

SUPREME COURT OF WISCONSIN
No. 2020AP1958-OA

DEAN W. MUELLER,
Petitioner,

v.

WISCONSIN ELECTIONS COMMISSION COMMISSIONERS
ANN. S. JACOBS, *et al.*,
Respondents.

Original Action in the Wisconsin Supreme Court
**RESPONSE AND APPENDIX OF PROPOSED
RESPONDENT-INTERVENOR
DEMOCRATIC NATIONAL COMMITTEE TO
EMERGENCY PETITION FOR ORIGINAL ACTION**

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COUNTERSTATEMENT OF THE ISSUES

1. Does Mr. Mueller have standing to seek judicial relief for his generalized grievances?

2. Should this Court exercise original jurisdiction where the recount process in Wis. Stat. § 9.01 provides the “exclusive remedy” for alleged defects in an election?

3. Should this Court exercise original jurisdiction to review the validity of Wisconsin Election Commission guidance documents regarding the use of absentee-ballot drop boxes where “the exclusive means of judicial review of the validity” of such guidance is through a declaratory judgment action under Wis. Stat. § 227.40(1)?

4. Should this Court exercise original jurisdiction given the many disputed fact issues raised in the Petition?

5. Does one or more of the equitable doctrines of laches, estoppel, and/or unclean hands bar Mr. Mueller from

obtaining relief since he waited until *after* the election to raise his objections?

6. Has Mr. Mueller satisfied the elements required to obtain declaratory or injunctive relief?

7. Would Mr. Mueller's requested relief violate the constitutionally protected fundamental rights of every other Wisconsin voter?

INTRODUCTION

Petitioner Dean W. Mueller alleges in his Emergency Petition for Original Action—one of three challenges to the outcome of the November 3rd election filed with this Court in the past week—that numerous federal, state, and private entities and assorted individuals conspired to prevent President Trump from winning Wisconsin’s ten electoral votes and deliver them instead to President-elect Biden. Although Mr. Mueller names only the six members and the Administrator of the Wisconsin Elections Commission (“WEC”) as Respondents, much of his Petition is devoted to laying out his detailed grievances against an allegedly “treacherous operation” led by the United States Cybersecurity and Infrastructure Security Agency (“CISA”), which was joined by the National Conference of State Legislators (“NCSL”), the National Association of Secretaries of State (“NASS”), and the National Association of State Election Directors (“NASD”).

See Pet. ¶¶ 12-24. According to Mr. Mueller, “unknown government actors within CISA in working with these other organizations, did in fact interfere in the election laws of Wisconsin”—a “treacherous operation to interfere with the presidential election.” Pet. ¶ 14.¹

How does Mr. Mueller contend this “treacherous operation” was carried out? Through absentee-ballot drop boxes. Secure drop boxes are among the few things that Democrats, Republicans, and Independents seem to have

¹ Mr. Mueller includes allegations against various other actors—including Dominion Voting Systems and the Center for Technology and Civic Life (“CTCL”), the latter of which is the target of many of the allegations in the “Emergency Petition for Original Action” in *Wisconsin Voters Alliance v. Wisconsin Elections Commission*, No. 2020AP1939-OA, now pending before this Court. See Pet. ¶¶ 17-18. Mr. Mueller claims that “CISA ran a continuous propaganda campaign through these entities by telling the American people to just ‘trust election officials’ and stop the spread of misinformation and disinformation’ regarding the upcoming election” *Id.* at 11-12 ¶ 19. He also accuses this federal agency of “plant[ing] doubts into the minds of people regarding” the reliability of the U.S. Postal Service as a means to “steer” voters “toward the ballot drop boxes” that CISA was promoting. *Id.* at 12 ¶ 21.

agreed upon during this historically contentious and contagious Presidential election year. In late September, for example, Wisconsin State Assembly Speaker Robin Vos and Wisconsin State Senate Majority Leader Scott Fitzgerald publicly emphasized that they “wholeheartedly support[ed] voters’ use” of “authorized ‘drop boxes,’ which ‘must be secured at all times’ to protect ballot integrity.” App. 1.² These legislative leaders called “drop boxes” a “convenient, secure, and **expressly authorized** absentee-ballot-return method[.]” and emphasized that such boxes were especially appropriate for emergency use during the COVID-19 global pandemic. *Id.* (emphasis added).

Mr. Mueller disagrees with Speaker Vos, Senator Fitzgerald, the WEC, and all the other proponents of absentee-ballot drop boxes. His Petition contends that the more than 500

² All citations to App. ____ are to the short Appendix bound together with this Response.

absentee-ballot drop boxes used throughout the State in the leadup to the Nov. 3rd election “were, in fact, illegal” because the Wisconsin Legislature did not expressly authorize their use, even though the WEC promoted, assisted in, and regulated the installation and operation of drop boxes throughout the State. *See* Pet. ¶¶ 30, 32-34.

From his premise that the WEC exceeded its statutory authority in authorizing and promoting the use of secure drop boxes throughout Wisconsin, apparently at the behest of CISA *et al.*, Mr. Mueller reasons as follows: Since the drop boxes were illegal, “every ballot that was cast by placing it into one of the illegal drop boxes, is also illegal and cannot be counted.” *Id.* at 20 ¶ 4. And from that mistaken premise, Mr. Mueller concludes that “this Supreme Court of Wisconsin [should] **nullify the November 3, 2020 presidential election results** in the State of Wisconsin and notify the Wisconsin State Legislature that as a body, it must either arrange for another

election before the Dec. 14, 2020 [*sic*] or appoint 10 Electors under the U.S. Constitution.” *Id.* at 20 ¶ 6 (emphasis added).

Just like the similar relief sought by the Wisconsin Voters Alliance (“WVA”) in its pending petition for an original action, the outcome sought by Mr. Mueller would be unprecedented in American history, unthinkable in our modern constitutional democracy, and an affront to many of our most cherished state and national values. We are unaware of any state or federal court that has ever attempted such a shift of authority from a state’s voters to the state’s legislature. Doing so would violate both the Wisconsin and federal constitutions. “Wisconsinites have a fundamental right to vote. Therefore, a vote legally cast and received by the time the polls close on Election Day **must be counted** if the ballot expresses the will of the voter.” *O’Bright v. Lynch*, No. 2020AP1761-OA (Wis.

