NO. 20-_____

IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Petitioners,

v.

JOSEPH R. BIDEN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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December 29, 2020

QUESTIONS PRESENTED

Article II of the Constitution provides that "[e]ach State shall appoint" electors for President and Vice President "*in such Manner as the Legislature thereof may direct*." U.S. Const. art. II, § 1, cl. 2 (emphasis added). That power is "plenary," and the statutory provisions enacted by the Legislature of a State, in the furtherance of that constitutionally delegated duty, may not be ignored by state election officials or changed by state courts. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

Yet during the 2020 presidential election, officials in Wisconsin, wrongly backed by four of the seven Justices of the Wisconsin Supreme Court, ignored statutory provisions which tightly regulate absentee balloting — identified by the Legislature as "mandatory," such that ballots in violation of them "may not be counted." They require that absentee ballots be delivered *only* by mail or by hand delivery to the clerk, photo i.d. must be supplied to obtain ballots (with limited, inapplicable exceptions), and absentee ballots missing the required witness address may be "cured" only by the voter, and not by the clerk.

Collectively, this resulted in the counting of at least 50,125 absentee ballots in heavily Democrat areas, in violation of the directives of the Wisconsin Legislature — more than enough to have affected the outcome of the presidential election in Wisconsin, in which the vote margin stands at 20,682. The questions presented are therefore:

1. Whether it violates Article II of the Constitution, as well as the First and Fourteenth Amendments, for state courts, on review of a post-election challenge to the specific ballots cast in a presidential election, to invoke the non-statutory, judge-made doctrine of

laches to require the counting of ballots that the Legislature has expressly directed "may not be counted."

2. Whether the Wisconsin Supreme Court violated Article II by upholding the counting of 50,125 absentee ballots cast in two counties pursuant to the decisions of election officials to ignore or circumvent state statutes requiring that absentee ballots be delivered *only* by mail or by hand delivery to the clerk; that photo i.d. be supplied to obtain an absentee ballot (with limited, inapplicable exceptions); and that absentee-ballot envelopes must contain all statutorily required information and may not be altered once delivered.

3. Whether this Court should set aside the election result in Wisconsin, as not produced in the "Manner" directed by the Legislature, and hence as "failed" within the meaning of 3 U.S.C. § 2, thus affording the Wisconsin Legislature explicit statutory authority to appoint presidential electors to represent Wisconsin.

PARTIES TO THE PROCEEDING

Petitioners:

Donald J. Trump, Michael R. Pence, and Donald J. Trump for President, Inc.

Respondents:

Joseph R. Biden, Kamala D. Harris, Milwaukee County Clerk c/o George L. Christenson, Milwaukee County Board of Canvassers c/o Tim Posnanski, Wisconsin Elections Commission, Ann S. Jacobs, Dane County Clerk c/o Scott McDonell and Dane County Board of Canvassers c/o Alan Arnsten.

RULE 29.6 STATEMENT

Petitioner, Donald J. Trump for President, Inc., is the official campaign committee for Donald J. Trump, President of the United States and candidate for reelection to the office of President. Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Petitioners are the President and Vice President of the United States, currently seeking reelection to those offices. Petitioners respectfully petition for a writ of certiorari to review the judgment of the Wisconsin Supreme Court concerning that State's electoral votes. Competing slates of electoral votes cast on December 14, 2020, in Wisconsin and in six other still-contested States, are set to be counted in Congress beginning on January 6, 2021. To minimize the prospect of delays in that electoral count, petitioners request that this petition be given expedited consideration and be consolidated with any other petitions for certiorari raising similar issues that the Court deems worthy of review, including two filed from Pennsylvania.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin, of which review is sought, dated December 14, 2020, is reported at 2020 WI 91, 2020 Wisc. LEXIS 193, 2020 WL 7331907, and reprinted in Pet. App. 1a-21a.[1]

That Court's earlier order, dated December 3, 2020, denying leave to commence an original action, is unreported, and reprinted in Pet. App. 85a-87a.

The Final Order of the Circuit Court of Milwaukee County, dated December 11, 2020, which was the subject of review below, is unreported, and reprinted in Pet. App. 105a-152a.

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[1] References to the attached Appendix are styled: "Pet. App. __a." References to the two-volume Petitioners' Appendix filed in the Wisconsin Supreme Court on Dec. 11, 2020, are styled: "__ WI App. __." To facilitate expedited review, copies of that Appendix have been posted at https://drive.google.com/file/d/1Dbdmf2YrrunoRVd65xK-cXeMO4DsYdbS/view?usp=sharing and https://drive.google.com/file/d/1lqN48WqQ-VjF9yj72CdPrYlwFodri2oC/view?usp=sharing.

JURISDICTION

The decision of the Supreme Court of Wisconsin was entered on December 14, 2020. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, § 1, cl. 2, of the United States Constitution provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."

The First Amendment of the Constitution provides:

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

The Fourteenth Amendment of the Constitution, § 1, provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pertinent provisions from Title 3 of the U.S. Code and Chapters 5, 6, 7 & 9 of the Wisconsin Statutes are reprinted in Pet. App. 153a-173a.

STATEMENT OF THE CASE

In key jurisdictions across our nation, with respect to the presidential election held on November 3, 2020, state and local election officials and courts altered or ignored state election laws, in violation of the federal Constitution's Article II assignment to State Legislatures of the plenary authority over the "Manner" of choosing electors, a matter of undoubted importance. *See, e.g.*, *Republican Party v. Boockvar*, 208 L.Ed.2d 266, 267, 2020 U.S. LEXIS 5188, 2020 WL 6304626 (2020) (Statement of Alito, J., joined by Thomas and Gorsuch, JJ.) ("[T]he constitutionality of the [Pennsylvania] Supreme Court's decision [in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. Sep. 17, 2020)] . . . has national importance, and there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution.").[2]

This case presents in stark relief several of the violations that occurred in Wisconsin. Together, those violations affected more than the current margin of difference between petitioners and former Vice President Biden and Senator Harris.

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[2] *See also* Motion for Leave to File Bill of Complaint, *State of Tex. v. Commonwealth of Pa., et. al*, No. 22O155 (U.S. S. Ct., filed Dec. 8, 2020), in which the State of Texas identified numerous provisions of state law that were altered or ignored in four key states — the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin. On December 11, this Court denied that motion for lack of standing. Petitioners' standing in this case is not at issue.

I. Mailed-In and Other Absentee Ballots and the Importance of Anti-Fraud Mandates

After the presidential election controversy in Florida in 2000, a bipartisan commission headed by former Democrat President Jimmy Carter and former Republican Secretary of State James Baker concluded that mailed-in ballots are "the largest source of potential voter fraud." *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform*, at 46 (Sept. 2005) (hereinafter, "Carter-Baker Report").[3]

Wisconsin's Legislature, which possesses "plenary" power under Article II of the U.S. Constitution to determine the manner for choosing Wisconsin's presidential electors, see Art. II, § 1, cl. 2; *McPherson v. Blecker*, 146 U.S. 1, 25 (1892); *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("*Bush II*"), has long been concerned about the potential for fraud with regard to mailed-in and other absentee ballots, and has enacted a presumption against counting such ballots unless they are cast in strict compliance with statutory requirements.

A. Presumption Against Absentee Ballots

The Wisconsin Legislature has enacted a general presumption under which every effort should be made to count a voter's election-day ballot, cast in person, even if statutory provisions have not been satisfied with exactitude. "Except as otherwise provided," its election code "shall be construed to give effect to the

[3] At: https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf.

will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." Wis. Stats. § 5.01(1).

