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John Barrett
Clerk of Circuit Court
2020CV007092

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DONALD J. TRUMP ET AL.,

Plaintiffs/Appellants,

Milwaukee County Case No.: 2020CV7092

v.

Dane County Case No.: 2020CV2514

JOSEPH R. BIDEN, ET AL.,

Defendants/Appellees.

**PROPOSED FINDINGS OF FACTS AND
CONCLUSIONS OF LAW OF PLAINTIFFS/APPELLANTS**

Plaintiffs/Appellants, Donald J. Trump, Michael R. Pence, and Donald J. Trump for President, Inc., (collectively, “Appellants”), by their attorneys, TROUPIS LAW OFFICE and the LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C., hereby file and assert the following Findings of Facts and Conclusions of Law:

THE PARTIES

1. Plaintiff/Appellant, Donald J. Trump, is the sitting President of the United States. President Trump is a resident of the State of Florida and has a residence of 1100 South Ocean Boulevard, Palm Beach, FL 33480.

2. Plaintiff/Appellant, Michael R. Pence, is the sitting Vice President of the United States. Vice President Pence is a resident of the State of Indiana and has a residence of 4750 North Meridian Street, Indianapolis, Indiana 46208.

3. Plaintiff/Appellant, Donald J. Trump for President, Inc. (the “Trump Campaign”), is the Presidential Campaign of the sitting President of the United States. The Trump Campaign’s principal office is located at 725 Fifth Avenue, New York, NY 10022.

4. Defendant/Appellee, Joseph R. Biden, is the Democratic Party Candidate for the Office of the President of the United States and a former Vice President of the United States. Former Vice President Biden is a resident of the State of Delaware with a residence of 1209 Barley Mill Road, Wilmington, Delaware 19807.

5. Defendant/Appellee, Kamala D. Harris, is the Democratic Party candidate for the Office of the Vice President of the United States and is currently a United States Senator from California. Senator Harris is a resident of the State of California with an address of 435 N. Kenter Avenue, Los Angeles, California 90049.

6. Defendant/Appellee, Milwaukee County Clerk, with a principal office located at 901 North 9th Street, Milwaukee, Wisconsin 53233. George L. Christenson is the sitting Milwaukee County Clerk.

7. Defendant/Appellee, Milwaukee County Board of Canvassers, with a principal office located at 901 North 9th Street, Room 105, Milwaukee, Wisconsin 53233. Timothy H. Posnanski is the Chairman of the Milwaukee County Board of Canvassers.

8. Defendant/Appellee, Wisconsin Election Commission (“WEC”) is an agency of the State of Wisconsin established to administer and enforce state election laws, with a principal office located at 212 E. Washington Avenue, Third Floor, Madison, Wisconsin 53703.

9. Defendant/Appellee, Ann S. Jacobs, is the Chairperson of WEC, with her principal office, in her official capacity, located at 212 E. Washington Avenue, Third Floor, Madison, Wisconsin 53705.

JURISDICTION AND VENUE

10. This Court has jurisdiction over the parties pursuant to Wis. Stat. § 9.01(6).

11. This Court has jurisdiction over the parties pursuant to Wis. Stat. § 801.05(1).

12. Venue is proper in the Wisconsin Circuit Court located pursuant to Wis. Stat. §9.01(6), § 801.50(2)(a) and (c) as it is the county in which the recount took place and the recount determination was made.

FACTUAL FINDINGS¹

13. The 2020 Wisconsin Presidential Election (the “Election”) is a very close Election with results for the two top candidates within a single percentage point. WEC, Unofficial Results November 3, 2020 General Election, *available at* <https://elections.wi.gov/node/7234>.

14. WEC reported its unofficial results indicating that President Donald J. Trump and Vice President Michael R. Pence (“Trump-Pence”) received 1,610,076 votes and Joseph R. Biden and Senator Kamala D. Harris (“Biden-Harris”) received 1,630,503 votes, a difference of 20,427 votes or 0.620%. WEC, Unofficial Results November 3, 2020 General Election, *available at* <https://elections.wi.gov/node/7234>.

15. Donald J. Trump and Michael R. Pence, as candidates for the offices of President and Vice President of the United States, requested a recount of the results in both Milwaukee County and Dane County pursuant to Wis. Stat. § 9.01(1)(a)1 (the “Recount”). Verified Recount Petition to WEC, November 18, 2020, *available at*: <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Trump%20Campaign%20Recount%20Petition.pdf> (P. App. 1-9).

16. The Recount Petition asserted that, upon information and belief, either mistakes and/or fraud occurred in Milwaukee and Dane Counties affecting enough votes to alter the outcome

¹ Citations to “P. App. ___” refer to the page(s) of the Appendix filed with Appellants’ Supporting Memorandum in this matter; citations to the transcript of the Recount proceedings in Milwaukee County appear as “Milwaukee Cty. Trans. [date] at [page:line]” and citations to the transcript of the Recount proceedings in Dane County appear as “Dane Cty. Trans. [date] at [page:line].” Appellants’ Appendix also contains “bookmarks” linked to the findings of fact paragraphs herein.

of the Election. <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Trump%20Campaign%20Recount%20Petition.pdf>. (P. App. 1-9).