Sup. Ct. Oct. 29, 2020) (Roggensack, C.J., concurring) (emphasis added).³

Mr. Mueller emphasizes in support of his Petition that “[t]here have been a number of court actions filed across the country in various state and federal courts within a span of only the past three weeks” raising analogous claims and seeking similar relief. Pet. 2. Mr. Mueller omits to mention that these court actions have repeatedly been *rejected*, often summarily and in sharply worded decisions by state and federal judges

³ See also *Ollmann v. Kowalewski*, 238 Wis. 574, 579, 300 N.W. 183, 185 (1941) (failure to count voter’s ballot “for no fault of his own would deprive him of his constitutional right to vote,” which “cannot be baffled by latent official failure or defect”) (citation omitted); *United States v. Classic*, 313 U.S. 299, 315 (1941) (“Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted”); *Shipley v. Chi. Bd. of Election Comm’rs*, 947 F.3d 1056, 1061 (7th Cir. 2020) (“It is undeniable that the right to vote is a fundamental right guaranteed by the Constitution. The right to vote is not just the right to put a ballot in a box but also the right to have one’s vote counted.”) (citations omitted).

from across the ideological spectrum. This Court should not be the first and only court to give credence to such baseless claims and theories.⁴

The proposed Intervenor-Respondent Democratic National Committee (“DNC”) already has briefed at length and in great detail the many reasons why WVA’s petition should be denied. Those reasons apply with equal force to Mr. Mueller’s petition. The DNC will not repeat in full in this proposed Response all of the arguments in its WVA Response, but will briefly summarize those arguments as they apply to Mr. Mueller’s contentions; cross-reference to the DNC’s WVA

⁴ See, e.g., *Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522, * 1 (3rd Cir. Nov. 27, 2020) (“Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here. ... Plus, tossing out millions of mail-in ballots would be drastic and unprecedented, disenfranchising a huge swath of the electorate and upsetting all down-ballot races too. That remedy would be grossly disproportionate to the procedural challenges raised.”).

Response for further supporting arguments and authorities; and respond to the handful of new issues raised by Mr. Mueller that were not raised by WVA (such as the legality of drop boxes).⁵

Mr. Mueller's Emergency Petition for Original Action should be denied in its entirety.

LEGAL STANDARD

This Court has discretion to exercise original jurisdiction over a case that “so importantly affect[s] the rights and liberties of the people of this state as to warrant such intervention.” *Petition of Heil*, 230 Wis. 428, ¶¶ 11, 284 N.W. 42, 49 (1938); *see also* Wis. Const. art. VII, § 3(2); Wis. Stat. § 809.70. The Court, however, has declined to exercise such jurisdiction where it is “too late to grant petitioners any form of relief that would be feasible,” or where granting relief would

⁵ Counsel for the DNC have provided Mr. Mueller's counsel with PDFs of the Nov. 27, 2020 proposed Response and Appendix the DNC filed in opposition to WVA's Emergency Petition.

cause “undue damage.” *Hawkins v. Wis. Elections Comm’n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877. The Court also typically declines to exercise original jurisdiction where material facts are disputed, because it “is not a fact-finding tribunal.” Wis. S. Ct. Internal Operating Procedures III.B.3.

COUNTERSTATEMENT OF THE CASE & THE FACTS

An absentee ballot envelope “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) (emphasis added). Like election authorities around the country, the WEC interprets the “delivered in person” option to mean that, instead of mailing her ballot, a voter may deliver it “in person” to the municipal clerk at one or more secure places designated by the clerk. *See* App. 4 (“Under Wis. Stat. §6.87(4)(b)(1) municipal clerks may establish opportunities for voters to hand deliver their ballot in their jurisdictions.”).

In response to the pandemic and to the serious concerns about the speed and reliability of the U.S. Postal Service, the WEC on August 21, 2020 issued a guidance document for local election officials outlining their permissible “drop box options for secure absentee ballot return for voters.” App. 5-8. The WEC’s guidance on drop boxes came on the heels of a warning from the Postal Service to Wisconsin election officials of a “significant risk” that ballots sent through the mail in the weeks leading up to election day would arrive late and not be counted. App. 10. “A drop box is a secure, locked structure operated by local election officials,” where voters may conveniently and safely return their by-mail absentee ballots without having to rely on the USPS or enter government office buildings. App. 5. The WEC’s guidance document specifies the numerous security precautions that local officials must take when using such boxes (including the use of secure locks, tamper-evident seals, security cameras, and chain-of-custody logs). App. 5-8.

The guidance also encourages local election officials to “repurpose” existing municipal “infrastructure set up for secure collection of payment and materials,” such as mail slots used for tax payments and public library book drop slots. App. 5-6.

For a variety of reasons—convenience, fear of the pandemic, and distrust of USPS service, among others—secure drop boxes were popular with Wisconsin voters throughout the State. There ultimately were over 500 secure drop boxes used in all 72 counties in the weeks leading up to the election. Pet. 2.

The DNC is not aware of any problems with absentee-ballot drop boxes identified during the statewide canvass or partial recount processes. Mr. Mueller has not alleged any specific incidents of ballot-tampering, ballot theft, or other abuses of ballot drop boxes. The closest he comes is speculating about “[t]he *possibility* that there were some one-

sided partisan teams retrieving un-mailed and un-postmarked ballots from illegally placed ballot drop boxes.” *Id.* at 14 ¶ 25 (emphasis added). There is no factual support for such wild conjecture about “partisan teams” tampering with absentee ballots deposited into drop boxes.

ARGUMENT

I. MR. MUELLER LACKS STANDING

Petitioner lacks standing to pursue his generalized grievances about the WEC’s decision to authorize and promote the use of secure absentee-ballot drop boxes. The DNC argued in its Response to the WVA Petitioners last week (at 11) that “[l]iterally any voter could raise the same objections they make, and there no doubt would be many more such suits if this one were allowed to proceed.” Mr. Mueller’s Petition underscores that point. He is a single voter seeking to undo the results of Wisconsin’s November 3rd Presidential election, though he adds there are “tens of thousands of people across

the State of Wisconsin that believes [*sic*] his fundamental right to vote and to have a safe, free, secure and transparent election was compromised and tainted by the illegal actions of the Respondents” in approving the use of secure absentee-ballot drop boxes. Pet. at 2. If this Court were to conclude (which it should not) that Mr. Mueller has standing to pursue an original action, the same conclusion would be required concerning each of the tens of thousands of voters who allegedly do not accept the outcome of the election.

For the same reasons detailed in Part A of the DNC’s Response in WVA, Mr. Mueller has not suffered any *personal* injury separate and apart from the public at large, and thus lacks the personal stake necessary to sue. See Resp. to WVA Pet. at 28-33; *see also Marx v. Morris*, 2019 WI 34, ¶ 35, 386 Wis. 2d 122, 925 N.W.2d 112 (2019); *Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517 (2009); *Cornwell Pers. Assocs., Ltd. v. Dep’t of Indus., Labor &*

Human Relations, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979) (no standing in Wisconsin to litigate “‘generalized grievances’ about the administration” of the law).