By contrast, that general presumption does not apply to absentee ballots. For the Wisconsin Legislature has determined that absentee balloting is rife with the potential for fraud and other abuse, and so absentee balloting must be strictly regulated:

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

Wis. Stats. § 6.84(1). Accordingly, the Wisconsin Legislature has directed, with respect to several "matters relating to the absentee ballot process," that the relevant statutory provisions

> shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures

> specified in those provisions may not be included in the certified result of any election.

Id., § 6.84(2).

B. Specific Statutory Requirements

Three such provisions are implicated in this case.[4]

1. Photo I.D. to Obtain Absentee Ballots

The Wisconsin Legislature requires, with very limited exceptions, that all eligible voters must provide photographic proof of identity in order to register to vote, and each time they vote. Wis. Stats. §§ 6.79(2)(a), (3), and 6.87(1). Photo i.d. is also required when requesting to vote by absentee ballot. Wis. Stats. §§ 6.86(1)(ac), (ar) & 6.87(1).

The limited exceptions include an exception where a voter certifies that he or she is "indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period." Wis. Stats. § 6.86(2)(a). In order to qualify for this exception, a voter must be "elderly, infirm or disabled *and* indefinitely confined . . . ." *Frank v. Walker*, 17 F. Supp. 3d 837, 844 (E.D. Wis. 2014) (emphasis added), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014). Only voters who meet this strict definition of "indefinitely confined" in § 6.86(2)(a) are eligible to sign a statement to that effect and then "may, in lieu

[4] Petitioners' objection below to a fourth provision, involving the requirement that a "written application" be filed before an absentee ballot is received, *see* Pet. App. 14a-15a, 48a-50a, is no longer being pressed in these proceedings.

of providing proof of identification, submit with his or her absentee ballot a statement . . . which contains the name and address of the elector and verifies that the name and address are correct." Wis. Stats. § 6.87(4)(b)2.

2. Return of Absentee Ballots

The Wisconsin Legislature has also provided that there are two, and only two, ways that a voter may return an absentee ballot. No "drop boxes" or the equivalent are permitted under Wisconsin law. Instead, absentee ballots must *personally* be returned by the voter — either *mailed* to the clerk, or else *delivered in person* to the clerk's office. Wis. Stats. § 6.87(4)(b). Regarding personal delivery to the clerk's office, in general this means that there can be only *one* place in each municipality where ballots can be returned. Alternate locations can only be established through municipal authorities' compliance with very stringent rules set out in Wis. Stats. § 6.855(1). *See Olson v. Lindberg*, 2 Wis. 2d 229, 236, 85 N.W.2d 775 (1957).

3. "Curing" of Missing Information for Witnesses Who Sign Ballot Envelopes

Further, the Wisconsin Legislature has provided that absentee ballots must be witnessed, and must be returned to the municipal clerks in a secure, sealed ballot-certification envelope. Wis. Stats. § 6.86(3)(c). The certification on the outside of the envelope provides a place where the witness must sign *and provide his or her address*. Wis. Stats. § 6.87(2). A missing address is fatal: "If a certificate is missing the

address of a witness, the ballot *may not* be counted." Wis. Stats. § 6.87(6d) (emphasis added). As recently as 2015, the Wisconsin Legislature reaffirmed the essential requirement that the ballot envelope certificate must be fully and accurately completed by the voter and the witness. 2015 Wis. Act 261, § 78 (creating Wis. Stats. § 6.87(6d)).

The Legislature has provided one, and only one, legal 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 voter:

> 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. Stats. § 6.87(9).

II. These Anti-Fraud Mandates Were Disregarded by Wisconsin Election Officials

Following the initial canvass which announced that former Vice President Biden and Senator Harris had won Wisconsin by 20,427 votes out of 3,240,579 votes cast (a 0.620% margin),[5] petitioners filed for

[5] Wisconsin Elections Commission, Unofficial Results for the November 3, 2020 General Election, *available at* https://elections.wi.gov/elections-voting/results.

recounts in Milwaukee and Dane Counties, pursuant to Wis. Stats. § 9.01(1). Pet. App. 6a. The 50,125 absentee ballots challenged herein were cast in areas which heavily favored former Vice President Biden over President Trump — by more than 70 to 30[6] — and, in particular, through vote-drive events designed to favor Biden, 1 WI App. 104, 117-18, making it certain that these illegal ballots were more than enough to change the result. During the recount, which lasted from November 20 to 29, petitioners established that each of these anti-fraud mandates was disregarded by the election officials who administrated the election. The county and city officials in charge of the recounts nonetheless insisted on counting the affected ballots. *Id.* 36a-40a.

As Chief Justice Roggensack observed, without objection from any of the six other Justices of the Wisconsin Supreme Court, no pertinent facts are in dispute; the parties differ only on the legal conclusions to be drawn therefrom. *Id.* 41a, note 5.

A. Voters Were Encouraged to Lie, to Avoid the Photo I.D. Requirement, Using Covid-19 as an Excuse

Under Wisconsin law, clerks are responsible for ensuring that only qualified voters receive absentee ballots, and they must guard against prospective voters abusing the ability to avoid supplying photo i.d.

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[6] In Milwaukee and Dane Counties, Biden received 577,648 of a total of 804,451 votes cast, 71.8% of the total vote. WEC Canvass Reporting System County by County Report, Nov. 30, 2020, *available at* https://elections.wi.gov/sites/elections.wi.gov/files/County%20by%20County%20Report%20-%20President%20of%20the%20United%20States%20post%20recount.pdf.

on the basis that they claim to be "indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period." Wis. Stats. § 6.86(2)(a). The lists of voters thus entitled to vote without supplying photo i.d. "shall be kept current through all possible means," and "[t]he clerk shall remove the name" of anyone on the list "upon receipt of reliable information that" the voter no longer qualifies as "indefinitely confined." Wis. Stats. § 6.96(2)(b).

Rather than monitor the list of "indefinitely confined" voters for abuses, the clerks of Milwaukee and Dane Counties instead used all possible means to *encourage* voters to falsely qualify under this exception to the photo i.d. requirement. On March 25, 2020, the clerks issued statements advising the public that because of the Covid-19 "Safer at Home" precautions issued by the Wisconsin Governor, prospective voters were entitled to "declare themselves 'indefinitely confined under Wis. Stats. § 6.86(2) due to illness . . . thereby avoiding the legal requirement to present or upload a copy of the voter's proof of identification when requesting an absentee ballot." 1 WI App. 78-80 (Order of March 31, 2020, *Jefferson v. Dane*, No. 2020AP557-OA at 2).

Unsurprisingly, along with the clerks' failure to police the "indefinitely confined" status came an explosion of voters claiming such status to obtain ballots without providing photo i.d. In Milwaukee, for example, there were only 6,000 voters claiming that status at the start of 2020, 1 WI App. 38; by November the number had mushroomed to over 51,060. *Id*. 128. The recount proceeding established that 19,488 of them obtained ballots *after* the unlawful advice issued by the clerk on March 25, and ultimately were able to

cast ballots without ever providing identification. *Id.* 81-83, 128. Similarly, 8,907 voters in Dane County obtained ballots after March 25 without providing identification, *id.* 85-87, for a total of **28,395** ballots cast that were tainted by this unlawful advice and the clerks' subsequent failure to scrutinize applications to prevent this unlawful advice from being acted on.[7]

Petitioners objected to counting any of these ballots and requested that the ballots be excluded from the results. This was refused; the canvassing boards held that despite having issued their unlawful advice, the clerks had no obligation to verify that the individuals who claimed to be "indefinitely confined" after March 25 actually qualified for that status. *Id.* 63, 82-83, 85-86.

