctrine, derived from *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995), and *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942). Under the *Wilton/Brillhart* abstention doctrine, "district courts possess significant discretion to dismiss or stay claims seeking declaratory relief, even though they have subject matter jurisdiction over such claims." *R.R. St. & Co. v. Vulcan Materials Co.*, 569 F.3d 711, 713 (7th

Cir. 2009). While labelled with Supreme Court case names, this form of abstention arises from the plain terms of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, itself. Section 2201 expressly provides that district courts "*may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). The statute thus gives district courts the discretion not to declare the rights of litigants. The Seventh Circuit has confirmed that a district court properly exercises discretion to abstain where, for example, "declaratory relief is sought and parallel state proceedings are ongoing." *Envision Healthcare, Inc. v. PreferredOne Ins. Co.*, 604 F.3d 983, 986 (7th Cir. 2010).

Defendants also invoke *Pullman* abstention. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501-02 (1941). The *Pullman* doctrine "applies when 'the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law.'" *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 150 (7th Cir. 2011) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-17 (1996)). *Pullman* abstention is appropriate if there is (1) "a substantial uncertainty as to the meaning of the state law" and (2) "a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Id.* (internal quotation marks omitted).

Finally, defendants ask the Court to avoid deciding this case under *Colorado River* abstention. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976). Under *Colorado River* abstention principles, a federal court should abstain in

favor of a parallel state court lawsuit if (1) "the concurrent state and federal actions are actually parallel" and (2) "the necessary exceptional circumstances exist to support a stay or dismissal." *DePuy Synthes Sales, Inc. v. OrthoLA, Inc.*, 953 F.3d 469, 477 (7th Cir. 2020) (internal quotation marks omitted).

The Court declines to abstain under any of these doctrines. The federal Constitutional issues raised in plaintiff's complaint are obviously of tremendous public significance. For the first time in the nation's history, a candidate that has lost an election for president based on the popular vote is trying to use federal law to challenge the results of a statewide popular election. While there is parallel litigation pending in the state court, that litigation does not address the federal constitutional issue that is the center of plaintiff's case. Given the importance of the federal issue and the limited timeline available, it would be inappropriate to wait for the conclusion of the state court case. In these circumstances, the Court will exercise its discretion to declare plaintiff's rights under the Electors Clause and will decline to utilize *Pullman* or *Colorado River* abstention principles to defer to the state court proceedings.

II. Plaintiff's Claims Fail on Their Merits—Wisconsin's Appointment of Presidential Electors for the 2020 Presidential Election Was Conducted in the Manner Directed by the Wisconsin Legislature.

To succeed on his claims for relief under 42 U.S.C. §1983, plaintiff must prove that defendants acted under the color of state law and deprived him of a right secured by the Constitution or laws of the United States. *Wilson v. Warren Cnty., Ill.*, 830 F.3d 464, 468 (7th Cir. 2016) (citations omitted). Plaintiff alleges

that the defendants violated his rights under the Electors Clause in Article II, Section 1. (Compl., ECF No. 1.) There is no dispute that defendants' actions as alleged in the complaint were undertaken under the color of Wisconsin law.

Defendants strongly and uniformly dispute, however, that their conduct violated any Constitutional provision. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.)

A. The Wisconsin Legislature Has Directed the Appointment of Presidential Electors to Be by Popular Vote.

The Electors Clause directs state legislatures to appoint presidential electors in a manner of their choosing. U.S. CONST. art. II, § 1, cl. 2. As the Supreme Court explained just this past summer, the Electors Clause was the result of "an eleventh-hour compromise" at the 1787 Constitutional convention. *Chiafalo v. Washington*, __ U.S. __, 140 S. Ct. 2316, 2320 (2020). Apparently fatigued and ready to return to their homes, the delegates decided on language that would give state legislatures the responsibility of choosing the "Manner" in which presidential electors would be appointed. *Id.* And the Supreme Court has confirmed that state legislators have "the broadest power of determination" over who becomes a Presidential Elector. *Id.* at 2324 (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)).

Today, the manner of appointment among the states is largely uniform. *See Chiafalo*, 140 S. Ct. at 2321. All states use an appointment process tied to the popular vote, with political parties fielding presidential candidates having the responsibility to nominate slates of Presidential Electors. *Id.* at 2321-22. But that manner

of appointing Presidential Electors is not required by the Constitution. As Chief Justice Fuller explained in 1892:

> The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

McPherson, 146 U.S. at 27. Historically, presidential electors have been appointed directly by state legislatures, by general ticket, by districts, and by majority popular vote. *Id.* at 27-32 (summarizing the methods by which presidential electors were appointed by state legislatures during the first four presidential elections). But by 1832, "all States but one had introduced popular presidential elections." *Chiafalo*, 140 S. Ct. at 2321.

The Wisconsin Legislature's decision to appoint the state's presidential electors by popular vote is embodied in Wis. Stat. §8.25(1). This statute provides:

> Presidential electors. By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress. A vote for the president and vice president nominations of any party is a vote for the electors of the nominees.

Wis. Stat. §8.25(1). The statutes define "general election" as "the election held in even-numbered years on the Tuesday after the first Monday in November to elect United States . . . presidential electors." Wis. Stat. §5.02(5).

Plaintiff contends defendants have violated the Electors Clause by failing to appoint the state's presidential electors in the "Manner" directed by the Wisconsin Legislature. (Compl., ECF No. 1.) By this, plaintiff means that he has raised issues with the WEC's guidance on three issues related to the administration of the election. This argument confuses and conflates the "Manner" of appointing presidential electors—popular election—with underlying rules of election administration. As used in the Electors Clause, the word "Manner" refers to the "[f]orm" or "method" of selection of the Presidential Electors. *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring) (citations omitted). It "requires state legislatures merely to set the approach for selecting Presidential electors." *Id.* Put another way, it refers simply to "the mode of appointing electors—consistent with the plain meaning of the term." *Id.*; *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("It has been said that the word 'appoint' is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode . . .").

The approach, form, method, or mode the Wisconsin Legislature has set for appointing Presidential electors is by "general ballot at the general election." Wis. Stat. §8.25(1). There is no dispute that this is precisely how Wisconsin election officials, including all the defendants, determined the appointment of Wisconsin's Presidential Electors in the latest

election. They used "general ballot[s] at the general election for choosing the president and vice president of the United States" and treated a "vote for the president and vice president nominations of any party is a vote for the electors of the nominees." Absent proof that defendants failed to follow this "Manner" of determining the state's Presidential Electors, plaintiff has not and cannot show a violation of the Electors Clause.