Mr. Mueller, in other words, “claims only harm to his and every citizen’s interest in proper application of the Constitution and laws,” and the relief they seek “no more directly and tangibly benefits [them] than it does the public at large” *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 573-74 (1992). Allowing his claims to proceed in the absence of any showing of individualized injury to him personally would open a “universe of entities or people” who could similarly bring challenges to the outcome or conduct of any election. *Krier*, 317 Wis.2d 288, ¶ 20.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE IT SEEKS AN END-RUN AROUND WISCONSIN’S RECOUNT PROCEDURE

The DNC demonstrated in Part B of its Response to the WVA Petition that an original action in this Court seeking to

change the outcome of the November 3rd Presidential election would be an improper end-run around Wisconsin's "exclusive judicial remedy" for any "alleged irregularity, defect or mistake committed during the voting or canvassing process": a recount, followed, if necessary, by an appeal to circuit court. Wis. Stat. § 9.01(11); *see also State ex rel. Shroble v. Prusener*, 185 Wis. 2d 102, 107, 517 N.W.2d 169 (1994); *Carlson v. Oconto Cty. Bd. of Canvassers*, 2001 WI App 20, ¶ 7, 240 Wis. 2d 438, 623 N.W.2d 195 (2000).

As with WVA's Petition, Mr. Mueller's request to this Court is fatally deficient in at least two respects. *First*, this Court is not the proper forum in which to challenge "an alleged irregularity, defect, or mistake committed during the voting or canvassing process." Wis. Stat. § 9.01(11). Rather, a recount, followed by an appeal to the circuit court, is the "exclusive remedy" for such alleged wrongs.

Second, Mr. Mueller is not a proper party to raise such a challenge. Instead, as relevant here, the Election Code reserves that right to the candidates themselves. *See* Wis. Stat. §§ 9.01(1)(a), 9.01(6); *Shroble*, 185 Wis. 2d at 114 (“sec. 9.01 does not allow members of the electorate to request a recount”). Indeed, in this case, the party authorized to pursue the “exclusive remedy,” President Trump, is already doing so. *See generally* DNC Resp. to WVA Pet. at 33-37.

III. MR. MUELLER’S CHALLENGE TO THE WEC’S “DROP BOX” GUIDANCE IS SUBJECT TO THE EXCLUSIVE JUDICIAL REVIEW PROVISIONS OF WIS. STAT. § 227.40(1).

Mr. Mueller is seeking to challenge through an original action a carefully crafted plan by the WEC to promote the use of secured drop boxes, which was embodied in WEC guidance documents that were relied upon by local election officials and voters throughout the State. But as demonstrated in Part C of the DNC’s Response to the WVA Petition, Wis. Stat. § 227.40(1) provides “the exclusive means of judicial review of the validity of a

... guidance document” issued by a state agency like the WEC. This “exclusive” avenue for review includes any argument that an agency guidance document “exceeds the statutory authority of the agency”—precisely what Mr. Mueller claims here. *Id.* § 227.40(4)(a); *see* Pet. at ¶¶ 30-36.

The DNC’s Response to the WVA Petition demonstrated (at 38-42) that the WEC unquestionably is subject to chapter 227 review. *See id.* § 227.01(1) (an “agency” subject to chapter 227 “means a board, commission, committee, department or officer in the state government,” with limited exceptions not relevant here). And the Commission’s pronouncements about the permissibility of using absentee-witness drop boxes and the conditions for their use are clearly “guidance documents.” They are official communications issued by the WEC advising local election officials and voters how it interprets and applies the relevant

statutory provisions. *Id.* § 227.01(3m)(a); *see* App. 5-8.⁶ The exclusive review provisions of Section 227.40 “are not permissive, but rather are mandatory.” *Richards v. Young*, 150 Wis.2d 549, 555, 441 N.W.2d 742 (1989); *see State v. Town of Linn*, 205 Wis.2d 426, 449, 556 N.W.2d 394 (Ct. App. 1996). *See generally* DNC Resp. to WVA Pet. at 38-42.

IV. THIS COURT SHOULD DENY MR. MUELLER’S FACT-BOUND PETITION.

Like the WVA Petition, Mr. Mueller’s Petition makes many strongly disputed (and, frankly, outlandish) allegations of fact. *See* DNC Resp. to WVA Pet. at 42-47. Mr. Mueller

⁶ Wis. Stat. § 227.01(3m)(a) provides that, with limited exceptions not relevant here, “‘guidance document’ means ... any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the following: (1) Explains the agency’s implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency. (2) Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.”

claims, among other things, that “unknown government actors within CISA ... interfere[d] in the election laws of Wisconsin”; that “there were massive improprieties and fraud” in the election; and that proper chain-of-custody protocols for drop boxes were not followed. Pet. at 10 ¶ 14, 13 ¶ 22, 16 ¶¶ 28-29.

To the extent they state any claim at all (they do not), these allegations must be the subject of discovery and fact-finding. This Court has repeatedly said it will not exercise jurisdiction in such a case, and there is no reason to make an exception here. *See* Wis. S. Ct. Internal Operating Procedures III.B.3; *see Green for Wis. v. State Elections Bd.*, 2007 WI 45, ¶ 3, 300 Wis. 2d 164, 732 N.W.2d 750 (Crooks, J., concurring); *In re Exercise of Original Jurisdiction of Sup. Ct.*, 201 Wis. 123, 128, 229 N.W. 643 (1930) (per curiam) (“The circuit court is much better equipped for the trial and disposition of questions of fact than is this court and such cases should be first presented to that court.”)

**V. THIS COURT SHOULD DENY THE PETITION
BECAUSE EQUITY BARS RELIEF**

Mr. Mueller is asking this Court to change the rules of a presidential election that already has been conducted. The State expended substantial resources in ensuring that the election took place in a secure and lawful manner. Untold numbers of Wisconsinites devoted countless hours, at significant personal risk during a pandemic, to prepare for, hold, and tally the vote. And Wisconsin voters relied upon the election procedures in casting their ballots as directed, including by using the over 500 WEC-authorized absentee-ballot drop boxes available throughout Wisconsin. Now Mr. Mueller is asking this Court to undo all of those efforts and abrogate the fundamental right to vote for all Wisconsinites on the grounds that the WEC lacked sufficient statutory authority to authorize local election jurisdictions to use secure drop boxes subject to compliance with Commission guidelines.