17. The totals following the Recount reported by WEC on November 30, 2020 were that President Donald J. Trump's and Vice President Michael R. Pence's electors received 1,610,184 votes and Joseph R. Biden's and Senator Kamala D. Harris' electors received 1,630,866 votes, a difference of 20,682. WEC, Signed Canvass for President – Vice President, *available at* <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20President%20-%20Vice%20President.pdf>; Milwaukee Cty. Trans. 11/27/20 at 27:11 - 28:4 (P. App. 10-11); Dane Cty. Trans. 11/29/20 at 12:15 - 13:5 (P. App. 12-13).

In-Person Absentee Ballots without Applications²

18. During the Recount, the Board of Canvassers for Milwaukee County found that 108,947 In-Person Absentee Ballots were issued by municipal clerks in Milwaukee County without the elector first submitting a separate, written application for such absentee ballot and were cast in the Election during the 14-day period allowed for in-person absentee voting pursuant to Wis. Stat. § 6.86(1)(b). Milwaukee Cty. Trans. 11/21/20 at 183:15 - 187:22 (P. App. 13-16).

19. During the Recount, the Board of Canvassers for Dane County found that 61,193 In-Person Absentee Ballots were issued by municipal clerks in Dane County without the elector first submitting a separate, written application for such absentee ballot and were cast in the Election

² Although colloquially referred to as “early voting,” Wisconsin law does not actually permit early voting. Instead, Wisconsin law authorizes a 14-day window preceding the election during which electors are authorized to apply for their absentee ballot in person at their clerk’s office and during which the clerk is authorized to act as the witness on an elector’s absentee ballot envelope. Wis. Stat. § 6.86(1)(b). Once the completed absentee ballot envelope is witnessed by the clerk, an elector’s absentee ballot is added to any absentee ballots the clerk has received by mail and processed and counted in the same manner as all other absentee ballots in the elector’s ward. *Id.* These are, as a matter of law, no different than any other absentee ballot and are treated as such.

during the 14-day period allowed for in-person absentee voting pursuant to Wis. Stat. § 6.86(1)(b). Dane Cty. Trans. 11/22/20 at 57:23 - 61:22 (P. App. 21-23); Dane Cty. Board Ex. 1 (P. App. 18).

20. As a result of the findings by the Dane and Milwaukee County Boards of Canvassers, a total of 170,140 In-Person Absentee Ballots were issued by municipal clerks throughout Dane and Milwaukee Counties without the elector first submitting a separate, written application for such absentee ballot and were cast in the Election in Milwaukee and Dane Counties during the 14-day period allowed for in-person absentee voting pursuant to Wis. Stat. § 6.86(1)(b) (the “In-Person Absentee Ballots without Applications”). Milwaukee Cty. Trans. 11/21/20 at 183:15 - 187:22 (P. App. 12-16); Dane Cty. Trans. 11/22/20 at 57:23 - 61:22 (P. App. 22-23); Dane Cty. Board Ex. 1 (P. App. 18).

21. WEC Form EL-121 is provided for electors to complete and submit as the required written application before a municipal clerk may issue such elector an absentee ballot, whether by mail or in-person (the “Application”). Form EL-121 at P. App. 24-25; *see also* WEC, EL-121 Absentee Ballot Application, <https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/EL-121%20Application%20for%20Absentee%20Ballot%20%28rev.%202020-06%29.pdf> (P. App. 24-25).

22. In the upper right-hand corner of the Form EL-121 Application there is a box for a municipal clerk to check if the person is an “in-person voter,” pursuant to Wis. Stat. § 6.86(1)(b), as shown below:

ot	(Municipal Clerk) If in-person voter, check here: <input type="checkbox"/>
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Id.

23. WEC Form EL-122 is the ballot envelope WEC provides for electors to return their absentee ballot (the “Ballot Envelope”). Form EL-122 (P. App. 26); *see also* WEC, EL-122 Standard Absentee Ballot Certificate (August 2020), <https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/EL-122%20Standard%20Absentee%20Ballot%20Certificate-portrait%20%28rev.%202020-08%29.pdf>.

24. Municipal clerks, outside of Dane County and Milwaukee County, properly require electors to complete and submit an Application before issuing an elector an absentee ballot during the 14-day period allowed for in-person absentee voting pursuant to Wis. Stat. § 6.86(1)(b). Milwaukee Cty. Trans. 11/25/20 at 84:16-85:9 (P. App. 171-172); Dane Cty. Trans. 11/28/20 at 6:7-25 (P. App. 170), Affidavit of Lori Opitz, dated November 20, 2020 at ¶¶ 2-4 (P. App. 31-32).