Plaintiff's complaints about the WEC's guidance on indefinitely confined voters, the use of absentee ballot drop boxes, and corrections to witness addresses accompanying absentee ballots are not challenges to the "Manner" of Wisconsin's appointment of Presidential Electors; they are disagreements over election administration. Indeed, the existence of these (or other) disagreements in the implementation of a large election is hardly surprising, especially one conducted statewide and involving more than 3.2 million votes. But issues of mere administration of a general election do not mean there has not been a "general ballot" at a "general election." Plaintiff's conflation of these potential nonconformities with Constitutional violations is contrary to the plain meaning of the Electors Clause. If plaintiff's reading of "Manner" was correct, any disappointed loser in a Presidential election, able to hire a team of clever lawyers, could flag claimed deviations from the election rules and cast doubt on the election results. This would risk turning every Presidential election into a federal court lawsuit over the Electors Clause. Such an expansive reading of "Manner" is thus contrary both to the plain meaning of the Constitutional text and common sense.

B. Even If "Manner" Includes Aspects of Election Administration, Defendants Administered Wisconsin's 2020 Presidential Election as Directed by the Wisconsin Legislature.

Plaintiff's claims would fail even if the Court were to read the word "Manner" in Article II, Section 1, Clause 2 to encompass more than just the "mode" of appointment. Including material aspects of defendants' election administration in "Manner" does not give plaintiff a win for at least two reasons. First, the record shows defendants acted consistently with, and as expressly authorized by, the Wisconsin Legislature. Second, their guidance was not a significant or material departure from legislative direction.

Plaintiff's "Manner" challenges all stem from the WEC's having issued guidance concerning indefinitely confined voters, the use of absentee ballot drop boxes, and corrections to witness addresses on absentee ballots. (Compl., ECF No. 1.) Plaintiff expresses strong disagreement with the WEC's interpretations of Wisconsin's election statutes, accusing the WEC of "deviat[ing] from the law" and "substitut[ing] their 'wisdom' for the laws passed by the State Legislature and signed by the Governor." (Pl. Br., ECF No. 109.) While plaintiff's statutory construction arguments are not frivolous, when they are cleared of their rhetoric, they consist of little more than ordinary disputes over statutory construction.

These issues are ones the Wisconsin Legislature has expressly entrusted to the WEC. Wis. Stat. §5.05(2w) ("The elections commission has the responsibility for the administration of chs. 5 to 10 and 12."). When the legislature created the WEC, it authorized the commission to issue guidance to help election officials statewide interpret the Wisconsin election statutes

and new binding court decisions. Wis. Stat. §5.05(5t). The WEC is also expressly authorized to issue advisory opinions, Wis. Stat. §5.05(6a), and to "[p]romulgate rules . . . applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns." Wis. Stat. §5.05(1)(f). The Wisconsin Legislature also directed that the WEC would have "responsibility for the administration of . . . laws relating to elections and election campaigns." Wis. Stat. §5.05(1). In sum, far from defying the will of the Wisconsin Legislature in issuing the challenged guidance, the WEC was in fact acting pursuant to the legislature's express directives.

If "Manner" in the Electors Clause is read to includes legislative enactments concerning election administration, the term necessarily also encompasses the Wisconsin Legislature's statutory choice to empower the WEC to perform the very roles that plaintiff now condemns. Thus, the guidance that plaintiff claims constitutes an unconstitutional deviation from the Wisconsin Legislature's direction, is, to the contrary, the direct consequence of legislature's express command. And, defendants have acted consistent with the "Manner" of election administration prescribed by the legislature.

Plaintiff points to language in Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*, stating that "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). But the record does not show any *significant* departure from the legislative scheme during Wisconsin's 2020 Presidential election. At best,

plaintiff has raised disputed issues of statutory construction on three aspects of election administration.[10] While plaintiff's disputes are not frivolous, the Court finds these issues do not remotely rise to the level of a material or significant departure from Wisconsin Legislature's plan for choosing Presidential Electors.

Because plaintiff has failed to show a clear departure from the Wisconsin Legislature's directives, his complaint must be dismissed. As Chief Justice Rehnquist stated, "in a Presidential election the clearly expressed intent of the legislature must prevail." *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring). That is what occurred here. There has been no violation of the Constitution.

CONCLUSION

Plaintiff's Electors Clause claims fail as a matter of law and fact. The record establishes that Wisconsin's selection of its 2020 Presidential Electors was conducted in the very manner established by the Wisconsin Legislature, "[b]y general ballot at the general election." Wis. Stat. §8.25(1). Plaintiff's complaints about defendants' administration of the election go to the implementation of the Wisconsin Legislature's chosen manner of appointing Presidential Electors, not to the manner itself. Moreover, even if "Manner" were stretched to include plaintiff's implementation objections, plaintiff has not shown a

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[10] Even these three statutory construction issues were raised only after-the-fact. If these issues were as significant as plaintiff claims, he has only himself to blame for not raising them *before* the election. Plaintiff's delay likely implicates the equitable doctrine of laches. The Court does not need to reach that issue, however, and therefore makes no findings or holdings on laches.

significant departure from the Wisconsin Legislature's chosen election scheme.

This is an *extraordinary* case. A sitting president who did not prevail in his bid for reelection has asked for federal court help in setting aside the popular vote based on disputed issues of election administration, issues he plainly could have raised before the vote occurred. This Court has allowed plaintiff the chance to make his case and he has lost on the merits. In his reply brief, plaintiff "asks that the Rule of Law be followed." (Pl. Br., ECF No. 109.) It has been.

IT IS HEREBY ORDERED:

1. Plaintiff's complaint, ECF No. 1, is DISMISSED WITH PREJUDICE.
2. Plaintiff's motion for preliminary injunction, ECF No. 6, is DENIED as moot.
3. Defendants' motions to dismiss, ECF No. 69, 71, 78, 84, 86, 96, 97, and 99, are GRANTED.
4. Defendant Governor Evers' oral motion for judgment under Fed. R. Civ. P. 52 is GRANTED.

Dated at Milwaukee, Wisconsin on December 12, 2020.

s/ *Brett H. Ludwig*
BRETT H. LUDWIG
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Filed 12/12/20]

Case No. 20-cv-1785-bhl

DONALD J TRUMP,

Plaintiff,

v.