Mr. Mueller could have challenged the WEC's widely publicized efforts to promote the use of drop boxes in the months *prior* to the election, before local election officials and voters had relied on the Commission's guidance in the election. That he chose to wait is fatal. Whether labeled as laches, estoppel, unclean hands, or simply the exercise of sound equitable discretion, this Court does not grant original jurisdiction when a petitioner has slept on his rights.

In *Hawkins v. Wisconsin Elections Commission*, for example, the Court rejected a petition for original action filed by members of the Green Party nearly two months *before* the 2020 general election. 2020 WI 75, ¶ 10, 393 Wis. 2d 629, 948 N.W.2d 877. The Court concluded there was insufficient time to grant “any form of relief that would be feasible,” and that granting relief would “completely upset[] the election,” causing “confusion and disarray” and “undermin[ing] confidence in the general election results.” *Id.* at ¶¶ 9-10.

Overturning the results of an election *after* it has been held, as Mr. Mueller seeks to accomplish, would create far more confusion, disarray, and loss of public confidence in the results.

This Court's application of the laches doctrine in *Wisconsin Small Business United, Inc. v. Brennan* further undermines Mr. Mueller's belated original action. *See* 2020 WI 69, 393 Wis. 2d 308, 946 N.W.2d 101. In *Brennan*, this Court denied a request to overturn a budget enactment on which Wisconsinites had relied. That enactment, the Court explained, gave rise to "**substantial reliance interests** on behalf of both public and private parties across the state." 2020 WI 69, ¶ 27 (emphasis added). The Court declined to disturb such reliance interests based on claims not "brought in a timely manner." *Id.* at ¶ 31.

Voters who used drop boxes in reliance on encouragement from the WEC and local election officials have

similar if not stronger “substantial reliance interests.” Mr. Mueller has no right to use an original action *after* the election to retroactively disenfranchise the entire Wisconsin electorate simply because local election officials relied on WEC guidance about drop boxes that Mr. Mueller could have challenged before voters’ substantial reliance interests had vested. His challenge simply comes too late.

Part E of the DNC’s Response to WVA’s Petition includes a detailed demonstration of how the doctrines of laches, unclean hands, and equitable estoppel individually and collectively bar WVA’s attempt through a post-election original action to change the result of Wisconsin’s November 3rd Presidential election in Wisconsin. *See* DNC Resp. to WVA at 48-65. The analysis of each of those equitable doctrines applies with equal force to Mr. Mueller’s objections to drop boxes at this late date, whether through an original action or other litigation avenues. To minimize repetition, the

DNC respectfully refers Mr. Mueller and the Court to its prior WVA Response.

**VI. MR. MUELLER IS NOT ENTITLED TO
EITHER DECLARATORY OR INJUNCTIVE
RELIEF**

This Court also should decline to exercise its original jurisdiction because Mr. Mueller is manifestly unable to meet the requirements for either the declaratory or injunctive relief he seeks.

Declaratory relief. To obtain a declaratory judgment, Mr. Mueller must demonstrate the existence of the “conditions precedent to the proper maintenance of a declaratory judgment action,” including that he has a “legally protectible interest,” *i.e.*, standing, and that this dispute is “ripe for judicial determination.” *Tooley v. O’Connell*, 77 Wis. 2d 422, 433-34, 253 N.W.2d 335, 340 (1977). Moreover, to obtain a judgment, Mr. Mueller would need to prevail on the merits. He falls short in multiple respects.

First, Mr. Mueller lacks standing for the reasons stated in Section I, *supra*. This precludes him from maintaining a declaratory judgment action (or any action). *Second*, this dispute is not ripe. For a claim to be ripe, “the facts [must] be sufficiently developed to avoid courts entangling themselves in abstract disagreements.” *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 43, 309 Wis. 2d 365, 749 N.W.2d 211 (internal quotation marks omitted). Here, no discovery has occurred, and, to say the least, there are very substantial reasons to doubt the facts alleged by Mr. Mueller. Not only that, the facts are contingent upon any appeal of the recount determinations addressing many of the same issues. *Third*, Mr. Mueller is simply wrong on the merits. As explained below, a review of the Petition demonstrates the infirmity of the legal theories underlying Mr. Mueller’s extraordinary demand to overturn the election results.

Injunctive relief. Nor is Mr. Mueller entitled to his requested injunctive relief disenfranchising the entire Wisconsin electorate and ordering the Legislature to choose Wisconsin's ten electors, especially given the lack of *any* evidence of fraud or other wrongdoing in connection with the secure absentee-ballot drop boxes operated by local election officials and regulated by the WEC. Even if there were *any* merit to his specific legal claims (there is not), any rational balancing of the equities must reject such an unprecedented (and unconstitutional) shift of power from the voters themselves to the Legislature.

Nor can Mr. Mueller show a likelihood of success on the merits of any of the legal claims and theories he tosses out in the course of recounting the allegedly “treacherous operation” undertaken by CISA and others.

Mr. Mueller's principal legal argument is that the WEC lacks the statutory authority to approve and supervise the use

of absentee-ballot drop boxes by local election officials, given the statutory requirement that absentee ballot envelopes “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) (emphasis added). The WEC interprets the “delivered in person” option to mean that, instead of mailing her ballot, a voter may deliver it “in person” to the municipal clerk at one or more secure places designated and supervised by the clerk. *See* App. 4 (“Under Wis. Stat. §6.87(4)(b)(1) municipal clerks may establish opportunities for voters to hand deliver their ballot in their jurisdictions.”).

This is an entirely reasonable construction of the “delivered in person” language in Wis. Stat. § 6.87(4)(b)(1). “Delivered in person” surely cannot be limited to personal hand-delivery to the clerk herself. Just as an after-hours deposit can be “delivered in person” to a bank by leaving it in the outside drop box, just as a library book is “delivered in

person” by taking it to the library and slipping it through the return slot, and just as a letter is “mailed” by placing it into an official USPS mailbox, it is eminently reasonable to read Section 6.87(4)(b)(1) as allowing delivery “to” the clerk to occur through deposit into a designated secure receptacle under the clerk’s jurisdiction, control, and supervision. That reading has been especially reasonable in 2020, in the midst of a deadly pandemic and widely reported USPS service problems.⁷ Indeed, based on nearly identical statutory language, the Pennsylvania Supreme Court recently affirmed the lawfulness of the Pennsylvania Secretary of State’s determination that drop boxes are among the locations where voters can return

⁷ See, e.g., USPS Office of Inspector General, Management Alert: Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area (Report Number 20-235-R20, July 7, 2020), <https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-235-R20.pdf>; USPS Office of Inspector General, Audit Report: Processing Readiness of Election and Political Mail During the 2020 General Elections (Report Number 20-225-R20, August 31, 2020), <https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-225-R20.pdf>.

hand-delivered mail-in ballots. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 361(Pa. 2020).