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[7] 1 WI App. 86, 173. So widespread and blatant was the fraud that, it turns out, two of the ten electors who cast electoral votes for the Biden-Harris ticket, who thus proved quite able to venture outside their homes, were among those who obtained absentee ballots by falsely claiming (as revealed by contemporaneous social-media posts) to be "indefinitely confined." Dan O'Donnell, "Dem State Senator, a Biden Elector, Falsely Claims Indefinite Confinement," Dec. 14, 2020, https://newstalk1130.iheart.com/featured/common-sense-central/content/2020-12-14-dem-state-senator-claims-indefinite-confinement-is-not-confined-to-home; Dan O'Donnell, "Second Biden Elector in Wisconsin Falsely Claimed Indefinite Confinement," https://newstalk1130.iheart.com/featured/common-sense-central/content/2020-12-16-second-biden-elector-in-wisconsin-falsely-claimed-indefinite-confinement.

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B. Extensive Violations of Chain-of-Custody Controls for Returning Absentee Ballots

To ensure a tight chain of custody over ballots, Wisconsin statutes also provide that there are only *two* means by which an absentee ballot can lawfully be returned, after being sealed in the return envelope: "The envelope shall be *mailed* by the elector, or *delivered in person*, to the municipal clerk . . . ." Wis. Stats. § 6.87(4)(b)1 (emphasis added). It is clear under this statutory regime that a voter must *personally* return the ballot (i.e., may not use an agent). *Olson v. Lindberg*, 2 Wis. 2d 229, 236-38, 85 N.W.2d 775 (1957) (interpreting earlier version of statute).

To maintain a strict chain of custody, once the absentee ballot is personally returned by the voter, Wisconsin statutes require that "the clerk shall enclose it, unopened, in a carrier envelope which shall be securely sealed and endorsed with the name and official title of the clerk," and a notation that the envelope can only be opened on election day, as part of the counting of votes. Wis. Stats. § 6.88(1). To ensure that the chain of custody remains unbroken, absentee ballots can only be delivered to the clerk's regular office or to an alternate site, established by the municipal governing body and staffed by government employees. Wis. Stats. § 6.855(1) & (3).[8]

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[8] Further, Wis. Stats. § 7.15(2m) provides that if an alternate site is established, "the municipal clerk shall operate such site as though it were his or her office for absentee ballot purposes and shall ensure that such site is adequately staffed." It was conceded below that there were no such alternate sites relevant in this case that were established by "[t]he governing body of a municipality." Wis. Stats. § 6.855(1). In Madison, for example, 206 separate locations were established by the clerk's

The Wisconsin statutes requiring that voters *personally* return their absentee ballots to a *staffed* office of the clerk (either by mail or in person) obviously rule out practices used in other states which permit ballots to be left in unstaffed drop boxes, or to be collected by partisan volunteers or others hired to act as voters' agents – so-called "ballot harvesters."

First, these practices were nonetheless used in the City of Madison (part of Dane County) to unlawfully collect 17,271 ballots at issue in this case. Under a program dubbed "Democracy in the Park," the city clerk placed poll workers in 206 locations on September 26 and October 3, 2020. 1 WI App. 100, 120, 123. These locations mimicked polling places, displaying signs identical to those used for elections, and appearing in every way to be voting sites, excepting only that ballots were not distributed. *Id*. 101-13, 117-20. These ad hoc sites for the harvesting of ballots violated Wisconsin law because they were never approved by the Madison Common Council, see pp. 12-13, note 8, *supra*, because they were geographically dispersed, rather than "located as near as practicable" to the clerk's office, Wis. Stats. § 6.855(1), and because the ballot envelopes were not delivered by mail or in person to the municipal clerk. Wis. Stats. § 6.87(4)(b)(1).

Second, because these sites were coordinated with, and heavily promoted by, the Biden-Harris

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office, acting unilaterally. 1 WI App. 123. That none of them qualified as alternate sites is evident given that the regular clerk's office continued in operation for absentee balloting. *See* Wis. Stats. § 6.855(1) (requiring that if an alternate site is established, "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").

campaign, 1 WI App. 104, 117-18, they could not be squared with the Legislature's admonition in Wis. Stats. § 6.87(4)(b)(1) that "no site may be designated that affords an advantage to any political party.

Petitioners objected to the counting of these **17,271** ballots received during the "Democracy in the Park" events. *Id.* 100, 119. The Dane County Board of Canvassers nonetheless held against petitioners and counted all the ballots. *Id.* 120-121.

C. Tampering With, and Counting of, Defective Absentee Ballot Envelopes

Another 4,469 absentee ballots were isolated by petitioners as unlawfully counted because the ballot envelope certificates violated the requirement, recently reaffirmed by the Legislature, that they be fully and accurately completed by both the voter *and* the witness, including the witness's address and the clerk's initials (if the absentee ballot was cast in person, Wis. Stats. § 6.87(2)) — and that any deficiency can be corrected *only* by the voter. *Id.* § 6.87(6d). See pp. 7-8, *supra*.

Ignoring the sole means of "curing" deficient ballot envelope certificates identified by the Legislature, employees of the municipal clerks' offices in Milwaukee and Dane Counties took it upon themselves to search for missing information on the internet and write it on the ballot envelope.[9] During the recount, petitioners'

[9] The City of Milwaukee used red ink to signify that an address had been added or altered by the clerk's office. 1 WI App. 38; *see also* Youtube.com, Milwaukee Central Count Training Video (April 1, 2020), https://youtu.be/hbm-pPaYIqk (visited December 28, 2020) (City of Milwaukee training video indicating,

legal objection to these ballots was rejected.[10] Included in the final vote totals were 2,231 absentee ballots in Milwaukee County with incomplete or clerk-altered absentee envelopes, 1 WI App. 203-13, and 2,238 such ballots in Dane County, *id*. 56-57, 152; *see also id*. 139, 143, 147, 150-51, for a total of **4,469** absentee ballots.

III. The Wisconsin Supreme Court Tolerated These Deviations From the Manner in Which the Legislature Directed the Election be Conducted

A. Procedural History

On December 1, 2020, one day after the Wisconsin Elections Commission found, following the recount, that the Biden-Harris ticket had received 20,682 more votes than petitioners, petitioners filed for immediate review in the Wisconsin Supreme Court, invoking its original jurisdiction. Pet. App. 40a. The Court denied review on December 3, Pet. App. 85a-87a, with the deciding vote cast by Justice Brian Hagedorn, who concluded that Wis. Stats. § 9.01 required that all challenges to the result of a recount must be decided through an appeal filed with the circuit court. Pet.

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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). In other municipalities, the clerks initialed the certification next to the addresses they added. 1 WI App. 140, 144.

[10] 1 WI App. 58, 60-61. During the recount, it was uncontested that the objected-to ballots were either incomplete or altered. Having noted the existence of incomplete and altered envelopes, the canvassing boards of both counties nonetheless allowed them to be counted. 1 WI App. 62-65, 67-68, 72, 74.

App. 87a-89a.

Petitioners' appeals were, accordingly, filed the same day, and after briefing and oral argument, were decided on December 11, with the circuit judge assigned to the consolidated appeals reaching the merits of all of petitioners' arguments, but denying all relief sought. *Id*. 105a-06a. Later that day, petitioners filed an appeal in the Wisconsin intermediate appellate court, along with a motion with the Wisconsin Supreme Court seeking to bypass the intermediate appellate court, which was granted. *Id*. 7a. That Court heard oral argument on December 12,[11] and issued its ruling on December 14.