THE WISCONSIN ELECTIONS COMMISSION, COMMISSIONER ANN S JACOBS, MARK L THOMSEN, COMMISSIONER MARGE BOSTELMANN, COMMISSIONER DEAN KNUDSON, ROBERT F SPINDELL, JR, GEORGE L CHRISTENSON, JULIETTA HENRY, CLAIRE WOODALL-VOGG, MAYOR TOM BARRETT, JIM OWCZARSKI, MAYOR SATYA RHODES-CONWAY, MARIBETH WITZEL-BEHL, MAYOR CORY MASON, TARA COOLIDGE, MAYOR JOHN ANTARAMIAN, MATT KRAUTER, ERIC GENRICH, KRIS TESKE, DOUGLAS J LA FOLLETTE, TONY EVERS, SCOTT MCDONELL,

Defendants,

WISCONSIN STATE CONFERENCE NAACP, DOROTHY HARRELL, WENDELL J HARRIS, SR, EARNESTINE MOSS, DEMOCRATIC NATIONAL COMMITTEE,

Intervenor Defendants.

JUDGMENT IN A CIVIL CASE

☒ **Decision by Court.** This case came before the court, the court has decided the issues, and the court has rendered a decision.

PURSUANT TO THE COURT'S ORDER**,** the action is DISMISSED WITH PREJUDICE and the plaintiff shall recover nothing on the complaint.

GINA M. COLLETTI
Clerk of Court

Dated: December 12, 2020

s/ *Melissa P.*
(By) Deputy Clerk

APPENDIX E

Constitutional and Statutory Provisions Involved

U.S. Const. art. I, § 4, cl. 1

The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

U.S. Const. art. II § 1 cl. 2

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress. . .

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV (Equal Protection and Due Process Clauses)

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3 U.S.C.A. § 2
Failure to make choice on prescribed day

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

3 U.S.C.A. § 5
Determination of controversy as to appointment of electors

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C.A. § 15
Counting electoral votes in Congress

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of

Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject

the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

Wis. Stat. § 5.02(6m)
Definitions

(6m) "Identification" means any of the following documents issued to an individual:

(a) One of the following documents that is unexpired or if expired has expired after the date of the most recent general election:

1. An operator's license issued under ch. 343.

2. An identification card issued under s. 343.50.

3. An identification card issued by a U.S. uniformed service.

4. A U.S. passport.

(b) A certificate of U.S. naturalization that was issued not earlier than 2 years before the date of an election at which it is presented.

(c) An unexpired driving receipt under s. 343.11.

(d) An unexpired identification card receipt issued under s. 343.50.

(e) An identification card issued by a federally recognized Indian tribe in this state.

(f) An unexpired identification card issued by a university or college in this state that is accredited, as defined in s. 39.30(1)(d), or by a technical college in this state that is a member of and governed by the

technical college system under ch. 38, that contains the date of issuance and signature of the individual to whom it is issued and that contains an expiration date indicating that the card expires no later than 2 years after the date of issuance if the individual establishes that he or she is enrolled as a student at the university or college on the date that the card is presented.

(g) An unexpired veterans identification card issued by the veterans health administration of the federal department of veterans affairs.

Wis. Stat. §§ 5.05(1) and (2m)
Elections commission; powers and duties

(1) General authority. The elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing.

[(a) is omitted in the statute]

(b) In the discharge of its duties and after providing notice to any party who is the subject of an investigation, subpoena and bring before it any person and require the production of any papers, books, or other records relevant to an investigation. Notwithstanding s. 885.01(4), the issuance of a subpoena requires action by the commission at a meeting of the commission. In the discharge of its duties, the commission may cause the deposition of witnesses to be taken in the manner prescribed for taking depositions in civil actions in circuit court.

(c) Bring civil actions to require a forfeiture for any violation of chs. 5 to 10 or 12. The commission may compromise and settle any civil action or potential

action brought or authorized to be brought by it which, in the opinion of the commission, constitutes a minor violation, a violation caused by excusable neglect, or which for other good cause shown, should not in the public interest be prosecuted under such chapter. Notwithstanding s. 778.06, a civil action or proposed civil action authorized under this paragraph may be settled for such sum as may be agreed between the parties. Any settlement made by the commission shall be in such amount as to deprive the alleged violator of any benefit of his or her wrongdoing and may contain a penal component to serve as a deterrent to future violations. In settling civil actions or proposed civil actions, the commission shall treat comparable situations in a comparable manner and shall assure that any settlement bears a reasonable relationship to the severity of the offense or alleged offense. Except as otherwise provided in sub. (2m)(c)15. and 16. and ss. 5.08 and 5.081, forfeiture actions brought by the commission shall be brought in the circuit court for the county where the defendant resides, or if the defendant is a nonresident of this state, in circuit court for the county wherein the violation is alleged to occur. For purposes of this paragraph, a person other than an individual resides within a county if the person's principal place of operation is located within that county. Whenever the commission enters into a settlement agreement with an individual who is accused of a civil violation of chs. 5 to 10 or 12 or who is investigated by the commission for a possible civil violation of one of those provisions, the commission shall reduce the agreement to writing, together with a statement of the commission's findings and reasons for entering into the agreement and shall

retain the agreement and statement in its office for inspection.

(d) Sue for injunctive relief, a writ of mandamus or prohibition, or other such legal or equitable relief as may be appropriate to enforce any law regulating the conduct of elections or election campaigns, other than laws regulating campaign financing, or ensure its proper administration. No bond is required in such actions. Actions shall be brought in circuit court for the county where a violation occurs or may occur.

(e) Issue an order under s. 5.06, exempt a polling place from accessibility requirements under s. 5.25(4)(a), exempt a municipality from the requirement to use voting machines or an electronic voting system under s. 5.40(5m), approve an electronic data recording system for maintaining poll lists under s. 6.79, or authorize nonappointment of an individual who is nominated to serve as an election official under s. 7.30(4)(e).

(f) Promulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns, other than laws regulating campaign financing, or ensuring their proper administration.

* * *

(2m) Enforcement.

(a) The commission shall investigate violations of laws administered by the commission and may prosecute alleged civil violations of those laws, directly or through its agents under this subsection, pursuant to all statutes granting or assigning that

authority or responsibility to the commission. Prosecution of alleged criminal violations investigated by the commission may be brought only as provided in par. (c)11., 14., 15., and 16. and s. 978.05(1). For purposes of this subsection, the commission may only initiate an investigation of an alleged violation of chs. 5 to 10 and 12, other than an offense described under par. (c)12., based on a sworn complaint filed with the commission, as provided under par. (c). Neither the commission nor any member or employee of the commission, including the commission administrator, may file a sworn complaint for purposes of this subsection.