Mr. Mueller at one point invokes Wis. Stat. §§ 6.93 and 7.52(5)(a) in asserting that he “hereby challenges every ballot that was placed in an illegal ballot drop box across the State of Wisconsin and asks this Court to set all of those ballots aside.” Pet. at 18. And if the “drop box ballots” were mixed in with other ballots, Mr. Mueller wants this Court “to nullify the results of this whole election in Wisconsin.” *Id.* at 19.

But the provisions Mr. Mueller cites relate to challenges to absentee ballots during the canvassing process, which are directed to and decided by boards of absentee ballot canvassers and election inspectors. *See* Wis. Stat. §§ 6.93, 7.52. Mr. Mueller made no such challenges, and the state canvassing process is now over. Mr. Mueller has no statutory authority or equitable claim that would empower him to march before this Court and demand the “nullification” of the entire Presidential

election in Wisconsin because of his disagreement with the WEC and local election officials over the use of drop boxes.

Mr. Mueller makes two other passing allegations that clearly flunk the pleading requirements of Wis. Stat. § 802.02(1)(a) and *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶¶ 19-31, 356 Wis. 2d 665, 849 N.W.2d 693. *First*, he refers in passing in ¶ 25 to the interpretation of the “indefinitely confined” exception to the voter ID requirement, calling it “a recipe for voter fraud.” This conclusory assertion states no valid claim for relief. And in any event, the DNC has thoroughly addressed the “indefinitely confined” exception in its Response to the WVA Petition. *See* DNC Response to WVA Petition at 22-26, 70-73.

Second, just like the WVA Petitioners, Mr. Mueller complains about CTCL’s election administration grants to the Cities of Milwaukee, Madison, Green Bay, Racine, and Kenosha. Pet. ¶ 27. Again, his cursory references to CTCL

state no valid claim. Moreover, WVA’s identical complaints about these grants were rejected *prior* to the November 3 election by the U.S. District Court for the Eastern District of Wisconsin, the Seventh Circuit, and the U.S. Supreme Court. *See Wis. Voters All. v. City of Racine*, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020) (Griesbach, J.), *stay denied*, 2020 WL 6591209 (E.D. Wis. Oct. 21, 2020), *stay denied*, No. 20-3002 (7th Cir. Oct. 23, 2020), *stay denied*, No. 20A75 (U.S. Oct. 29, 2020) (Kavanaugh, J., in Chambers). Mr. Mueller’s grievances about CTCL funding are more fully addressed and refuted on pages 17-19 and 73-74 of the DNC’s Response to the WVA Petition.

VII. THE PETITION SHOULD BE DENIED BECAUSE THE REQUESTED RELIEF IS BARRED BY FEDERAL AND STATE LAW

Finally, the Petition should be denied because the relief Mr. Mueller requests—among other things, a judgment “nullify[ing] the November 3, 2020 presidential election

results in the State of Wisconsin,” Pet. at 20—is impermissible as a matter of law, *see* DNC Resp. to WVA Pet. at 74-92.

First, nullifying the election would violate the constitutional and statutory frameworks governing the choice of presidential electors. As authorized under Article II of the U.S. Constitution, the State of Wisconsin has determined that presidential electors should be selected by popular vote. *See* Wis. Stat. § 8.25(1); *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). That decision cannot be reversed as it relates to an election that has already occurred, and even a prospective change would require lawmaking, not a court order. *See Smiley v. Holm*, 285 U.S. 355, 373 (1932); DNC Resp. to WVA Pet. at 78. Separately, only Congress has the power to determine the time of choosing electors, *see* U.S. Const. art. II, § 1, cl. 4, and Congress decided that choice should occur on Election Day, *i.e.*, November 3, 2020, with narrow exceptions not applicable here. Thus, granting Mr. Mueller’s request to

“arrange for another election,” Pet. at 20, would violate federal law, *see* 3 U.S.C. § 1; DNC Resp. to WVA Pet. at 80.

Second, the relief sought would disenfranchise millions of Wisconsinites, violating their fundamental voting rights. *See Shipley*, 947 F.3d at 1061; *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 62 n.14, 357 Wis. 2d 469, 499, 851 N.W.2d 262, 277. Even if Mr. Mueller had identified any flaws in the procedures used to conduct the election, which he has not, changing the rules of the election after the fact and with no opportunity to “cure” would be quintessentially unfair to voters, violating both substantive and procedural due process. *See Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1971); DNC Resp. to WVA Pet. at 83-86. Nullifying Wisconsinites’ votes would also violate their First Amendment rights. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); DNC Resp. to WVA Pet. at 86-89. And, doing so would violate the equal protection rights of voters who chose the winning Biden-Harris

slate, by arbitrarily diluting their votes. *See* DNC Resp. to WVA Pet. at 89-92; *see also, e.g., Bush*, 531 U.S. at 104-05; *Dells v. Kennedy*, 49 Wis. 555, 558 (1880).

CONCLUSION

For the reasons stated above, this Court should deny Mr. Mueller's Emergency Petition for Original Action.

Dated: December 2, 2020.

Respectfully Submitted,

By:



Charles G. Curtis, Jr.

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** Pro hac vice application
forthcoming*

*Counsel for Proposed Respondent-
Intervenor*

**CERTIFICATION REGARDING ELECTRONIC
RESPONSE**

I hereby certify that I have submitted an electronic copy of this response via e-mail to the Court Clerk. I further certify that the text of the electronic copy of this response is identical to the text of the paper copy of the response filed as of this date. A copy of this certificate has been served with the paper copies of this response filed with the court and served on all parties.

Dated: December 2, 2020

A handwritten signature in blue ink, appearing to read "Charles G. Curtis, Jr.", is positioned above a horizontal line.

Charles G. Curtis, Jr.

CERTIFICATION OF FILING AND SERVICE

I certify that on December 2, 2020, this response was e-mailed to and hand delivered to the Clerk of the Supreme Court.

I certify that on December 2, 2020, I caused a copy of this response to be e-mailed to counsel of record for all parties.

Dated: December 2, 2020.

A handwritten signature in blue ink, appearing to read "C. G. Curtis, Jr.", is written over a horizontal line.