25. Municipal clerks throughout Milwaukee County did not require electors to complete and submit an application for an absentee ballot before issuing an absentee ballot during the 14-day period allowed for in-person absentee voting pursuant to Wis. Stat. § 6.86(1)(b). Milwaukee Cty. Trans. 11/20/20 at 35:18-25; Milwaukee Cty. Trans. 11/24/20 at 15:16 - 16:14 (P. App. 33-35); Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12, Ex. 158, Aff. Claire Woodall-Vogg dated 11/23/20 at ¶ 16 (P. App. 36-39).

26. Municipal clerks throughout Dane County did not require electors to complete and submit an application for an absentee ballot before issuing an absentee ballot during the 14-day period allowed for in-person absentee voting pursuant to Wis. Stat. § 6.86(1)(b). Dane Cty. Trans. 11/22/20 at 58:19-21 (P. App. 54).

27. During the Recount, Appellants objected to the counting of any In-Person

Absentee Ballots without separate Applications and requested that such ballots be rejected. Milwaukee Cty. Trans. 11/22/20 at 4:20-24 (P. App. 17); Dane Cty. Trans. 11/20/20 at 15:9 - 18:14 (P. App. 20-21).

28. Both the Milwaukee County and Dane County Boards of Canvassers overruled Appellants' objections to the counting of any In-Person Absentee Ballots without separate Applications, and such ballots were included and counted in the Recount. Milwaukee Cty. Trans. 11/21/20 at 186:11 - 187:10 (P. App. 27-28); Dane Cty. Trans. 11/20/20 at 36:15 - 40:25 (P. App. 29-30).

29. In both Dane County and Milwaukee County, the Canvassing Boards during the Recount found that a municipal clerk's receipt of the Ballot Envelope after the absentee ballot was issued and the elector voted, was sufficient to satisfy the statutory written application requirement. *See e.g.*, Milwaukee Cty. Trans. 11/20/20 at 34:13-20 (P. App. 41); Dane Cty. Trans. 11/22/20 at 58:19-21 (P. App. 42); Dane County Board Ex. 1 (P. App. 18); Milwaukee Cty. Trans. 11/20/20 at 57:1 - 66:2 (P. App. 43-52); Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12, Ex. 158, Aff. of Claire Woodall-Vogg dated 11/23/20 at ¶16 (P. App. 36-39) (“The absentee ballot certificate envelope serves as the absentee ballot request when a person votes in person absentee.”).

30. The Dane County Board of Canvassers made the following order:

The WEC identifies, through publicly available information that 61,193 electors cast absentee ballots in person in Dane County. This constitutes the beginning total of in-person absentee voters. A final total may be determined after the recount to account for drawdowns and in-person voters for which a ballot may not have been submitted. 2. Each of the in-person ballots delivered in person were accompanied by a signed EL-122 language. 3. The Board concludes that the EL-122 is legally sufficient to satisfy Wis. Stat. Section 6.86(1)(ar) and 9.01(1)(b)(2). No. 4. On November 20, 2020, the Board determined that a review of all absentee ballot applications is not required by the recount statute, Wis. Stat. 9.01(1)(b). The Board granted the Trump Campaign a standing

objection as to all absentee ballots. 5. The Board concludes as to in-person absentee voters, it is not necessary to make additional written absentee applications available at this time for further inspection. That's the order.

Dane Cty. Board Ex. 1 (P. App. 18); Dane Cty. Trans. 11/22/20 at 57:23 – 59:7.

Incomplete and Altered Absentee Ballots

31. At least 2,231 absentee ballots were cast in Milwaukee County for the Election with incomplete or incorrect Ballot Envelopes:

- a. At least 2,209 absentee Ballot Envelopes were missing witness addresses and that were added by the municipal clerk (P. App. 203-213);³
- b. At least 15 absentee Ballot Envelopes were missing witness signatures (P. App. 203-213); and
- c. At least 7 absentee Ballot Envelopes were missing the date (P. App. 203-213).

32. At least 2,238 absentee ballots were cast in Dane County with incomplete or incorrect Ballot Envelopes including at least:

- a. 2,233 Ballot Envelopes that did not have the municipal clerk's initials on the ballots (Dane Cty. Trans. 11/23/20 at 49:8-53:22, 11/24/20 at 78:25-79:18 (P. App. 56-57); Trump Ex. 13 (P. App. 152-162)); and
- b. Ballot Envelopes in which the clerk added a witness address (we have attached