[(b) is omitted in the statute]

(c) [1. is omitted in the statute]

2. a. Any person may file a complaint with the commission alleging a violation of chs. 5 to 10 or 12. No later than 5 days after receiving a complaint, the commission shall notify each person who or which the complaint alleges committed such a violation. Before voting on whether to take any action regarding the complaint, other than to dismiss, the commission shall give each person receiving a notice under this subd. 2.a. an opportunity to demonstrate to the commission, in writing and within 15 days after receiving the notice, that the commission should take no action against the person on the basis of the complaint. The commission may not conduct any investigation or take any other action under this subsection solely on the basis of a complaint by an unidentified complainant.

am. If the commission finds, by a preponderance of the evidence, that a complaint is frivolous, the

commission may order the complainant to forfeit not more than the greater of $500 or the expenses incurred by the commission in investigating the complaint.

[3. is omitted in the statute]

4. If the commission reviews a complaint and fails to find that there is a reasonable suspicion that a violation under subd. 2. has occurred or is occurring, the commission shall dismiss the complaint. If the commission believes that there is reasonable suspicion that a violation under subd. 2. has occurred or is occurring, the commission may by resolution authorize the commencement of an investigation. The resolution shall specifically set forth any matter that is authorized to be investigated. To assist in the investigation, the commission may elect to retain a special investigator. If the commission elects to retain a special investigator, the administrator of the commission shall submit to the commission the names of 3 qualified individuals to serve as a special investigator. The commission may retain one or more of the individuals. If the commission retains a special investigator to investigate a complaint against a person who is a resident of this state, the commission shall provide to the district attorney for the county in which the person resides a copy of the complaint and shall notify the district attorney that it has retained a special investigator to investigate the complaint. For purposes of this subdivision, a person other than an individual resides within a county if the person's principal place of operation is located within that county. The commission shall enter into a written contract with any individual who is retained as a

special investigator setting forth the terms of the engagement. A special investigator who is retained by the commission may request the commission to issue a subpoena to a specific person or to authorize the special investigator to request the circuit court of the county in which the specific person resides to issue a search warrant. The commission may grant the request by approving a motion to that effect at a meeting of the commission if the commission finds that such action is legally appropriate.

5. Each special investigator who is retained by the commission shall make periodic reports to the commission, as directed by the commission, but in no case may the interval for reporting exceed 30 days. If the commission authorizes the commission administrator to investigate any matter without retaining a special investigator, the administrator shall make periodic reports to the commission, as directed by the commission, but in no case may the reporting interval exceed 30 days. During the pendency of any investigation, the commission shall meet for the purpose of reviewing the progress of the investigation at least once every 90 days. The special investigator or the administrator shall report in person to the commission at that meeting concerning the progress of the investigation. If, after receiving a report, the commission does not vote to continue an investigation for an additional period not exceeding 90 days, the investigation is terminated at the end of the reporting interval. The commission shall not expend more than $25,000 to finance the cost of an investigation before receiving a report on the progress of the investigation and a recommendation to commit additional resources. The commission

may vote to terminate an investigation at any time. If an investigation is terminated, any complaint from which the investigation arose is deemed to be dismissed by the commission. Unless an investigation is terminated by the commission, at the conclusion of each investigation, the administrator shall present to the commission one of the following:

a. A recommendation to make a finding that probable cause exists to believe that one or more violations under subd. 2. have occurred or are occurring, together with a recommended course of action.

b. A recommendation for further investigation of the matter together with facts supporting that course of action.

c. A recommendation to terminate the investigation due to lack of sufficient evidence to indicate that a violation under subd. 2 has occurred or is occurring.

6. a. If the commission finds that there is probable cause to believe that a violation under subd. 2. has occurred or is occurring, the commission may authorize the commission administrator to file a civil complaint against the alleged violator. In such case, the administrator may request the assistance of special counsel to prosecute any action brought by the commission. If the administrator requests the assistance of special counsel with respect to any matter, the administrator shall submit to the commission the names of 3 qualified individuals to serve as special counsel. The commission may retain one of the individuals to act as special

counsel. The staff of the commission shall provide assistance to the special counsel as may be required by the counsel to carry out his or her responsibilities.

b. The commission shall enter into a written contract with any individual who is retained as special counsel setting forth the terms of the engagement. The contract shall set forth the compensation to be paid such counsel by the state. The contract shall be executed on behalf of the state by the commission and the commission shall file the contract in the office of the secretary of state. The compensation shall be charged to the appropriation under s. 20.510(1)(br).

7. No individual who is appointed or retained by the commission to serve as special counsel or as a special investigator is subject to approval under s. 20.930.

[8. is omitted in the statute]

9. At the conclusion of its investigation, the commission shall, in preliminary written findings of fact and conclusions based thereon, make a determination of whether or not probable cause exists to believe that a violation under subd. 2. has occurred or is occurring. If the commission determines that no probable cause exists, it shall dismiss the complaint. Whenever the commission dismisses a complaint or a complaint is deemed to be dismissed under subd. 5., the commission shall immediately send written notice of the dismissal to the accused and to the party who made the complaint.

10. The commission shall inform the accused or his or her counsel of exculpatory evidence in its possession.

11. If the commission finds that there is probable cause to believe that a violation under subd. 2. has occurred or is occurring, the commission may, in lieu of civil prosecution of any matter by the commission, refer the matter to the district attorney for the county in which the alleged violator resides, or if the alleged violator is a nonresident, to the district attorney for the county where the matter arises, or if par. (i) applies, to the attorney general or a special prosecutor. For purposes of this subdivision, a person other than a natural person resides within a county if the person's principal place of operation is located within that county.

12. The commission shall, by rule, prescribe categories of civil offenses which the commission will agree to compromise and settle without a formal investigation upon payment of specified amounts by the alleged offender. The commission may authorize the commission administrator to compromise and settle such alleged offenses in the name of the commission if the alleged offenses by an offender, in the aggregate, do not involve payment of more than $2,500.

13. If a special investigator or the commission administrator , in the course of an investigation authorized by the commission, discovers evidence that a violation under subd. 2. that was not within the scope of the authorized investigation has occurred or is occurring, the special investigator or the administrator may present that evidence to the commission. If the commission finds that there is a reasonable suspicion that a violation

under subd. 2. that is not within the scope of the authorized investigation has occurred or is occurring, the commission may authorize the special investigator or the administrator to investigate the alleged violation or may elect to authorize a separate investigation of the alleged violation as provided in subd. 4.

14. If a special investigator or the commission administrator , in the course of an investigation authorized by the commission, discovers evidence of a potential violation of a law that is not administered by the commission arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, the special investigator or the administrator may present that evidence to the commission. The commission may thereupon refer the matter to the appropriate district attorney specified in subd. 11. or may refer the matter to the attorney general. The attorney general may then commence a civil or criminal prosecution relating to the matter.