B. Majority Decision

In his opinion for the 4-to-3 majority, Justice Hagedorn declined (with one exception) even to review the merits of the circuit court's rulings on petitioners' objections. He issued this decision notwithstanding his ruling eleven days earlier recognizing that, per the Wisconsin Legislature, an aggrieved candidate has an appeal as of right from a recount.

As to petitioners' objection to the 17,271 absentee ballots in Madison that were not returned by mail or in person to the clerk's office, and the 4,469 absentee ballots in Dane and Milwaukee Counties that had missing or altered ballot certifications, the majority found these objections barred by the common-law doctrine of laches. Here the Justices contended that petitioners should have brought suit earlier, even

[11] Video of the oral argument is *available at* https://wiseye.org/2020/12/12/wisconsin-supreme-court-oral-argument-donald-j-trump-v-joseph-r-biden/.

though they had not been harmed by the relevant practices until the ballots at issue were counted in violation of Wisconsin statutes. Pet. App. 9a-20a.[12]

The majority did, however, address petitioners' objection that the clerks of both Milwaukee and Dane Counties had on March 25, 2020, explicitly encouraged voters to lie in order to obtain absentee ballots without providing photo i.d., by using Covid-19 as an excuse to claim they were "indefinitely confined because of age, physical illness or infirmity" — and had done nothing to scrutinize the veracity of the 28,395 absentee ballots cast by voters who afterwards obtained that status. See pp. 9-11, *supra*. Ignoring the rank unlawfulness of the clerks' actions and the statutory obligation of *the clerks* to police the voting rolls for voters abusing this status, the majority refused any remedy on the basis that petitioners had failed to prove a negative: they had not met their supposed burden of affirmatively proving, with respect to the 28,395 tainted ballots, that the voters who cast them were *not* "in fact indefinitely confined . . . ." Pet. App. 8a-9a.

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[12] Despite the majority decision written by Justice Hagedorn having *refused* to reach the merits of these claims based on the doctrine of laches, Justice Hagedorn curiously issued an opinion concurring in his own majority opinion, in which he volunteered additional views, albeit tentative — "[a] comprehensive analysis" not being "possible or appropriate in light of the abbreviated nature of this review," Pet. App. 23a — on aspects of the merits that the majority had not decided. *Id*. 23a-34a. Subsequently he granted an interview to the *New York Times* in which he issued a further opinion on the case: that "[t]here was certainly nothing in the nature of the law or the facts that supported getting anywhere close" to "throw[ing] out" the election. Reid J. Epstein, "A Conservative Justice in Wisconsin Says He Followed the Law, Not the Politics," *N.Y. Times*, Dec. 28, 2020, *available at* https://nyti.ms/3mAUOB0.

C. Dissenting Opinions

Each of the three dissenting Justices wrote dissents, joined by their dissenting colleagues.

First, Chief Justice Roggensack accused the majority of cowardice — of lacking "the courage" to address the merits of the case, and opting instead to "throw the cloak of laches over numerous problems" with the election. Pet. App.35a. "[F]our justices on this court," she complained, "cannot be bothered with addressing what the statutes require to assure that absentee ballots are lawfully cast." *Id*.

On the merits, writing for all three dissenters, Chief Justice Roggensack agreed with petitioners' objection to the **4,469** ballot envelopes with missing or altered information. *Id*. 43a-48a. She also agreed with petitioners' objection to the **17,271** absentee ballots collected in 206 locations during Madison's "Democracy in the Park" voting drive that had been promoted by the Biden-Harris campaign. Rejecting the clerks' suggestion that these ballots had been validly collected, she concluded that there was no conceivable rationale for finding that these ballots could be legally counted. *Id.* 51a-54a.

As to the remaining **28,395** challenged ballots, Chief Justice Roggensack agreed with petitioners that the county clerks had violated the Wisconsin statutes by encouraging voters to use Covid-19 as an excuse to falsely claim they were "indefinitely confined," but she refrained from further analysis based on questions about the completeness of the record concerning the appropriate remedy. *Id.* 50a-51a.

Second, Justice Ziegler likewise criticized the majority for abdicating its responsibility to decide the issues presented by the case, noting that "the majority

opinion fails to even mention, let alone analyze, the pertinent Wisconsin statutes." *Id.* 56a. She particularly targeted the majority's reliance on laches to justify not reaching the merits, suggesting it was a pretextual excuse:

> "[O]ur constitutional duty requires us to declare what the law is. Quite obviously, defaulting to laches and claiming that it is "just not possible" is directly contradicted by the majority author's own undertaking. If it is important enough to address in his concurrence, then it should also satisfy the discretionary standard which overcomes the application of laches. Instead of undertaking the duty to decide novel legal issues presented, this court shirks its institutional responsibility to the public and instead falls back on a self-prescribed, previously unknown standard it calls laches.

Id. 56a-57a. In her view, applying the doctrine of laches was entirely inappropriate: the majority's view that this lawsuit is "a challenge to general election policies" is incorrect, because "this lawsuit is a challenge to specific ballots that were cast in this election, contrary to the law," *id.* 61a, under a statute commanding that such ballots cannot be counted. *Id.* 68a-69a.

Finally, Justice Rebecca Grassl Bradley excoriated the majority as fundamentally anti-democratic, for relying on "the discretionary doctrine of laches as a mechanism to avoid answering questions of law the people of Wisconsin elected us to decide," *id.* 71a, thus denying "the citizens of Wisconsin any

judicial scrutiny of the election whatsoever." *Id.* 79a. Rejecting the majority's view that this lawsuit could have been brought years earlier, she noted that Wis. Stats. § 9.01(11) authorized only *post*-election review of specific ballots, and pointed out that the "rules" the majority claimed should have been challenged earlier consisted merely of non-binding guidance by an unelected election commission, which cannot supplant statutory mandates. *Id.* 75a-77a.

"When the state's highest court refuses to uphold the law, and stands by while an unelected body of six commissioners rewrites it," Justice Bradley observed, "our system of representative government is subverted." *Id.* 71a. She was particularly troubled about this result being reached after one Justice in the majority complained during oral argument, addressing the attorney representing the President, that: "You want us to overturn this election so that your king can stay in power, and that is so un-American."[13] "When a justice displays such overt political bias, the public's confidence in the integrity and impartiality of the judiciary is destroyed." *Id.* Justice Bradley concluded:

> The majority's failure to act leaves an indelible stain on our most recent election. It will also profoundly and perhaps irreparably impact all

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[13] Pet. App. 72a, note 1 (quoting Justice Jill J. Karofsky). This exchange, with Justice Karofsky reading from prepared remarks, can be viewed in the oral argument video, see p. 16, note 11, *supra*, starting at 1:34:20. The blatant partisanship animating the majority vote, noted by Justice Bradley, was also illustrated by Justice Karofsky's labored effort to suggest a racist motive behind the President's selection of which counties to recount. *See* video at 0:04:15 to 0:05:00 (asserting that lawsuit "smacks of racism").

> local, statewide, and national elections going forward, with grave consequence to the State of Wisconsin and significant harm to the rule of law.

Id. 82a.