Charles G. Curtis, Jr.

**APPENDIX TO RESPONSE OF PROPOSED
RESPONDENT-INTERVENOR DEMOCRATIC
NATIONAL COMMITTEE**

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Misha Tseytlin

misha.tseytlin@troutman.com

VIA ELECTRONIC AND PAPER MAIL

Maribeth Witzel-Behl, City Clerk
City Clerk's Office
210 Martin Luther King Jr. Blvd
Room 103, City-County Building
Madison, WI 53703
clerk@cityofmadison.com

September 25, 2020

Re: The City Of Madison's "Democracy In The Park" Campaign's Illegal Collection Of Absentee Ballots

Dear City Clerk Witzel-Behl:

I write on behalf of Wisconsin State Assembly Speaker Robin Vos and Wisconsin State Senate Majority Leader Scott Fitzgerald, regarding the imminent, illegal collection of absentee ballots that your office intends to perform tomorrow through your so-called "Democracy in the Park" campaign.

Wisconsin law already provides for numerous, readily available methods for all voters to return their completed absentee ballots by the November 3, 2020, statutory deadline. See Wis. Stat. § 6.87(6). Voters may return their completed ballots through the mail, Wis. Stat. § 6.87(4)(b)1, deliver them in-person at the clerk's office, *id.*, submit them at an authorized in-person-absentee-voting location, Wis. Stat. § 6.855, or even bring them to their polling location on election day, Wis. Stat. § 6.87(4)(b)1, (6); *see also* Wis. Stat. § 6.80(2)(e). Further, voters may also deposit their completed absentee ballots in authorized "drop boxes," which "must be secured and locked at all times" to protect ballot integrity. See Wis. Elections Comm'n Administrator Meagan Wolfe, *Absentee Ballot Drop Box Information* at 3 (Aug. 19, 2020).^{*} We wholeheartedly support voters' use of any of these convenient, secure, and expressly authorized absentee-ballot-return methods.

Your "Democracy in the Park" campaign, however, appears to fall outside of these lawful categories. As your office describes the campaign, your poll workers will attempt to collect absentee ballots at over 200 unsecured, outdoor locations, and only deliver these ballots to the City Clerk's Office at the end of the six-hour campaign. The threat that this procedure poses to ballot integrity is manifestly obvious. Moreover, in light of these many convenient absentee-ballot-

^{*} Available at <https://elections.wi.gov/node/7036>.

September 25, 2020
City Clerk Witzel-Behl
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return options described just above, there could be no justification for this *ad hoc*, unsecure, and unlawful approach that your campaign appears to be creating.

Given the apparent unlawfulness of the absentee-ballot-collection efforts of your "Democracy in the Park" campaign, there is a grave risk that all ballots you collect through this campaign will be challenged in court and ultimately invalidated. See Wis. Stat. § 6.93; see also Wis. Stat. § 6.87(6). We urge you in the strongest possible terms to abandon this unlawful effort immediately, in order to avoid the threat of invalidated ballots and needless litigation. At minimum, your office should keep any ballots collected during this illegal effort separate from all other ballots that your office receives.

Sincerely,

A handwritten signature in blue ink, appearing to read "Misha Tseytlin".

Misha Tseytlin



Wisconsin Elections Commission

212 East Washington Avenue | Third Floor | P.O. Box 7984 | Madison, WI 53707-7984
(608) 266-8005 | elections@wi.gov | elections.wi.gov

DATE: September 26, 2020

TO: All Wisconsin Elections Officials

FROM: Meagan Wolfe
Administrator

SUBJECT: **In-Person Absentee Voting Reminders**

We have received a number of questions regarding the timeline for in-person absentee voting and witness procedures for the November General Election. This communication will provide reminders and links to resources for both issues that clerks can use to prepare for the election. The information below does not represent changes in guidance but are reminders in light of recent questions we have received.

- 1. In-Person Absentee Voting:** Due to the recent court decision in the *One Wisconsin Institute* case, in-person absentee voting can only take place in the two weeks prior to election day and no in-person absentee hours can be offered on the Monday prior to election day. Wisconsin Statute § 6.86(1)(b), which sets the 14-day time period for in-person absentee voting was held to be constitutional.

For the November 3, 2020 General Election, in-person absentee voting can begin no earlier than October 20, 2020 and the final day in-person absentee voting hours can be offered is Sunday November 1, 2020.

In-person absentee is defined by state law as the process of issuing an absentee ballot in-person at the clerk's office or alternate site, or sites. During the in-person absentee time period, beginning on October 20 and ending on November 1, there is no restriction on the number of hours you may offer and in-person absentee voting can be offered at multiple locations (although those locations were required to be set by June 12, 2020 for the November General Election). As always, your Type E Notice should accurately reflect the in-person absentee voting hours for your municipality even if you are offering hours by appointment only. More information about the court decision can be found here: <https://elections.wi.gov/node/6978>.

Further, please note that the only way clerk may issue absentee ballots to voters prior to October 20 is by mail. Before this time, you may not provide voters a ballot in-person nor can you deliver a ballot to a voter in-person or through an agent. Prior to October 20, voters may only receive the ballot by mail.

- 2. Accepting Absentee Ballot Applications In-Person:** Under Wis. Stat. § 6.86(1)(b), clerks cannot accept applications for absentee ballots in person earlier than 14 days preceding the election and no later than the Sunday preceding the election.

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Administrator
Meagan Wolfe

App. 3

For the November 3, 2020 General Election, in-person absentee applications can be accepted no earlier than October 20, 2020 and the final day these applications can be accepted is Sunday November 1, 2020.

Voters may submit their absentee ballot applications by mail, by mail, or through MyVote.wi.gov but they cannot submit absentee ballot applications in-person prior to October 20, 2020 and only at locations designated in your Type E notice and established prior to the June 12, 2020 deadline.

- 3. Witness Requirements:** Each absentee ballot is required to have the voter signature, witness signature and witness address on the return envelope in order to be counted. State law requires that the voter must show their unmarked ballot to their witness prior to marking their ballot in their presence (Wis. Stat. § 6.87(2)). The witness then signs the certification indicating the proper voting procedure has been followed. If a ballot has not been voted in the presence of the witness, a witness cannot certify that the unmarked ballot was shown to them. The voter should request a replacement ballot from their municipal clerk in these situations.
- 4. Ballot Drop Off Opportunities:** Under Wis. Stat. §6.87(4)(b)(1) municipal clerks may establish opportunities for voters to hand deliver their ballot in their jurisdictions. Guidance on how to securely establish drop off opportunities and drop box locations please see WEC's August 19 communication <https://elections.wi.gov/node/7036>

Please contact us with any questions you may have at (608)261-2028 or elections@wi.gov.