15. Except as provided in subd. 17., if the commission refers a matter to the district attorney specified in subd. 11. for prosecution of a potential violation under subd. 2. or 14. and the district attorney informs the commission that he or she declines to prosecute any alleged civil or criminal violation related to any matter referred to the district attorney by the commission, or the district attorney fails to commence a prosecution of any civil or criminal violation related to any matter referred to the district attorney by the commission within 60 days of the date of the commission's referral, the commission may refer the matter to

the district attorney for another prosecutorial unit that is contiguous to the prosecutorial unit of the district attorney to whom the matter was originally referred. If there is more than one such prosecutorial unit, the chairperson of the commission shall determine the district attorney to whom the matter shall be referred by publicly drawing lots at a meeting of the commission. The district attorney may then commence a civil or criminal prosecution relating to the matter.

16. Except as provided in subd. 17., if the commission refers a matter to a district attorney under subd. 15. for prosecution of a potential violation under subd. 2. or 14. and the district attorney informs the commission that he or she declines to prosecute any alleged civil or criminal violation related to any matter referred to the district attorney by the commission, or the district attorney fails to commence a prosecution of any civil or criminal violation related to any matter referred to the district attorney by the commission within 60 days of the date of the commission's referral, the commission may refer the matter to the attorney general. The attorney general may then commence a civil or criminal prosecution relating to the matter.

17. The commission is not authorized to act under subd. 15. or 16. if a special prosecutor is appointed under s. 978.045 in lieu of the district attorney specified in subd. 11.

18. Whenever the commission refers a matter to special counsel or to a district attorney or to the attorney general under this subsection, the special counsel, district attorney, or attorney general shall report to the commission concerning any action

taken regarding the matter. The report shall be transmitted no later than 40 days after the date of the referral. If the matter is not disposed of during that period, the special counsel, district attorney, or attorney general shall file a subsequent report at the end of each 30-day period following the filing of the initial report until final disposition of the matter.

(d) 1. No individual who serves as the commission administrator may have been a lobbyist, as defined in s. 13.62(11). No such individual may have served in a partisan state or local office.

2. No employee of the commission, while so employed, may become a candidate, as defined in s. 11.0101(1), for a state or partisan local office. No individual who is retained by the commission to serve as a special investigator or as special counsel may, while so retained, become a candidate, as defined in s. 11.0101(1), for any state or local office. A filing officer shall decline to accept nomination papers or a declaration of candidacy from any individual who does not qualify to become a candidate under this paragraph.

(e) No individual who serves as an employee of the commission and no individual who is retained by the commission to serve as a special investigator or a special counsel may, while so employed or retained, make a contribution to a candidate for state or local office. No individual who serves as an employee of the commission and no individual who is retained by the commission to serve as a special investigator or as special counsel, for 12 months prior to

becoming so employed or retained, may have made a contribution to a candidate for a partisan state or local office. In this paragraph, contribution has the meaning given in s. 11.0101(8).

(f) Pursuant to any investigation authorized under par. (c), the commission has the power:

1. To require any person to submit in writing such reports and answers to questions relevant to the proceedings as the commission may prescribe, such submission to be made within such period and under oath or otherwise as the commission may determine.

2. To order testimony to be taken by deposition before any individual who is designated by the commission and has the power to administer oaths, and, in such instances, to compel testimony and the production of evidence in the same manner as authorized by sub. (1)(b).

[3. is omitted in the statute]

4. To pay witnesses the same fees and mileage as are paid in like circumstances by the courts of this state.

5. To request and obtain from the department of revenue copies of state income or franchise tax returns and access to other appropriate information under s. 71.78(4) regarding all persons who are the subject of such investigation.

[(g) is omitted in the statute]

(h) If the defendant in an action for a civil violation of chs. 5 to 10 or 12 is a district attorney or a circuit

judge or a candidate for either such office, the action shall be brought by the commission. If the defendant in an action for a civil violation of chs. 5 to 10 or 12 is the attorney general or a candidate for that office, the commission may appoint special counsel to bring suit on behalf of the state.

(i) If the defendant in an action for a criminal violation of chs. 5 to 10 or 12 is a district attorney or a circuit judge or a candidate for either such office, the action shall be brought by the attorney general. If the defendant in an action for a criminal violation of chs. 5 to 10 or 12 is the attorney general or a candidate for that office, the commission may appoint a special prosecutor to conduct the prosecution on behalf of the state.

(j) Any special counsel or prosecutor who is appointed under par. (h) or (i) shall be independent of the attorney general and need not be a state employee at the time of his or her appointment.

(k) The commission's power to initiate civil actions under this subsection for the enforcement of chs. 5 to 10 or 12 shall be the exclusive remedy for alleged civil violations of chs. 5 to 10 or 12.

Wis. Stat. § 5.05(1)(f)
Elections commission; powers and duties
[Commission's rule-making authority]

* * *

(f) Promulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns, other than laws regulating campaign financing, or ensuring their proper administration.

Wis. Stat. § 6.84(1) and (2)
Construction [of Absentee Voting Statutes]

(1) Legislative policy. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

(2) Interpretation. Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

Wis. Stat. § 6.855
Alternate absentee ballot site

(1) The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. The designated site shall be located as near as practicable to the office of the municipal clerk or board

of election commissioners and no site may be designated that affords an advantage to any political party. An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15(1)(cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15(1)(cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.

* * *

(3) An alternate site under sub. (1) shall be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners.

(4) An alternate site under sub. (1) shall be accessible to all individuals with disabilities.

Wis. Stat. § 6.86(1)(b)
Methods for obtaining an absentee ballot

* * *

(1)(b) Except as provided in this section, if application is made by mail, the application shall be received no later than 5 p.m. on the 5th day immediately preceding the election. If application is made in person, the application shall be made no earlier than 14 days preceding the election and no later than the Sunday preceding the election. No application may be received

on a legal holiday. A municipality shall specify the hours in the notice under s. 10.01(2)(e). The municipal clerk or an election official shall witness the certificate for any in-person absentee ballot cast. Except as provided in par. (c), if the elector is making written application for an absentee ballot at the partisan primary, the general election, the presidential preference primary, or a special election for national office, and the application indicates that the elector is a military elector, as defined in s. 6.34(1), the application shall be received by the municipal clerk no later than 5 p.m. on election day. If the application indicates that the reason for requesting an absentee ballot is that the elector is a sequestered juror, the application shall be received no later than 5 p.m. on election day. If the application is received after 5 p.m. on the Friday immediately preceding the election, the municipal clerk or the clerk's agent shall immediately take the ballot to the court in which the elector is serving as a juror and deposit it with the judge. The judge shall recess court, as soon as convenient, and give the elector the ballot. The judge shall then witness the voting procedure as provided in s. 6.87 and shall deliver the ballot to the clerk or agent of the clerk who shall deliver it to the polling place or, in municipalities where absentee ballots are canvassed under s. 7.52, to the municipal clerk as required in s. 6.88. If application is made under sub. (2) or (2m), the application may be received no later than 5 p.m. on the Friday immediately preceding the election.