REASONS FOR GRANTING THE WRIT

I. The Wisconsin Supreme Court's Decision Invoking the Common-Law Doctrine of Laches to Avoid a Merits Decision Violates Article II and Threatens the Free Speech and Due Process Rights of Future Candidates

Justice Bradley was correct in warning of grave consequences for our nation, and particularly for the rule of law, if the decision below is left undisturbed. Petitioners properly and timely invoked Wisconsin statutes entitling them to judicial review as of right on their well-documented claims that a sizable number of absentee ballots — more than enough to make the difference in this election — were cast in violation of mandatory Wisconsin statutes. Yet the majority opted to "throw the cloak of laches over" the case, and refused to resolve the merits. Pet. App. 35a (Roggensack, C.J.).

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Accordingly, this Court has emphasized the importance of state courts acting in a manner "well calculated to sustain the confidence that all citizens must have in the outcome of elections." *Bush II*, 531

U.S. at 109. That confidence is now endangered. As Justice Ziegler noted in her dissent, "[r]ecent polls suggest that the American public, regardless of party affiliation, has serious questions about the integrity of the November 2020 election." Pet. App. 65a-66a & note 4. Such questions are only exacerbated when judges lack the courage to resolve election disputes on the merits, thereby allowing serious questions to fester, unaddressed, as has been permitted to occur here.[14]

This Court should grant review and reverse the decision below, first and foremost, because the majority's invocation of the common-law doctrine of laches cannot be squared with Article II, § 1, cl. 2, of the Constitution, which requires that States shall appoint presidential electors "in such Manner as the Legislature thereof may direct . . . ." *See McPherson v. Blacker*, 146 U.S. 1, 27 (1892). State legislative power in this sphere is "plenary." *Bush II*, 531 U.S. at 104; *McPherson*, 146 U.S. at 25. Where a state statute is made applicable to a presidential election, the legislature is acting "by virtue of a direct grant of authority made under Article II," *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("*Bush I*"), so that "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush II*, 531 U.S. at

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[14] A summary of disputes arising out of six key swing states (many left unaddressed by the judiciary), sketching some of the reasons for the public's unease concerning the election, was recently published by Peter Navarro, Director of the Office of Trade and Manufacturing Policy, in his personal capacity. *See* "The Immaculate Deception: Six Key Dimensions of Election Irregularities" (Dec. 17, 2020), *available at*: https://www.scribd.com/document/488534556/The-Immaculate-Deception-12-15-20-1.

113 (Rehnquist, C.J., joined by Scalia and Thomas, J.J., concurring).

Here, the Wisconsin Legislature has laid down two unambiguous statutory commands regarding how post-election review of ballots must be conducted where a candidate contends that specific ballots cannot be lawfully counted — neither of which was followed below.

First, as a *procedural* matter, under Wis. Stats. § 9.01(1)(a)1., any candidate who, after the initial vote count, trails by less than one percent of the votes cast, has the right to obtain a recount. Under § 9.01(5)(a), the officials conducting the recount must permit the filing of objections and evidence, and must make "specific findings of fact" on all contested ballots. Those findings are then reviewable in two appeals of right, first to the circuit court, § 9.01(6), and then to an appellate court. § 9.01(9). Here the Legislature has laid out with precision, procedurally, "the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process." § 9.01(11). *See Carlson v. Oconto County Board of Canvassers*, 2001 WI App 20, 240 Wis. 2d 438, 623 N.W.2d 195 (noting that § 9.01(11) is also the exclusive remedy for claims of election fraud).

Second, as a *substantive* matter, with regard to the absentee ballots at issue in this case, the Legislature has directed that given the potential for fraud and abuse inherent in absentee balloting, the ability to vote by absentee ballot must be treated as merely "a privilege," not a right, Wis. Stats. § 6.84(1), with regulations concerning them to "be construed as mandatory" — so that absentee ballots "cast in contravention" of statutory requirements "may not be

counted." *Id.* § 6.84(2). See pp. 5-6, *supra*.

There is not *a word* anywhere, in any of these statutes, suggesting that the election officials conducting a recount, or a circuit judge hearing an initial appeal, or appellate judges or justices hearing a final appeal, can refuse on the basis of laches, or any other judge-made "equitable" doctrine, to avoid a decision on the merits. The plain language of the applicable statutes requires that all involved must apply the "mandatory" substantive requirements imposed by the Wisconsin statutes to guard against fraud and abuse in absentee balloting and, where those requirements are not met, must refuse to count the affected ballots.

The dissenters below are correct that the majority, by invoking the doctrine of laches to avoid a decision on the merits, failed in its duty to apply the law enacted by the Legislature to the facts of the case and rule on the merits. Pet. App. 35a, 56a-57a, 71a, 82a.[15] Thus, this is a case where, as in *Bush v. Gore*, a state supreme court has failed to adhere to the plain meaning of the state statutes prescribing how election results are to be challenged. *Bush II*, 531 U.S. at 116-120 (Rehnquist, C.J., joined by Scalia and Thomas, J.J., concurring). Here, as in that case, "the clearly expressed intent of the legislature must prevail." *Id.* This conclusion – that the court below violated Article II by flouting the plain language of Wisconsin statutes mandating that discrete sets of unlawful ballots be excluded from the vote count — "does not imply a

[15] As the dissenters also noted, the doctrine of laches fails on its own terms when applied to the circumstances of this case. Pet. App. 59a-69a (Ziegler, J., joined by Roggensack, C.J., and R.G. Bradley, J., dissenting).

disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*." *Id*. (emphasis in original).

Third, the majority's application of laches is constitutionally fatally flawed for other reasons. The majority sought to excuse certain violations of the election code on the ground that an administrative agency, the Wisconsin Elections Commission ("WEC") had issued guidance documents endorsing the practices, which petitioners supposedly could have challenged earlier. Pet. App. 14a-16a, 18a, 20a. But petitioners could not fairly have been apprised of the need to mount such a pre-election challenge, *compare Bush II*, 531 U.S. at 114-15 (Rehnquist, C.J., joined by Scalia and Thomas, J.J., concurring), because it is not even clear they would have had *standing* to sue to challenge the WEC's informal guidance documents. For it is settled that the WEC's guidance documents "are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions."[16]

In sum, if left in place, the majority's reliance on laches would impose a burden on presidential candidates, in all battleground states, to monitor all election practices in numerous municipalities

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[16] *SEIU, Local 1 v. Vos*, 2020 WI 67, ¶102, 393 Wis. 2d 38, 946 N.W.2d 35. Indeed, the WEC itself acknowledges that its guidance documents are not legally binding. See WEC, Recount Manual at 14 (2 WI App. 492) ("Despite advice provided by [WEC] . . . ultimately [the Board of Canvassers] retains the authority and discretion to make decisions it deems appropriate."). This point is not disputed: the majority left unanswered the observation of Justice Bradley, in dissent, quoting the *SEIU* decision and concluding that "the majority commits a grave error by according WEC guidance the force of law." Pet. App. 71a-72a, ¶141.

(Wisconsin's elections are conducted by the local city, village, and town clerks, and in presidential elections the votes in smaller municipalities are canvassed at the county level; and there are 1,852 cities, villages, and towns, and 72 counties, in Wisconsin[17]), and bring litigation *before* election day against any practice that *might* end up later impacting the vote count, or risk being told later that they waited too long to sue, and will not be permitted to challenge unlawful ballots in a post-election proceeding authorized by state statutes. This is an impermissible burden on the right of a citizen to run for public office by seeking to persuade other citizens to cast their votes for him or her. To force a candidate, in the midst of the campaign, to continuously monitor ever-shifting election procedures and guess at which ones may impact the result, and expend scarce resources on preemptive litigation for fear of later being deemed barred from suit based on laches, would create a cloud of confusion, uncertainty, and ambiguity substantially burdening the First Amendment right to engage in election advocacy, *see e.g. Arizona Free Enterprise Club PAC v. Bennett*, 564 U.S. 721, 735-40 (2011); *Randall v. Sorrell*, 584 U.S. 230, 261-63 (2006), and would also violate the void-for-vagueness due process doctrine. *See e.g., FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

[17] *See* Wisconsin Policy Forum, "An Abundance of Goverment, August 2019, *available at* https://wispolicyforum.org /research/an-abundance-of-government.