³ Milwaukee County segregated the altered or "red ink" envelopes and placed them into new exhibit envelopes marked by municipality and ward. Milwaukee Cty. Trans. 11/21/20 at 20:18 - 22:22 (P. App. 174-176). Milwaukee County did this throughout the proceeding and was still processing this segregation as of the count's final day. *See* Milwaukee Cty. Trans. 11/25/20 at 10:23 - 11:13 (P. App. 177-178); 11/27/20 at 17:17 - 18:10 (P. App. 179-180). Milwaukee County did not issue its "final" exhibit list until December 4, 2020 and the vast majority of the exhibits submitted during the Recount are in the possession of the County. *See* Exhibit 829, "2020 General Election Recount," dated 12/04/20 (P. App. 181-202). In all, Milwaukee County had 2,209 envelopes that were altered or completed in red ink by the clerk; 15 envelopes that had no witness signature; and 7 that had a missing date. A detailed cite to the transcript and record is included at P. App. 203-213.

five samples, but numerous other Ballot Envelopes are in the record)(Dane Cty. Trans. 11/24/20 at 20:23-22:20, Ballot No. A7619 (P. App. 144-147); 11/25/20 at 43:18-44:21, Ballot No. 738A (P. App. 148-150); Dane Cty. Trans. at 11/25/20 at 83:1-84:22, Ballot No. 1002A (P. App. 140-141, 143); 11/28/20 at 61:1-25, Ballot No. 372 (P. App. 138-139); Ballot No. 571A (P. App. 151)).⁴

33. Municipal clerks in Milwaukee and Dane Counties changed the certification on the Ballot Envelopes after they had been submitted by supplying missing witness address information or Ballot Envelopes were left incomplete but nonetheless counted (collectively, the “Incomplete and Altered-Certification Absentee Ballots”). Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12, Ex. 158, Aff. Claire Woodall-Vogg dated 11/23/20 at ¶¶ 5-8 (P. App. 36-39).

34. During the Election, if “an absentee ballot envelope included the signature of the elector and witness, but was missing some or all of the witness’ address, [the City of Milwaukee] followed the October 18, 2016 Wisconsin Election Commission (“WEC”) Guidance Memorandum addressed to all Wisconsin County and Municipal Clerks as well as the City and County of Milwaukee Elections Commissions” and the clerks altered the incomplete certifications “in an attempt to remedy” the errors. Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12, Ex. 158, Aff. Claire Woodall-Vogg dated 11/23/20 at ¶ 6 (P. App. 36-39); *see also* WEC, AMENDED: Missing or Insufficient Witness Address on Absentee

⁴ Additionally, officials and clerks in municipalities in Dane County routinely disregarded the elections laws during their processing of the votes: (a) Clerk initials pre-printed on envelopes (Dane Cty. Trans. 11/21/20 at 103:13); (b) Clerk initials on ballots signed by unknown persons (Dane Cty. Trans. 11/25/20 at 19:1); (c) Envelopes witnessed by unauthorized poll workers (Dane Cty. Trans. 11/27/20 at 20:25); (d) No record of oath or bond required of poll workers (Dane Cty. Trans. 11/27/20 at 21:15); (e) Incomplete clerk title and address on envelopes (Dane Cty. Trans. 11/25/20 at 62:16); (f) Envelopes not properly marked as cast in person (Dane Cty. Trans. 11/21/20 at 81:17); (g) Sealed envelopes opened by clerks and added to count after Election Day (Dane Cty. Trans. 11/28/20 at 47:7); (h) Ballots initialed in purple and green ink (21 ballots, Dane Cty. Trans. 11/27/20 at 62:8) (P. App. 163-169).

Certificate Envelopes (October 18, 2016), available at https://elections.wi.gov/sites/elections.wi.gov/files/memo/20/guidance_insufficient_witness_address_amended_10_1_38089.pdf.

35. In Milwaukee, if witness information was added or altered on the Ballot Envelope, the “added information was done using a red pen.” Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12, Ex. 158, Aff. Claire Woodall-Vogg dated 11/23/20 at ¶ 9 (P. App. 36-39); *see also* Youtube.com, Milwaukee Central Count Training Video (April 1, 2020), <https://www.youtube.com/watch?v=hbm-pPaYIqk> (last visited November 25, 2020)(City of Milwaukee training video indicating, from 10:40 to 11:15 of the video, that election officials may insert a missing witness address in “red ink,” which is contrary to law).

36. Despite WEC’s October 2016 and October 2020 guidance, WEC’s Elections Day Manual reiterates that if a Ballot Envelope is missing a witness address or signature, the ballot must be rejected:

Note: If the envelope has been opened or resealed, the signature of either the elector or the witness is missing or the witness’ address is missing, the absentee ballot certificate envelope is insufficient, and the absentee ballot must be rejected.

WEC, Election Day Manual for Wisconsin Election Officials (Sept. 2020), at p. 93, available at: <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Election%20Day%20Manual%20%282020-09%29.pdf>.

37. During the Recount in both Dane and Milwaukee Counties, Appellants objected to the counting of any Incomplete and Altered-Certification Absentee Ballots. Dane Cty. Trans. 11/20/20 at 48:25 - 49:8 (P. App. 58); Milwaukee Cty. Trans. 11/23/20 at 25:19 - 27:21 (P. App.59-61).