Wisconsin Elections Commission

212 East Washington Avenue | Third Floor | P.O. Box 7984 | Madison, WI 53707-7984
(608) 266-8005 | elections@wi.gov | elections.wi.gov

DATE: August 19, 2020

TO: All Wisconsin Election Officials

FROM: Meagan Wolfe Richard Rydecki
Administrator Assistant Administrator

SUBJECT: Absentee Ballot Drop Box Information

This document is intended to provide information and guidance on drop box options for secure absentee ballot return for voters. The information has been adapted from a resource developed as part of the Cybersecurity and Infrastructure Security Agency (CISA) Elections Infrastructure Government Coordinating Council and Sector Coordinating Council's Joint COVID Working Group. The original document can be found here:
https://static1.squarespace.com/static/5a665c98017db2b60bc22084/t/5e8f42d717ee5e7ee2db8c8b/1586447064805/Ballot_Drop-Box_final.pdf.

What is an Absentee Ballot Drop Box?

A ballot drop box provides a secure and convenient means for voters to return their by mail absentee ballot. A drop box is a secure, locked structure operated by local election officials. Voters may deposit their ballot in a drop box at any time after they receive it in the mail up to the time of the last ballot collection Election Day. Ballot drop boxes can be staffed or unstaffed, temporary or permanent.

Some voters prefer to deliver their by mail absentee ballots to a drop box rather than sending them back through the mail. These voters may be motivated by lack of trust in the postal process, fear that their ballot could be tampered with, or concern that their information will be exposed. Voters may also be concerned about ensuring that their ballot is returned in time to be counted.

Ballot drop boxes and drop-off locations allow voters to deliver their ballots in person. More importantly, the availability of ballot drop boxes and drop-off locations ensures that even voters who wait until the last minute to return their ballot or who receive their requested ballot in the mail too late to return it via USPS will have timely options to return their ballots.

Repurposing Options

In a COVID-19 environment, creative solutions may be required. Your municipality may already have infrastructure set up for secure collection of payment and materials. Consider repurposing the following options as secure ballot drops:

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Administrator
Meagan Wolfe

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- Designate drop boxes or mail slots set up for taxes, mail and public utilities as secure ballot drop locations.
- Partnering with public libraries to use book and media drop slots for ballot collection.
- Partnering with businesses or locations that have already implemented social distancing practices, such as grocery stores and banks.



Many of these locations are already secure and located in places familiar to city residents. If you choose to do something similar, be sure to inquire about the security of these drops and identify how you can access ballots returned through these options. These locations should be marked with signage that clearly identifies the location as a ballot drop box and lists the final time ballots will be collected on election day. After the final election day pickup, clear signage should be placed at each drop site marking the location as “closed for ballot drop” and information regarding additional ballot return options and deadlines should be listed on these signs.

Types of Drop Boxes

Outdoor Options

1. Staffed, Temporary Drive-Through Drop Off

A drive-through drop-off location is an easy way to keep traffic flowing when demand for a ballot drop box is at its peak, especially on Election Day. This drive-through is typically set up in a parking lot or a street depending on the location.

The team staffing the site accepts ballots from voters as they pull through, depositing them directly into a ballot box. For voters who prefer placing the ballot directly into the box themselves, the portable ballot box is brought to the car window. In addition to the supplies listed below, you will need a team of at least two to three to support the drop-off site.

- Pop-up tent
- Table
- Chairs
- Ballot box
- Road signs
- Orange cones
- Flashlights
- High-visibility vests for workers
- Weather appropriate support— propane heater, rain gear, lanterns
- Personal protective equipment such as gloves, masks, and hand sanitizer as appropriate and in accordance with current CDC guidance



2. Unstaffed, 24-Hour Ballot Drop Box

In high-demand areas, installing a permanent ballot drop box—one that can be accessed by voters 24/7—is a good solution. These boxes should be constructed of durable material such as steel and be permanently cemented into the ground. This type of ballot drop box may cost as much as \$6,000 each. Other options such as courier boxes are available from industrial supply companies and may be more affordable. In addition to purchasing the 24-hour box you will need:

- Video surveillance camera (or place the drop box in an area already covered by a security camera)
- Media storage device (for recorded video)
- Municipal decal or Election signage
- Extra keys for opening slot and access door
- Security seals



Indoor Option

Staffed or Unstaffed – Indoor Temporary Ballot Drop Box

When demand for a ballot drop box is low, a temporary ballot box located in a place such as the municipal clerk's office is a good solution. These boxes should be constructed of durable material and include a key or combination lock as well as a way to securely fasten the box to prevent it from being moved or tampered with. This type of box looks similar to the example pictured here. Staffed drop boxes can also be used at polling places on election day to collect absentee ballots from voters without having those voters wait in line in the voting area.

In addition to purchasing or renting the ballot box, you will need:

- Padlock and keys (if not included)
- Bike chain or some other way to fasten the box to prevent it from being removed (if not staffed)
- Security seals



Security

Ballot drop boxes must be secured and locked at all times. Only an election official or a designated ballot drop box collection team should have access to the keys and/or combination of the lock. In addition to locks, all drop boxes should be sealed with one or more tamper evident seals.

Ideally, unstaffed 24-hour drop boxes should be located in areas with good lighting and be monitored by video surveillance cameras. When this is not feasible, positioning the box close to a nearby camera is a good option. Also consider placing it in a high traffic area and inviting local law enforcement to make regular observations.

Try to place indoor drop boxes in locations where they can be monitored by a person in real time. When ballot boxes are unstaffed and not being monitored, the box should be securely fastened to a stationary surface or immovable object, such as a counter or wall, in a way that prevents moving or tampering.

Chain of Custody

- Chain of custody logs must be completed every time ballots are collected.
- All ballot collection boxes/bags should be numbered to ensure all boxes are returned at the end of the shift, day, and on election night.
- Team members should sign the log and record the date and time, security seal number at opening, and security seal number when the box is locked and sealed again.

Location

Ballot drop boxes should be placed in convenient, accessible locations, including places close to public transportation routes, near or on college campuses, and public buildings, such as libraries and community centers familiar to voters and easy to find. If there is time, getting input from citizens and community groups is recommended.

All drop box locations should be evaluated for:

- Security
- Lighting (well-lit 24 hours a day)
- High visibility
- Security cameras
- Accessibility
- Voter convenience
- Parking or drive-through options

How Many Drop Boxes Do You Need?