II. The Wisconsin Supreme Court Violated Article II by Upholding the Counting of the 50,125 Absentee Ballots at Issue

This Court should hold that the 50,125 absentee ballots at issue are illegal and may not be counted, given the plain language of the Wisconsin statutes making it unlawful to count the ballots at issue, Wis. Stats. § 6.84(1) & (2), and the necessity of hewing closely to statutory language in post-election challenges to ballots in presidential elections, given the importance of ensuring that "the clearly expressed intent of the legislature must prevail." *Bush II*, 531 U.S. at 120 (Rehnquist, C.J., joined by Scalia and Thomas, J.J., concurring). *See also id*. at 112-14; *Bush I*, 531 U.S. at 76. Further, this Court should so rule on an expedited basis, given the press of time (the counting of electoral votes in Congress is scheduled to begin, under 3 U.S.C. § 15, on January 6).

First, as explained in pages 12-15, 18, *supra*, and the dissenting opinion cited therein, **17,271** absentee ballots were clearly cast in violation of mandatory chain-of-custody rules because they were neither *mailed* by the voter, nor returned to the clerk's office *in person*, but were instead deposited in drop boxes or scooped up by "ballot harvesters," in violation of Wis. Stats. § 6.87(4)(b)(1). Another **4,469** absentee ballots featured incomplete or altered ballot envelope certifications and hence violated Wis. Stats. §§ 6.87(2) & 6.87(6d). The **21,740** ballots in these two categories exceed the current vote margin between petitioners and former Vice President Biden and Senator Harris.

Second, as explained at pages 9-11, *supra*, an additional **28,395** absentee ballots are irreparably tainted because they were cast by voters who obtained

absentee ballots by claiming to be "indefinitely confined," *after* the clerks in their counties affirmatively encouraged voters to lie on their applications, using Covid-19 as an excuse for their fraudulent filing. Among the voters who thus obtained absentee ballots under false pretenses were two of the ten electors who cast electoral votes for the Biden-Harris ticket. *See* p. 11, note 7, *supra*.

The majority opinion below did not dispute the rank unlawfulness of the clerks' actions. Nor did it dispute that the clerks had an obligation, under Wis. Stats. § 6.96(2)(b) to police the voting rolls for voters abusing this status to obtain absentee ballots without supplying a photo i.d. Nonetheless, the majority refused any remedy on the basis that *petitioners had failed to prove a negative*: they had not met their supposed burden of affirmatively proving, with respect to the 28,395 tainted ballots, that the voters who cast them were *not*, "in fact, indefinitely confined . . . ." Pet. App. 8a-9a.

This analysis of the remedy for such a blatant violation of law is obviously inadequate. It would incentivize illegal activity in future elections in which it is difficult to prove the exact impact of the wrongdoing after ballots are opened. Other courts facing such situations, in which election officials, animated by partisan motives, have intentionally violated the law, but the impact of the wrongdoing is difficult to measure with exactitude, have resolved doubts against those officials in one of two ways. One way is to shift the burden of proof: all the affected ballots must be excluded unless *the election officials* can prove that some of them were cast legitimately. *See, e.g., Warf v. Bd. of Elections*, 619 F.3d 553, 561-62 (6th Cir. 2010) ("once the contestant has made a

showing of irregularity, . . . contestee must then come forward with evidence of substantial compliance with balloting procedures"). Another way, when suspect ballots are great enough in number such that they "*could* have affected the outcome of the election," so as to "render the apparent result an unreliable indicium of the will of the electorate," is simply to void the election result. *Marks v. Stinson*, 19 F.3d 873, 886-87 (3d Cir. 1994) (emphasis in original).

Regardless of the approach used, this Court should enforce the Wisconsin Legislature's directive, that the rules governing absentee ballots are mandatory, and, based on these 28,395 tainted ballots, and the other 21,740 illegally counted ballots, hold that the election failed, and thus the results must be voided. As the Seventh Circuit correctly recognized in parallel litigation, in which it joined the Wisconsin Supreme Court in denying relief (primarily on the ground of laches), although the President's ultimate objective "to be declared the victor of Wisconsin" may be beyond the power of a court, a court *can* "declare the election results void," which "would provide the opportunity for the appointment of a new slate of electors," leaving it for "the Wisconsin Legislature to decide the next steps in advance of Congress's count of the Electoral College's votes on January 6, 2021." *Trump v. Wisconsin Elections Comm'n*, 2020 U.S. LEXIS 40360, at *10-*11 (7th Cir. Dec. 24, 2020).

III. This Court Should Set Aside the Wisconsin Election as "Failed" Under 3 U.S.C. § 2, Thus Affording the Wisconsin Legislature Explicit Statutory Authority to Appoint Presidential Electors to Represent Wisconsin

As previously indicated, petitioners respectfully request that this Court's consideration of this petition, and perhaps related petitions that have been submitted, or will be submitted in the near future, be expedited, to ensure a decision before the electoral votes are counted in Congress beginning on January 6, 2021. Under 3 U.S.C. § 2, this Court may hold, on the undisputed record, that Wisconsin "failed to make a choice on the day prescribed by law" and, thus, its "electors may be appointed on a subsequent day in such a manner as the legislature of such State shall prescribe."

Any contention by Respondents that the issues in this petition are moot, simply because the slate of Wisconsin electors pledged to former Vice President Biden and Senator Harris already met on December 14, 2020, and cast their votes and transmitted them to the President of the Senate, as required by 3 U.S.C. §§ 7, 11, is without merit. For in Wisconsin (as well as in six other states), the slate of electors pledged to petitioners *also* met, cast their votes, and likewise transmitted them to the President of the Senate, so that two competing slates of votes from Wisconsin will be present when the counting of votes commences on January 6.[18] This is the appropriate means by which

[18] Haisten Willis, et al., "As electoral college formalizes Biden's win, Trump backers hold their own vote," *Wash. Post*, Dec. 14, 2020 (*available at*

the time period for the resolution of challenges to the electoral votes of a State can be extended to its maximum, a means employed on two prior occasions, during the presidential elections of 1876 and 1960.[19]

Thus, if this Court issues effective relief before the electoral votes of Wisconsin are both opened *and* counted in Congress on or after January 6, this Court can ensure that Wisconsin's electoral votes are cast in compliance with Article II of the Constitution, by allowing the Wisconsin Legislature, after this Court's ruling that the November 3 vote in Wisconsin failed to make a valid appointment of electors, to step into the breach and exercise the authority conveyed by the plain language of 3 U.S.C. § 2 to appoint one of the slates of electors whose votes have already been transmitted to Congress.[20]

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https://www.washingtonpost.com/politics/trump-backers-electoral-college/2020/12/14/f0fcc59c-3e52-11eb-9453-fc36ba051781_story.html); Ivan Pentchoukov, "Electors in 7 States Cast Dueling Votes for Trump," *The Epoch Times* (Dec. 15, 2020) (*available at* https://www.theepochtimes.com/electors-in-7- states-cast-dueling-votes-for-trump_3620059.html).