38. Both the Milwaukee County and Dane County Boards of Canvassers overruled

Appellants' objections to the counting of Incomplete and Altered-Certification Absentee Ballots, and at least 4,469 Incomplete and Altered-Certification Absentee Ballots were counted and included in the Recount. Dane Cty. Trans. 11/20/20 at 60:1 - 65:14 (P. App. 62-63); Milwaukee Cty. Trans. 11/20/20 at 115:11 - 128:17 (P. App. 64-77).

Indefinitely Confined Absentee Ballots

39. There was a massive increase of applications for absentee ballots by individuals claiming to be indefinitely confined, and therefore exempt from the requirement to provide proof of identification, in the State and in many municipalities. For example, Milwaukee went from 6,000 absentee ballot applications from indefinitely confined electors at the beginning of 2020 to over 130,000 by November 2020 (the "Indefinitely Confined Absentee Ballots"). Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12, Ex. 158, Aff. Claire Woodall-Vogg dated 11/23/20 at ¶¶ 13-15 (P. App. 36-39).

40. In *Jefferson v. Dane*, No. 2020AP557-OA, the Supreme Court of Wisconsin issued an Order addressing certain concerns about the Indefinitely Confined status and, in that Order, the Court acknowledged that on March 25, 2020, the Dane County Clerk and the Milwaukee County Clerk publicly approved the use of Indefinitely Confined status by all electors due to the COVID-19 pandemic.⁵ See, e.g., March 31, 2020 Order, *Jefferson v. Dane*, No. 2020AP557-OA at 2 (explaining that the Dane County and Milwaukee County Clerks indicated that "all Dane [and Milwaukee] County electors could declare themselves to be 'indefinitely confined' under Wis. Stat. § 6.86(2)" because of the Safer at Home Order,

⁵ It is also true that claiming to be indefinitely confined was not necessary for any elector who wished to participate in the election and avoid excess contact with others. Wisconsin Stat. § 6.85 permits electors "unable" or "unwilling" to vote at the polls on Election Day to vote absentee, so any elector could have applied for an absentee ballot, voted that ballot and mailed that ballot back to the clerk without leaving their home. Claiming to be indefinitely confined, however, did allow tens of thousands of electors to vote without providing the legally required proof of identification.

“thereby avoiding the legal requirement to present or upload a copy of the elector’s proof of identification when requesting an absentee ballot” and concluding that such “advice was legally incorrect.”). *See* March 31, 2020 Order, *Jefferson v. Dane*, No. 2020AP557-OA at 2 (P. App. 78-80).

41. 28,395 Indefinitely Confined Absentee Ballots were issued and were altered without proof of identification in Dane and Milwaukee Counties to those claiming that status after March 25, 2020 (19,488 in Milwaukee County and 8,907 in Dane County). Milwaukee Cty. Trans. 11/27/20 at 19:23 - 22:3 (P. App. 81-84); Dane Cty. Trans. 11/28/20 at 7:2 - 12:6 (P. App. 85-86); *Aff. Jordan Moskowitz* dated 11/27/20 at ¶¶ 2-6, Ex. 1-4. P (App. 87-96); *Aff. Jordan Moskowitz* dated 11/25/20 at ¶¶ 1-4 (P. App. 128-137).

42. During the Recount, Appellants objected to the counting of any Indefinitely Confined Absentee Ballots issued and voted by persons claiming the status after March 25 who provided no proof of identification. Dane Cty. Trans. 11/28/20 at 7:12 – 17:11 (P. App. 85-86, 173); Milwaukee Cty. Trans. 11/27/20 at 19:23 - 22:22 (P. App. 81-84); Milwaukee Cty. Trans. 11/25/20 at Ex. 261, *Aff. Jordan Moskowitz* dated 11/25/20 (P. App. 128-137).

43. Both the Milwaukee County and Dane County Boards of Canvassers overruled Appellants’ objections to the counting of Indefinitely Confined Absentee Ballots issued and voted without proof of identification for those claiming that status after March 25, 2020 and, as a result, all 28,395 Indefinitely Confined Absentee Ballots, within that category were counted and included during the Recount. *Id.*

Democracy in the Park Absentee Ballots

44. 17,271 absentee ballots were completed and/or delivered to employees of the City of Madison on September 26, 2020, and October 3, 2020, at 206 separate locations in an

event dubbed “Democracy in the Park.” Dane Cty. Trans. 11/24/20 at 52:16 - 56:15 (P. App. 99-100); Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at ¶¶ 3-6, Ex. B-E (P. App. 101-113); Dane Cty. Trans. 11/24/20 at Ex. 2, Affidavit of Maribeth Witzel-Behl dated Nov. 23, 2020 (P. App. 122-134).