Wis. Stat. § 6.86(2)(b)
Methods for obtaining an absentee ballot

* * *

(2)(b) The mailing list established under this subsection shall be kept current through all possible means.

If an elector fails to cast and return an absentee ballot received under this subsection, the clerk shall notify the elector by 1st class letter or postcard that his or her name will be removed from the mailing list unless the clerk receives a renewal of the application within 30 days of the notification. The clerk shall remove from the list the name of each elector who does not apply for renewal within the 30-day period. The clerk shall remove the name of any other elector from the list upon request of the elector or upon receipt of reliable information that an elector no longer qualifies for the service. The clerk shall notify the elector of such action not taken at the elector's request within 5 days, if possible.

Wis. Stat. § 6.87
Absent voting procedure

(1) Upon proper request made within the period prescribed in s. 6.86, the municipal clerk or a deputy clerk authorized by the municipal clerk shall write on the official ballot, in the space for official endorsement, the clerk's initials and official title. Unless application is made in person under s. 6.86(1)(ar), the absent elector is exempted from providing proof of identification under sub. (4)(b)2. or 3., or the applicant is a military or overseas elector, the absent elector shall enclose a copy of his or her proof of identification or any authorized substitute document with his or her application. The municipal clerk shall verify that the name on the proof of identification conforms to the name on the application. The clerk shall not issue an absentee ballot to an elector who is required to enclose a copy of proof of identification or an authorized substitute document with his or her application unless the copy is enclosed and the proof is verified by the clerk.

(2) Except as authorized under sub. (3)(d), the municipal clerk shall place the ballot in an unsealed

envelope furnished by the clerk. The envelope shall have the name, official title and post-office address of the clerk upon its face. The other side of the envelope shall have a printed certificate which shall include a space for the municipal clerk or deputy clerk to enter his or her initials indicating that if the absentee elector voted in person under s. 6.86(1)(ar), the elector presented proof of identification to the clerk and the clerk verified the proof presented. The certificate shall also include a space for the municipal clerk or deputy clerk to enter his or her initials indicating that the elector is exempt from providing proof of identification because the individual is a military elector or an overseas elector who does not qualify as a resident of this state under s. 6.10 or is exempted from providing proof of identification under sub. (4)(b)2. or 3. The certificate shall be in substantially the following form:

[STATE OF . . .

County of . . .]

or

[(name of foreign country and city or other jurisdictional unit)]

I, . . ., certify subject to the penalties of s. 12.60(1)(b), Wis. Stats., for false statements, that I am a resident of the [. . . ward of the] (town)(village) of . . ., or of the . . . aldermanic district in the city of . . ., residing at . . .* in said city, the county of . . ., state of Wisconsin, and am entitled to vote in the (ward)(election district) at the election to be held on . . .; that I am not voting at any other location in this election; that I am unable or unwilling to appear at the polling place in the (ward) (election district) on election day or have changed my residence within the state from one ward or election district to another later than 28 days before the

election. I certify that I exhibited the enclosed ballot unmarked to the witness, that I then in (his)(her) presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and any person rendering assistance under s. 6.87(5), Wis. Stats., if I requested assistance, could know how I voted.

Signed . . .

Identification serial number, if any: . . .

The witness shall execute the following:

I, the undersigned witness, subject to the penalties of s. 12.60(1)(b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen**and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

. . .(Printed name)

. . .(Address)***

Signed . . .

*--An elector who provides an identification serial number issued under s. 6.47(3), Wis. Stats., need not provide a street address.

**--An individual who serves as a witness for a military elector or an overseas elector voting absentee, regardless of whether the elector qualifies as a resident of Wisconsin under s. 6.10, Wis. Stats., need not be a U.S. citizen but must be 18 years of age or older.

***--If this form is executed before 2 special voting deputies under s. 6.875(6), Wis. Stats., both deputies shall witness and sign.

(3) (a) Except as authorized under par. (d) and as otherwise provided in s. 6.875, the municipal clerk shall mail the absentee ballot to the elector's residence unless otherwise directed by the elector, or shall deliver it to the elector personally at the clerk's office or at an alternate site under s. 6.855. If the ballot is mailed, and the ballot qualifies for mailing free of postage under federal free postage laws, the clerk shall affix the appropriate legend required by U.S. postal regulations. Otherwise, the clerk shall pay the postage required for return when the ballot is mailed from within the United States. If the ballot is not mailed by the absentee elector from within the United States, the absentee elector shall provide return postage. If the ballot is delivered to the elector at the clerk's office, or an alternate site under s. 6.855, the ballot shall be voted at the office or alternate site and may not be removed by the elector therefrom.

(b) No elector may direct that a ballot be sent to the address of a committee registered with the ethics commission under ch. 11 unless the elector permanently or temporarily resides at that address. Upon receipt of reliable information that an address given by an elector is not eligible to receive ballots under this subsection, the municipal clerk shall refrain from mailing or transmitting ballots to that address. Whenever possible, the municipal clerk shall notify an elector if his or her ballot cannot be mailed or transmitted to the address directed by the elector.

[(c) is omitted in the statute]

(d) A municipal clerk shall, if the clerk is reliably informed by a military elector, as defined in s. 6.34(1), or an overseas elector, regardless of whether the elector qualifies as a resident of this state under s. 6.10, of a facsimile transmission number or electronic mail address where the elector can receive an absentee ballot, transmit a facsimile or electronic copy of the elector's ballot to that elector in lieu of mailing under this subsection. An elector may receive an absentee ballot only if the elector is a military elector or an overseas elector and has filed a valid application for the ballot as provided in s. 6.86(1). If the clerk transmits an absentee ballot to a military or overseas elector electronically, the clerk shall also transmit a facsimile or electronic copy of the text of the material that appears on the certificate envelope prescribed in sub. (2), together with instructions prescribed by the commission. The instructions shall require the military or overseas elector to make and subscribe to the certification as required under sub. (4)(b) and to enclose the absentee ballot in a separate envelope contained within a larger envelope, that shall include the completed certificate. The elector shall then affix sufficient postage unless the absentee ballot qualifies for mailing free of postage under federal free postage laws and shall mail the absentee ballot to the municipal clerk. Except as authorized in s. 6.97(2), an absentee ballot received from a military or overseas elector who receives the ballot electronically shall not be counted unless it is cast in the manner prescribed in this paragraph and sub. (4) and in accordance with the instructions provided by the commission.