[19] *See* Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 Yale L.J. 1407, 1421 n. 55 (2001) (Hawaii in 1960); William H. Rehnquist, *Centennial Crisis: The Disputed Election of 1876*, at 105-11 (2005) (Florida, Louisiana, South Carolina, and Oregon in 1876).

[20] Petitioners respectfully submit that the time available for the resolution of the purely legal issues presented by this case, and perhaps related cases, prior to the start of the electoral count in Congress is sufficient for this Court to give these issues due consideration — more time, indeed, than was available for the resolution of *Bush v. Gore*, in which the application for a stay was filed on December 8, 2000, and a final decision was announced just four days later. However, in the alternative, if this Court were

CONCLUSION

During the election crisis of 1876-77, President Grant observed that "either Party can afford to be disappointed in the result, but the country cannot afford to have the result tainted by suspicion of illegal or false returns." Rehnquist, *supra* note 19, at 101. That remains true. Twenty years ago this Court emphasized that state courts have a duty to act in a manner "well calculated to sustain the confidence that all citizens must have in the outcome of elections." *Bush II*, 531 U.S. at 109. The majority below shirked that duty, refusing to rule on the merits. The result, as Justice Ziegler observed, is to feed doubts that are already widespread among Americans concerning the integrity of the November 2020 election. *See* p. 22 & note 14, *supra*. This Court is likely the only institution of our government capable of credibly resolving the controversy over this election. It is now this Court's "unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Bush II*, 531 U.S. at 111.

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to choose not to expedite this case, petitioners would urge the Court to nonetheless grant the petition and consider it, with full briefing and argument, so as to address constitutional issues that would otherwise evade review which are likely to arise in future contests — including the 2024 presidential election, in which petitioners would remain eligible to run. In particular, the interference with the First Amendment right of a citizen to run for public office without being forced to expend enormous resources on pre-election litigation — a burden which has been created by the Wisconsin Supreme Court's reliance on the doctrine of laches to avoid a decision on the merits — necessitates this Court's review quite apart from whatever impact this Court's review might have on the outcome of the current presidential race.

For all the reasons stated, this Court should grant certiorari; it should hear this petition (and any related petitions it deems worthy of review) on an expedited basis; and it should rule on the merits that under the plain language of the Wisconsin statutes, Article II prohibits counting the 50,125 absentee ballots, and that the election in Wisconsin failed to make a choice of electors within the meaning of 3 U.S.C. § 2, thus permitting the Wisconsin Legislature to now make a choice of electors.

Respectfully submitted.

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December 29, 2020

APPENDICES

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Appendix A

2020 WI 91

SUPREME COURT OF WISCONSIN

Case No.: 2020AP2038

Complete Title:

Donald J. Trump, Michael R. Pence
and Donald J. Trump for President, Inc.,

Plaintiffs-Appellants,

v.

Joseph R. Biden, Kamala D. Harris,
Milwaukee County Clerk c/o George L. Christenson,
Milwaukee County Board of Canvassers
c/o Tim Posnanski, Wisconsin Elections Commission,
Ann S. Jacobs, Dane County Clerk
c/o Scott McDonell and Dane County Board of
Canvassers c/o Alan Arnsten,

Defendants-Respondents.

ON PETITION TO BYPASS COURT OF APPEALS,
REVIEW OF DECISION OF THE CIRCUIT COURT

OPINION FILED: December 14, 2020

SUBMITTED ON BRIEFS:

ORAL ARGUMENT: December 12, 2020

SOURCE OF APPEAL:

COURT: Circuit Court

COUNTY: Milwaukee

JUDGE: Stephen A. Simanek

JUSTICES:

HAGEDORN, J., delivered the majority opinion of the Court, in which ANN WALSH BRADLEY, DALLET, and KAROFSKY, JJ., joined. DALLET and KAROFSKY, JJ., filed a concurring opinion. HAGEDORN, J., filed a concurring opinion, in which ANN WALSH BRADLEY, J., joined. ROGGENSACK, C.J., filed a dissenting opinion, in which ZIEGLER and REBECCA GRASSL BRADLEY, JJ., joined. ZIEGLER, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and REBECCA GRASSL BRADLEY, J., joined. REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and ZIEGLER, J., joined.

NOT PARTICIPATING:

ATTORNEYS:

For the plaintiffs-appellants, a brief was filed by James R. Troupis and Troupis Law Office, Cross Plains, and R. George Burnett and Conway, Olejniczak & Jerry S.C., Green Bay. Oral argument presented by James R. Troupis.

For the defendants-respondents Joseph R. Biden and Kamala D. Harris, a brief was filed by Matthew W. O'Neill and Fox, O'Neill & Shannon, S.C., Milwaukee, Charles G. Curtis, Jr., Michelle M. Umberger, Will M. Conley and Perkins Coie LLP, Madison, and John M. Devaney (pro hac vice) and Perkins Coie LLP, Washington, D.C. Oral argument was presented by John M. Devaney.

For the defendants-respondents Wisconsin Elections Commission and Ann S. Jacobs, oral argument was presented by assistant attorney general Colin T. Roth.

2020 WI 91

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2020AP2038
(L.C. No. 2020CV2514 & 2020CV7092)

STATE OF WISCONSIN: IN SUPREME COURT

Donald J. Trump, Michael R. Pence and Donald J. Trump for President, Inc.,

Plaintiffs-Appellants,

v.

Joseph R. Biden, Kamala D. Harris, Milwaukee County Clerk c/o George L. Christenson, Milwaukee County Board of Canvassers c/o Tim Posnanski, Wisconsin Elections Commission, Ann S. Jacobs, Dane County Clerk c/o Scott McDonell and Dane County Board of Canvassers c/o Alan Arnsten,

Defendants-Respondents.

FILED

DEC 14, 2020

Sheila T. Reiff
Clerk of Supreme Court

HAGEDORN, J., delivered the majority opinion of the Court, in which ANN WALSH BRADLEY, DALLET, and KAROFSKY, JJ., joined. DALLET and KAROFSKY, JJ., filed a concurring opinion. HAGEDORN, J., filed a concurring opinion, which ANN WALSH BRADLEY, J., joined.

ROGGENSACK, C.J., filed a dissenting opinion, in which ZIEGLER and REBECCA GRASSL BRADLEY, JJ., joined. ZIEGLER, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and REBECCA GRASSL BRADLEY, J., joined. REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and ZIEGLER, J., joined.

APPEAL from a judgment and an order of the Circuit Court for Milwaukee County, Stephen A. Simanek, Reserve Judge. *Affirmed*.

¶1 BRIAN HAGEDORN, J. In the 2020 presidential election, the initial Wisconsin county canvasses showed that Wisconsin voters selected Joseph R. Biden and Kamala D. Harris as the recipients of Wisconsin's electoral college votes. The petitioners[1] (collectively, the "Campaign") bring an action under Wis. Stat. § 9.01 (2017-18)[2] seeking to invalidate a sufficient number of Wisconsin ballots to change Wisconsin's certified election results. Specifically, the Campaign seeks to invalidate the ballots – either directly or through a drawdown – of more than 220,000 Wisconsin voters in Dane and Milwaukee Counties.

¶2 The Campaign focuses its objections on four different categories of ballots – each applying only to

[1] The petitioners are Donald J. Trump, Michael R. Pence, and Donald J. Trump for President, Inc.