45. Joseph R. Biden’s Campaign widely advertised the “Democracy in the Park” events (Dane Cty. Trans. 11/24/20 at 57:11 - 58:16 (P. App. 114); Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at ¶ 2, Ex. A (P. App. 101-113)), as did the Madison City Clerk (Statement of Madison City Clerk Maribeth Witzel-Behl Regarding Democracy in the Park (Sept. 25, 2020), *available at* <https://www.cityofmadison.com/clerk/news/statement-of-madison-city-clerk-maribeth-witzel-behl-regarding-democracy-in-the-park>. Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at Ex. B-E (P. App. 101-113).

46. At the “Democracy in the Park” events, representatives of the City of Madison’s Clerk’s Office registered electors, received ballots, helped in the completion of Ballot Envelopes, instructed on the ballot process, and acted as witnesses for electors. Dane County Trans. 11/24/20 at 52:16 - 64:10 (P. App. 116-119); Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at ¶ 2, Ex. A (P. App. 101-113).

47. The only voting activity that did not take place at the “Democracy in the Park” events was the distribution of ballots. Dane Cty. Trans. 11/24/20 at 52:16 - 64:10 (P. App. 116-119).

48. None of the 206 locations used for the “Democracy in the Park” events were approved as alternate polling locations by the City of Madison Common Council. *See* City of Madison, Statement of Madison City Clerk Maribeth Witzel-Behl Regarding Democracy in

the Park (Sept. 25, 2020), available at <https://www.cityofmadison.com/clerk/news/statement-of-madison-city-clerk-maribeth-witzel-behl-regarding-democracy-in-the-park> (“Democracy in the Park” events were “created by, planned by, staffed by, and paid for by the City Clerk’s Office.”); *see also* Dane Cty. Trans. 11/24/20 at Ex. 2, Aff. Maribeth Witzel-Behl dated 11/23/20 at ¶ 5 (P. App. 122-124).

49. During the Recount, the Appellants objected to the counting of ballots collected during the “Democracy in the Park” events. Dane Cty. Trans. 11/24/20 at 52:3 - 56:15 (P. App. 99-100).

50. At the Recount, the Board of Canvassers for Dane County overruled Appellants’ objections to the counting of ballots collected during the “Democracy in the Park” events and, as a result, all 17,271 such ballots were counted and included during the entire Recount. Dane Cty. Trans. 11/24/20 at 72:21 – 73:16 (P. App. 120-121).

Procedural History

51. Immediately following the Recount, Appellants filed a Petition for Original Action and Memorandum and Appendix in support of such Petition with the Supreme Court of Wisconsin challenging, inter alia, the above-mentioned adverse determinations of the Dane and Milwaukee County Board of Canvassers. *See Trump v. Evers*, No. 2020AP1971-OA.

52. On December 3, 2020 the Wisconsin Supreme Court, in a 4-3 decision, denied Appellant’s Petition for Leave to Commence an Original Action.

53. Writing in concurrence with the majority, Justice Brian Hagedorn concluded that Appellant’s Petition should be denied because the “exclusive judicial remedy” for challenging the determinations during the Recount was to file an appeal under Wis. Stat. §§ 9.01(6)-(8). *Id.*; December 3, 2020 Order (the “SCOWis Order”).

54. The same day as the SCOWis Order was issued, Appellants timely filed a Notice of Appeal under Wis. Stat. § 9.01(6)(a). Milwaukee County Case 20CV0792, Doc. 7; Dane County Case 20CV2514, Doc. 7.

55. The Chief Justice of the Supreme Court of Wisconsin appointed the Honorable Stephen A. Simanek to preside over the consolidated appeal proceedings in this Matter. Milwaukee County Case 20CV0792, Doc. 15.

CONCLUSIONS OF LAW

56. An elector may vote by absentee ballot if the elector is “qualified” and is for any reason “unable or unwilling to appear at the polling place in his or her ward or election district.” Wis. Stat. § 6.85.

57. Absentee balloting, as opposed to voting in person at the polls on election day, is a “privilege”:

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. . . .*”) (emphasis added).

Wis. Stat. § 6.84(1).

58. The Legislature determined that voting by absentee ballot increases the risk of “fraud or abuse ... overzealous solicitation of absent electors who may prefer not to participate in an election ... undue influence on an absent elector ... or other similar abuses.” Wis. Stat. § 6.84(2).

59. The Legislature has also made clear that the statutory requirements for absentee balloting are mandatory and must be strictly applied:

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.

Id. (emphasis added).

60. With regard to all absentee ballots, “ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.” Wis. Stat. § 6.84(2).

In-Person Absentee Ballots Without Applications

61. Any In-Person Absentee Ballot that was received from an elector who did not previously complete and submit a written application for absentee ballot must be excluded from the Election results. Wis. Stats. §§ 6.86(1)(a); 6.86(1)(ar).

62. In order to obtain an absentee ballot, a registered and qualified absent elector must make “written application to the municipal clerk of that municipality for an official ballot” by mail or in person at the office of the municipal clerk or at an alternate site under s. 6.855, if applicable; or by other means as expressly provided in Wis. Stat. § 6.86(1)(a).