At a minimum, you should have a drop box at your primary municipal building, such as the village hall. Voters generally know the locations of these buildings and are already accustomed to voting or doing business there. Some other best practices include:

- Have one drop box for every 15,000–20,000 registered voters.
- Consider adding more drop boxes to areas where there may be communities with historically low absentee ballot return rates.
- Use demographic data and analysis to determine whether there should be a different formula for rural and urban locations (i.e., 1 for every 15,000 residents may be every mile in an urban area, but every 50 miles in a rural area).



July 29, 2020

Honorable Meagan Wolfe
Administrator, Wisconsin Elections Commission
212 East Washington Avenue
3rd Floor
P.O. Box 7984
Madison, WI 53707-7984

Dear Ms. Wolfe:

Re: Deadlines for Mailing Ballots

With the 2020 General Election rapidly approaching, this letter follows up on my letter dated May 29, 2020, which I sent to election officials throughout the country. That letter highlighted some key aspects of the Postal Service's delivery processes. The purpose of this letter is to focus specifically on the deadlines for requesting and casting ballots by mail. In particular, we wanted to note that, under our reading of Wisconsin's election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards. This mismatch creates a risk that ballots requested near the deadline under state law will not be returned by mail in time to be counted under your laws as we understand them.

As I stated in my May 29 letter, the two main classes of mail that are used for ballots are First-Class Mail and USPS Marketing Mail, the latter of which includes the Nonprofit postage rate. Voters must use First-Class Mail (or an expedited level of service) to mail their ballots and ballot requests, while state or local election officials may generally use either First-Class Mail or Marketing Mail to mail blank ballots to voters. While the specific transit times for either class of mail cannot be guaranteed, and depend on factors such as a given mailpiece's place of origin and destination, most domestic First-Class Mail is delivered 2-5 days after it is received by the Postal Service, and most domestic Marketing Mail is delivered 3-10 days after it is received.

To account for these delivery standards and to allow for contingencies (e.g., weather issues or unforeseen events), the Postal Service strongly recommends adhering to the following timeframe when using the mail to transmit ballots to domestic voters:

- **Ballot requests:** Where voters will both receive and send a ballot by mail, voters should submit their ballot request early enough so that it is received by their election officials at least 15 days before Election Day at a minimum, and preferably long before that time.
- **Mailing blank ballots to voters:** In responding to a ballot request, election officials should consider that the ballot needs to be in the hands of the voter so that he or she has adequate time to complete it and put it back in the mail stream so that it can be processed and delivered by the applicable deadline. Accordingly, the Postal Service recommends that election officials use First-Class Mail to transmit blank ballots and allow 1 week for delivery to voters. Using Marketing Mail will result in slower delivery times and will increase the risk that voters will not receive their ballots in time to return them by mail.

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- **Mailing completed ballots to election officials:** To allow enough time for ballots to be returned to election officials, domestic voters should generally mail their completed ballots at least one week before the state's due date. So, if state law requires ballots to be returned by Election Day, voters should mail their ballots no later than Tuesday, October 27.

Under our reading of your state's election laws, as in effect on July 27, 2020, certain state-law requirements and deadlines appear to be incompatible with the Postal Service's delivery standards and the recommended timeframe noted above. As a result, to the extent that the mail is used to transmit ballots to and from voters, there is a significant risk that, at least in certain circumstances, ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted.

Specifically, it appears that a completed ballot must be received by Election Day to be counted. If that understanding is correct, we accordingly recommend, as noted above, that voters who choose to mail their ballots do so no later than Tuesday, October 27. However, it further appears that state law generally permits voters to request a ballot as late as 5 days before the election. If a voter submits such a request at or near that deadline, and if the requested ballot is transmitted to the voter by mail, there is a significant risk that the ballot will not reach the voter before Election Day, and accordingly that the voter will not be able to use the ballot to cast his or her vote. Even if a voter receives a ballot before Election Day, there is a significant risk that the voter will not have sufficient time to complete and mail the completed ballot back to election officials in time for it to arrive by the state's return deadline. That risk is exacerbated by the fact that the law does not appear to require election officials to transmit a ballot until one business day after receiving a ballot application.

To be clear, the Postal Service is not purporting to definitively interpret the requirements of your state's election laws, and also is not recommending that such laws be changed to accommodate the Postal Service's delivery standards. By the same token, however, the Postal Service cannot adjust its delivery standards to accommodate the requirements of state election law. For this reason, the Postal Service asks that election officials keep the Postal Service's delivery standards and recommendations in mind when making decisions as to the appropriate means used to send a piece of Election Mail to voters, and when informing voters how to successfully participate in an election where they choose to use the mail. It is particularly important that voters be made aware of the transit times for mail (including mail-in ballots) so that they can make informed decisions about whether and when to (1) request a mail-in ballot, and (2) mail a completed ballot back to election officials.

We remain committed to sustaining the mail as a secure, efficient, and effective means to allow citizens to participate in the electoral process when election officials determine to utilize the mail as a part of their election system. Ensuring that you have an understanding of our operational capabilities and recommended timelines, and can educate voters accordingly, is important to achieving a successful election season. Please reach out to your assigned election mail coordinator to discuss the logistics of your mailings and the services that are available as well as any questions you may have. A list of election mail coordinators may be found on our website at: <https://about.usps.com/election-mail/politicalection-mail-coordinators.pdf>.

We hope the information contained in this letter is helpful, and please let me know if you have any questions or concerns.

Sincerely,

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Thomas J. Marshall

CERTIFICATE OF CONFIDENTIALITY

I certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: December 2, 2020

A handwritten signature in blue ink, appearing to read "Charles G. Curtis, Jr.", with a stylized flourish at the end.

Charles G. Curtis, Jr.

CERTIFICATION REGARDING ELECTRONIC APPENDIX

I hereby certify that I have submitted an electronic copy of this appendix via e-mail to the Court Clerk. I further certify that the text of the electronic copy of this appendix is identical to the text of the paper copy of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all parties.

Dated: December 2, 2020

A handwritten signature in blue ink, appearing to read "Charles G. Curtis, Jr.", written over a horizontal line.

Charles G. Curtis, Jr.

CERTIFICATE OF SERVICE

I certify that on this 2nd day of December, 2020, I caused a copy of this appendix to be served upon all parties via e-mail.

Dated: December 2, 2020

A handwritten signature in blue ink, appearing to read "Charles G. Curtis, Jr.", written over a horizontal line.

Charles G. Curtis, Jr.