(4) (a) In this subsection, "military elector" has the meaning given in s. 6.34(1).

(b) 1. Except as otherwise provided in s. 6.875, an elector voting absentee, other than a military elector or an overseas elector, shall make and subscribe to the certification before one witness who is an adult U.S. citizen. A military elector or an overseas elector voting absentee, regardless of whether the elector qualifies as a resident of this state under s. 6.10, shall make and subscribe to the certification before one witness who is an adult but who need not be a U.S. citizen. The absent elector, in the presence of the witness, shall mark the ballot in a manner that will not disclose how the elector's vote is cast. The elector shall then, still in the presence of the witness, fold the ballots so each is separate and so that the elector conceals the markings thereon and deposit them in the proper envelope. If a consolidated ballot under s. 5.655 is used, the elector shall fold the ballot so that the elector conceals the markings thereon and deposit the ballot in the proper envelope. If proof of residence under s. 6.34 is required and the document enclosed by the elector under this subdivision does not constitute proof of residence under s. 6.34, the elector shall also enclose proof of residence under s. 6.34 in the envelope. Except as provided in s. 6.34(2m), proof of residence is required if the elector is not a military elector or an overseas elector and the elector registered by mail or by electronic application and has not voted in an election in this state. If the elector requested a ballot by means of facsimile transmission or electronic mail under s. 6.86(1)(ac), the elector shall enclose in the envelope a copy of the request which bears an original signature of the

elector. The elector may receive assistance under sub. (5). The return envelope shall then be sealed. The witness may not be a candidate. The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots. If the envelope is mailed from a location outside the United States, the elector shall affix sufficient postage unless the ballot qualifies for delivery free of postage under federal law. Failure to return an unused ballot in a primary does not invalidate the ballot on which the elector's votes are cast. Return of more than one marked ballot in a primary or return of a ballot prepared under s. 5.655 or a ballot used with an electronic voting system in a primary which is marked for candidates of more than one party invalidates all votes cast by the elector for candidates in the primary.

2. Unless subd. 3. applies, if the absentee elector has applied for and qualified to receive absentee ballots automatically under s. 6.86(2)(a), the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement signed by the same individual who witnesses voting of the ballot which contains the name and address of the elector and verifies that the name and address are correct.

3. If the absentee elector has received an absentee ballot from the municipal clerk by mail for a previous election, has provided proof of identification with that ballot, and has not changed his or her name or address since providing that proof of identification, the elector is not required to provide proof of identification.

4. If the absentee elector has received a citation or notice of intent to revoke or suspend an operator's license from a law enforcement officer in any jurisdiction that is dated within 60 days of the date of the election and is required to surrender his or her operator's license or driving receipt issued to the elector under ch. 343 at the time the citation or notice is issued, the elector may enclose a copy of the citation or notice in lieu of a copy of an operator's license or driving receipt issued under ch. 343 if the elector is voting by mail, or may present an original copy of the citation or notice in lieu of an operator's license or driving receipt under ch. 343 if the elector is voting at the office of the municipal clerk.

5. Unless subd. 3. or 4. applies, if the absentee elector resides in a qualified retirement home, as defined in s. 6.875(1)(at), or a residential care facility, as defined in s. 6.875(1)(bm), and the municipal clerk or board of election commissioners of the municipality where the facilityor home is located does not send special voting deputies to visit the facility or home at the election under s. 6.875, the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement signed by the same individual who witnesses voting of the ballot that contains the certification of an authorized representative of the facility or home that the elector resides in the facility or home and the facility or home is certified or registered as required by law, that contains the name and address of the elector, and that verifies that the name and address are correct.

(5) If the absent elector declares that he or she is unable to read, has difficulty in reading, writing or understanding English or due to disability is unable to mark his or her ballot, the elector may select any individual, except the elector's employer or an agent of that employer or an officer or agent of a labor organization which represents the elector, to assist in marking the ballot, and the assistant shall then sign his or her name to a certification on the back of the ballot, as provided under s. 5.55.

(6) The ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day. Except in municipalities where absentee ballots are canvassed under s. 7.52, if the municipal clerk receives an absentee ballot on election day, the clerk shall secure the ballot and cause the ballot to be delivered to the polling place serving the elector's residence before 8 p.m. Any ballot not mailed or delivered as provided in this subsection may not be counted.

(6d) If a certificate is missing the address of a witness, the ballot may not be counted.

(6m) Except as authorized in s. 6.47(8), the municipal clerk shall withhold from public inspection under s. 19.35(1) the name and address of any absent elector who obtains a confidential listing under s. 6.47(2).

(7) No individual who is a candidate at the election in which absentee ballots are cast may serve as a witness. Any candidate who serves as a witness shall be penalized by the discounting of a number of votes for his or her candidacy equal to the number of certificate envelopes bearing his or her signature.

(8) The provisions of this section which prohibit candidates from serving as a witness for absentee electors shall not apply to the municipal clerk in the performance of the clerk's official duties.

(9) If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).

Wis. Stat. § 6.87(1)
Absent voting procedure
[Enclosing ID with application]

(1) Upon proper request made within the period prescribed in s. 6.86, the municipal clerk or a deputy clerk authorized by the municipal clerk shall write on the official ballot, in the space for official endorsement, the clerk's initials and official title. Unless application is made in person under s. 6.86(1)(ar), the absent elector is exempted from providing proof of identification under sub. (4)(b)2. or 3., or the applicant is a military or overseas elector, the absent elector shall enclose a copy of his or her proof of identification or any authorized substitute document with his or her application. The municipal clerk shall verify that the name on the proof of identification conforms to the name on the application. The clerk shall not issue an absentee ballot to an elector who is required to enclose a copy of proof of identification or an authorized substitute document with his or her application unless the copy is enclosed and the proof is verified by the clerk.

Wis. Stat. § 6.87(4)(b)(1)
Absent voting procedure (part 1)
[Marking the Ballot]

* * *

(4)(b)1. Except as otherwise provided in s. 6.875, an elector voting absentee, other than a military elector or an overseas elector, shall make and subscribe to the certification before one witness who is an adult U.S. citizen. A military elector or an overseas elector voting absentee, regardless of whether the elector qualifies as a resident of this state under s. 6.10, shall make and subscribe to the certification before one witness who is an adult but who need not be a U.S. citizen. The absent elector, in the presence of the witness, shall mark the ballot in a manner that will not disclose how the elector's vote is cast.