63. Wisconsin's statutes forbid clerks from issuing an absentee ballot to an elector unless the elector first submits a written application therefor: “[T]he municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality.” Wis. Stat. § 6.86(1)(ar) (emphasis added).

64. A municipal clerk must retain the written applications for absentee ballots. Wis. Stat. § 6.86(1)(ar) (“The clerk shall retain each absentee ballot application until destruction is authorized under s. 7.23 (1).”).

65. Envelopes are expressly not retained by the municipal clerk, but must, instead, be delivered to the County. Wis. Stat. § 7.52(4)(i) (“...the municipal clerk shall transmit the used envelopes to the county clerk”).

66. WEC even provides a form for the delivery of Ballot Envelopes to the County, and sets out post-election procedures describing that same process. WEC, Used Certificate Envelopes of Absentee Electors, available at https://elections.wi.gov/sites/elections.wi.gov/files/gab_forms/4/el_103_used_certificate_envelope_pdf_13716.pdf.

67. When an elector applies for an absentee ballot in person, the clerk must compare the name on the written application to the name on the proof of identification produced by the elector:

The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application and shall verify that any photograph appearing on that document reasonably resembles the elector.

Wis. Stat. § 6.86(1)(ar).

68. In *Lee v. Paulson*, applying Wis. Stat. § 6.86(1)(ar), the Court of Appeals excluded five absentee ballots from the certified election results because there was no corresponding written application, which changed the outcome of the election. 2001 WI App 19, 241 Wis.2d 38, 623 N.W.2d 577.

69. All In-Person Absentee Ballots without Applications issued by Dane County and Milwaukee Count “may not be counted” and if such ballots were erroneously counted, they “may not be included in the certified result of any election.” *Id.*; Wis. Stat. § 6.84(2).

70. Because municipal clerks throughout Milwaukee County did not require any written absentee ballot applications or EL-121 Forms during the 14-day period allowed for in-person absentee voting pursuant to Wis. Stat. § 6.86(1)(b), the 108,947 In-Person Absentee Ballots without Applications in Milwaukee County must be excluded from the results of the Recount. Wis. Stat. § 6.86(1)(ar); *Lee v. Paulson*, 2001 WI App 19, 241 Wis.2d 38, 623

N.W.2d 577.

71. Because municipal clerks throughout Dane County did not require any written absentee ballot applications or EL-121 Forms during the 14-day period allowed for in-person absentee voting pursuant to Wis. Stat. § 6.86(1)(b), the 61,193 In-Person Absentee Ballots in Dane County should be excluded from the results of the Recount. Wis. Stat. §§ 6.84(2), 6.86(1)(ar); *Lee v. Paulson*, 2001 WI App 19, 241 Wis.2d 38, 623 N.W.2d 577.

Incomplete and Altered-Certification Absentee Ballots

72. When casting an absentee ballot, the elector completes his or her ballot, places it inside the ballot certification envelope and seals it, which process must be witnessed, and the certification on the outside of the envelope requires the witness to sign and provide his or her address. Wis. Stat. § 6.87 (2) (emphasis added); see also Wis. Stat. § 6.87(4)(b)1.

73. The Wisconsin Legislature recently reaffirmed via the passage of 2015 Wis. Act 261 the long-held legal position of the State, that explicitly requires the exclusion of ballots that are contained in Ballot Envelopes that are incomplete. Wis. Stat. § 6.87(6d) (“If a certificate is missing the address of a witness, the ballot may not be counted.”); *see also* 2015 Wis. Act 261, § 78 (creating Wis. Stat. § 6.87(6d)).

74. Without the witness's address on the certification, the absentee ballot may not be counted: “If a certificate is missing the address of a witness, the ballot may not be counted.” Wis. Stat. § 6.87 (6d) (emphasis added).

75. There is only one statutorily authorized method for remedying an improperly completed absentee ballot certification (such as a certification lacking the witness's address), and that is to return it to the elector: “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 . . .” Wis. Stat. § 6.87 (9).

76. WEC’s published guidance indicates:

Note: If the envelope has been opened or resealed, the signature of either the elector or the witness is missing or the witness’ address is missing, the absentee ballot certificate envelope is insufficient, and the absentee ballot must be rejected.

WEC, Election Day Manual for Wisconsin Election Officials September 2020, *available at* <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Election%20Day%20Manual%20%282020-09%29.pdf>.

77. All Incomplete and Altered-Certification Absentee Ballots included in the Recount in Milwaukee County must be excluded from the Recount results. Wis. Stat. §§ 6.84(2), 6.87(6d).

78. All Incomplete and Altered-Certification Absentee Ballots included in the Recount in Dane County must be excluded from the Recount results. Wis. Stat. §§ 6.84(2), 6.87(6d).

Indefinitely Confined Absentee Ballots

79. All eligible electors must provide proof of identification in order to register to vote, and each time they vote. Wis. Stat. §§ 6.79(2)(a), 6.87(1)

80. Proof of identification is also required when requesting to vote by absentee ballot. Wis. Stat. §§ 6.86(1)(ac), (ar), and 6.87(1).

81. There are very limited exceptions to the requirement that an elector must provide proof of identification with any application for an absentee ballot, including an exception if an elector certifies that he or she is “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period.” Wis. Stat. § 6.86(2)(a).

82. In order to qualify for the indefinitely confined exception, an elector must be “elderly, infirm or disabled and indefinitely confined.” *Frank v. Walker*, 17 F. Supp. 3d 837, 844 (E.D. Wis. Apr 29, 2014) (emphasis added), *rev’d on other grounds*, 768 F.3d 744 (7th Cir. 2014).

83. Pursuant to Wis. Stat. § 6.86(2)(a), anyone “who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period” may, by “signing a statement to that effect require that an absentee ballot be sent to the elector automatically for every election,” and does not need to provide proof of identification—unlike those who vote by absentee ballot by other means.

84. Municipal Clerks are expressly charged with the responsibility to review and expunge from the voter rolls those claiming to be Indefinitely Confined Voters when the Clerk has “reliable information that [the]... elector no longer qualifies for the service.” Wis. Stat. 6.86(2)(b).

85. Electors who claimed they were Indefinitely Confined, but were not themselves physically, ill, infirm, elderly, or disabled were obligated to take steps to be removed from that status prior to the November 3, 2020, election. Wis. Stat. § 6.86(2)(a).

86. Clerks’ advice in Dane and Milwaukee Counties, indicating that electors in such counties could declare themselves “indefinitely confined” under Wis. Stat. § 6.86(2) because of the Safer at Home Order was legally incorrect. See March 31, 2020 Order, *Jefferson v. Dane*, No. 2020AP557-OA at 2 (P. App. 125-127).

87. All 8,907 Indefinitely Confined Absentee Ballots voted by a person claiming indefinitely confined status after March 25, 2020 that were cast without proof of identification must be excluded from the Recount results. Wis. Stat. §§ 6.86(2)(a), 6.84(2) (absentee ballot

procedures are “mandatory” and “[b]allots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.”).

88. All 19,488 Indefinitely Confined Absentee Ballots voted by a person claiming that status March 25, 2020 that were cast without proof of identification must be excluded from the Recount results.

Democracy in the Park Absentee Ballots

89. Wisconsin’s careful regulation of absentee balloting requires that all absentee ballots must “be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” Wis. Stats. § 6.87(4)(b)1; accord *Olson v. Lindberg*, 2 Wis. 2d 229, 236, 85 N.W.2d 775, 780 (1957) (excluding absentee ballots delivered to a location other than the appropriate municipal clerk’s office under a prior version of the statute).

90. “Democracy in Park” locations were not legally established alternate absentee ballot sites because they failed to meet Wis. Stat. § 6.855(1) obligations.

91. Alternate absentee ballot sites may only be established by the “governing body of a municipality” and, if such a site is designated by the governing body of a municipality, “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”—none of which occurred prior to the “Democracy in the Park” events. Wis. Stat. § 6.855(1).

92. The Democratic National Committee attempted to extend the deadline for approving alternate absentee ballot sites, such as “Democracy in the Park,” but their attempt was rejected. *See Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020).

93. All 17,271 absentee ballots collected at the “Democracy in the Park” events

must be excluded from the Recount results. Wis. Stat. §§ 6.87(4)(b)1, 6.84(2) (absentee ballot procedures are “mandatory” and “[b]allots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.”).

Appellants’ Remedies

94. 130,650 absentee ballots must be excluded from the Recount results in Milwaukee County, including (1) 108,947 In-Person Absentee Ballots without Applications; (2) 2,231 Incomplete and Altered-Certification Absentee Ballots; and (3) 19,488 Indefinitely Confined Absentee Ballots.

95. The Milwaukee County portion of this matter shall be remanded to the Milwaukee County Board of Canvassers with instructions to remove 130,650 absentee ballots from the Recount results in Milwaukee County, pursuant to the drawdown procedures contained in Wis. Stat. §§ 9.01(1)(b)2-4.

96. 73,402 absentee ballots must be excluded from the Recount results in Dane County, including (1) 61,193 In-Person Absentee Ballots without Applications; (2) at least 2,238 Incomplete and Altered-Certification Absentee Ballots; and (3) 8,907 Indefinitely Confined Absentee Ballots.

97. The Dane County portion of this matter shall be remanded to the Dane County Board of Canvassers with instructions to remove 73,402 absentee ballots from the Recount results in Dane County, pursuant to the drawdown procedures contained in Wis. Stat. §§ 9.01(1)(b)2-4.

Dated this 7th day of December, 2020.

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