Wis. Stat. § 6.87(4)(b)(1)
Absent voting procedure (part 2)
[Placing the Ballot in the Ballot Envelope]

* * *

The elector shall then, still in the presence of the witness, fold the ballots so each is separate and so that the elector conceals the markings thereon and deposit them in the proper envelope. If a consolidated ballot under s. 5.655 is used, the elector shall fold the ballot so that the elector conceals the markings thereon and deposit the ballot in the proper envelope. If proof of residence under s. 6.34 is required and the document enclosed by the elector under this subdivision does not constitute proof of residence under s. 6.34, the elector shall also enclose proof of residence under s. 6.34 in the envelope. Except as provided in s. 6.34(2m), proof of residence is required if the elector is not a military elector or an overseas elector and the elector

registered by mail or by electronic application and has not voted in an election in this state. If the elector requested a ballot by means of facsimile transmission or electronic mail under s. 6.86(1)(ac), the elector shall enclose in the envelope a copy of the request which bears an original signature of the elector. The elector may receive assistance under sub. (5). The return envelope shall then be sealed. The witness may not be a candidate.

Wis. Stat. § 6.87(4)(b)(1)
Absent voting procedure (part 3)
[Returning the Ballot]

* * *

The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots. If the envelope is mailed from a location outside the United States, the elector shall affix sufficient postage unless the ballot qualifies for delivery free of postage under federal law. Failure to return an unused ballot in a primary does not invalidate the ballot on which the elector's votes are cast. Return of more than one marked ballot in a primary or return of a ballot prepared under s. 5.655 or a ballot used with an electronic voting system in a primary which is marked for candidates of more than one party invalidates all votes cast by the elector for candidates in the primary.

Wis. Stat. § 6.87(4)(b)(2)
Absent voting procedure
["Indefinitely confined" exemption from photo ID]

* * *

(4)(b)2. Unless subd. 3. applies, if the absentee elector has applied for and qualified to receive absentee ballots automatically under s. 6.86(2)(a), the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement signed by the same individual who witnesses voting of the ballot which contains the name and address of the elector and verifies that the name and address are correct.

Wis. Stat. § 6.87(4)(b)(3)
Absent voting procedure
[Second-time absentee voter who has not changed name or address, exemption from photo ID]

* * *

(4)(b)3. If the absentee elector has received an absentee ballot from the municipal clerk by mail for a previous election, has provided proof of identification with that ballot, and has not changed his or her name or address since providing that proof of identification, the elector is not required to provide proof of identification.

Wis. Stat. § 6.87(6) and (6d)
Absent voting procedure
[Return of the Ballot - continued from § 6.87(4)(b)(1)]

* * *

(6) The ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day. Except in municipalities where absentee ballots are canvassed under s. 7.52, if the municipal clerk receives an absentee ballot on election day, the clerk shall secure the ballot and cause the ballot to be delivered to the polling place serving the elector's residence before 8 p.m. Any ballot not mailed or delivered as provided in this subsection may not be counted.

(6d) If a certificate is missing the address of a witness, the ballot may not be counted.

Wis. Stat. § 6.87(9)
Absent voting procedure
[Clerk's return of a ballot with a defective certification]

* * *

(9) If a municipal clerk receives an absentee ballot with an improperly completed ce rtificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).

Wis. Stat. § 6.88(1)
Voting and recording the absentee ballot
[Clerk's receipt of ballot and placement in carrier envelope]

(1) When an absentee ballot arrives at the office of the municipal clerk, or at an alternate site under s. 6.855, if applicable, the clerk shall enclose it, unopened, in a carrier envelope which shall be securely sealed and endorsed with the name and official title of the clerk, and the words "This envelope contains the ballot of an absent elector and must be opened in the same room where votes are being cast at the polls during polling hours on election day or, in municipalities where absentee ballots are canvassed under s. 7.52, stats., at a meeting of the municipal board of absentee ballot canvassers under s. 7.52, stats." If the elector is a military elector, as defined in s. 6.34(1), or an overseas elector, regardless of whether the elector qualifies as a resident of this state under s. 6.10, and the ballot was received by the elector by facsimile transmission or electronic mail and is accompanied by a separate certificate, the clerk shall enclose the ballot in a certificate envelope and securely append the completed certificate to the outside of the envelope before enclosing the ballot in the carrier envelope. The clerk shall keep the ballot in the clerk's office or at the alternate site, if applicable until delivered, as required in sub. (2).

Wis. Stat. § 6.88(3)(b)
Voting and recording the absentee ballot
[Inspector review – certification insufficient]

* * *

(3)(b) When the inspectors find that a certification is insufficient, that the applicant is not a qualified elector in the ward or election district, that the ballot envelope

is open or has been opened and resealed, that the ballot envelope contains more than one ballot of any one kind or, except in municipalities where absentee ballots are canvassed under s. 7.52, that the certificate of a military or overseas elector who received an absentee ballot by facsimile transmission or electronic mail is missing, or if proof is submitted to the inspectors that an elector voting an absentee ballot has since died, the inspectors shall not count the ballot. The inspectors shall endorse every ballot not counted on the back, "rejected (giving the reason)". The inspectors shall reinsert each rejected ballot into the certificate envelope in which it was delivered and enclose the certificate envelopes and ballots, and securely seal the ballots and envelopes in an envelope marked for rejected absentee ballots. The inspectors shall endorse the envelope, "rejected ballots" with a statement of the ward or election district and date of the election, signed by the chief inspector and one of the inspectors representing each of the 2 major political parties and returned to the municipal clerk in the same manner as official ballots voted at the election.

Wis. Stat. § 6.87(6d)
Absent voting procedure
[Return of the ballot]

(6d) If a certificate is missing the address of a witness, the ballot may not be counted.

Wis. Stat. § 7.15(2m)
Municipal clerks
[Staffing absentee ballot site]

* * *

(2m) Operation of alternate absentee ballot site. In a municipality in which the governing body has elected to establish an alternate absentee ballot site under s.

6.855, the municipal clerk shall operate such site as though it were his or her office for absentee ballot purposes and shall ensure that such site is adequately staffed.

Wis. Stat. § 227.112(3)
Guidance documents

* * *

(3) A guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license. An agency that proposes to rely on a guidance document to the detriment of a person in any proceeding shall afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the guidance document. An agency may not use a guidance document to foreclose consideration of any issue raised in the guidance document.