[2] All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

voters in Dane County and Milwaukee County. First, it seeks to strike all ballots cast by voters who claimed indefinitely confined status since March 25, 2020. Second, it argues that a form used for in-person absentee voting is not a "written application" and therefore all in-person absentee ballots should be struck. Third, it maintains that municipal officials improperly added witness information on absentee ballot certifications, and that these ballots are therefore invalid. Finally, the Campaign asserts that all ballots collected at "Democracy in the Park," two City of Madison events in late September and early October, were illegally cast.

¶3 We conclude the Campaign is not entitled to the relief it seeks. The challenge to the indefinitely confined voter ballots is meritless on its face, and the other three categories of ballots challenged fail under the doctrine of laches.

I. BACKGROUND

¶4 After all votes were counted and canvassing was completed for the 2020 presidential election contest, the results showed that Vice President Biden and Senator Harris won Wisconsin by 20,427 votes. The Campaign sought a recount in two of Wisconsin's 72 counties – Milwaukee and Dane. The Milwaukee County Elections Commission and the Dane County Board of Canvassers conducted the recount and certified the results. The recount increased the margin of victory for Vice President Biden and Senator Harris to 20,682 votes.

¶5 The Campaign appealed those decisions in a consolidated appeal to the circuit court under Wis. Stat. § 9.01(6)(a), naming Vice President Biden,

Senator Harris, the Wisconsin Elections Commission (WEC), and several election officials as respondents.[3] The circuit court[4] affirmed the determinations of the Dane County Board of Canvassers and the Milwaukee County Elections Commission in full. The Campaign appealed and filed a petition for bypass, which we granted.

II. DISCUSSION

¶6 The Campaign asks this court to reverse determinations of the Dane County Board of Canvassers and the Milwaukee County Elections Commission with respect to four categories of ballots it rgues were unlawfully cast.[5] The respondents argue that all ballots were cast in compliance with the law, or at least that the Campaign has not shown otherwise. They further maintain that a multitude of legal doctrines – including laches, equitable estoppel, unclean hands, due process, and equal protection – bar the Campaign from receiving its requested relief. We agree that the challenge to the indefinitely confined voter ballots is without merit, and that laches bars the

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[3] Also named were Milwaukee County Clerk c/o George L. Christenson, Milwaukee County Board of Canvassers c/o Tim Posnanski, Ann S. Jacobs, Dane County Clerk c/o Scott McDonell, and Dane County Board of Canvassers c/o Alan Arnsten.

[4] The consolidated appeals were assigned to Reserve Judge Stephen A. Simanek.

[5] We may set aside or modify the determination if "a provision of law" is "erroneously interpreted" and "a correct interpretation compels a particular action." Wis. Stat. § 9.01(8). We accept the findings of fact unless a factual finding "is not supported by substantial evidence." *Id.*

relief the Campaign seeks on the three remaining categories of challenged ballots.

A. Indefinitely Confined Voters

¶7 Wisconsin allows voters to declare themselves indefinitely confined, provided they meet the statutory requirements. *See* Wis. Stat. § 6.86(2)(a).[6] These individuals are not required to provide photo identification to obtain an absentee ballot. *Id.* On March 25, 2020, the Dane and Milwaukee County Clerks issued guidance on Facebook suggesting all voters could declare themselves indefinitely confined because of the pandemic and the governor's then-existing Safer-at-Home Order. This court unanimously deemed that advice incorrect on March 31, 2020, and we noted that "the WEC guidance . . . provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." The county clerks immediately updated

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[6] 6 Wisconsin Stat. § 6.86(2)(a) provides:

> An elector 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. The application form and instructions shall be prescribed by the commission, and furnished upon request to any elector by each municipality. The envelope containing the absentee ballot shall be clearly marked as not forwardable. If any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.

their advice in accordance with our decision.

¶8 The Campaign does not challenge the ballots of individual voters. Rather, the Campaign argues that *all* voters claiming indefinitely confined status since the date of the erroneous Facebook advice should have their votes invalidated, whether they are actually indefinitely confined or not. Although the number of individuals claiming indefinitely confined status has increased throughout the state, the Campaign asks us to apply this blanket invalidation of indefinitely confined voters only to ballots cast in Dane and Milwaukee Counties, a total exceeding 28,000 votes. The Campaign's request to strike indefinitely confined voters in Dane and Milwaukee Counties as a class without regard to whether any individual voter was in fact indefinitely confined has no basis in reason or law; it is wholly without merit.

B. Laches

¶9 Three additional categories of ballots are challenged by the Campaign. In Milwaukee and Dane Counties, the Campaign asserts all in-person absentee votes were cast unlawfully without an application, and that all absentee ballots with certifications containing witness address information added by the municipal clerks were improperly counted. Additionally, the Campaign challenges all ballots returned at the City of Madison's "Democracy in the Park" events.

¶10 All three of these challenges fail under the longstanding and well-settled doctrine of laches. "Laches is founded on the notion that equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936

N.W.2d 587. Application of laches is within the court's discretion upon a showing by the party raising the claim of unreasonable delay, lack of knowledge the claim would be raised, and prejudice. *Id.*, ¶15.

¶11 For obvious reasons, laches has particular import in the election context. As one noted treatise explains:

> Extreme diligence and promptness are required in election-related matters, particularly where actionable election practices are discovered prior to the election. Therefore, laches is available in election challenges. In fact, in election contests, a court especially considers the application of laches. Such doctrine is applied because the efficient use of public resources demands that a court not allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process. Thus if a party seeking extraordinary relief in an election-related matter fails to exercise the requisite diligence, laches will bar the action.

29 C.J.S. Elections § 459 (2020) (footnotes omitted).

¶12 Although it disagrees the elements were satisfied here, the Campaign does not dispute the proposition that laches may bar an untimely election challenge. This principle appears to be recognized and applied universally. *See, e.g., Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1060–61 (7th Cir. 2016) ("The obligation to seek injunctive relief in

a timely manner in the election context is hardly a new concept.").[7] This case may be a paradigmatic

[7] *See also Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990), *cert. denied*, 501 U.S. 1206 (1991) ("The candidate's and party's claims to be respectively a serious candidate and a serious party with a serious injury become less credible by their having slept on their rights."); *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988) ("Although adequate explanation for failure to seek preelection relief has been held to exist where, for example, the party challenging the election had no opportunity to seek such relief, if aggrieved parties, without adequate explanation, do not come forward before the election, they will be barred from the equitable relief of overturning the results of the election." (citation omitted)); *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) ("[F]ailure to require pre-election adjudication would 'permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action.'"); *Perry v. Judd*, 471 Fed. App'x 219, 220 (4th Cir. 2012) ("Movant had every opportunity to challenge the various Virginia ballot requirements at a time when the challenge would not have created the disruption that this last-minute lawsuit has."); *McClung v. Bennett*, 235 P.3d 1037, 1040 (Ariz. 2010) ("McClung's belated prosecution of this appeal . . . would warrant dismissal on the grounds of laches, because his dilatory conduct left Sweeney with only one day to file his response brief, jeopardized election officials' timely compliance with statutory deadlines, and required the Court to decide this matter on an unnecessarily accelerated basis." (citations omitted)); *Smith v. Scioto Cnty. Bd. of Elections*, 918 N.E.2d 131, 133-34 (Ohio 2009) ("Appellees could have raised their claims in a timely pre-election protest to the petition. 'Election contests may not be used as a vehicle for asserting an untimely protest.'" (citations omitted)); *Clark v. Pawlenty*, 755 N.W.2d 293, 301 (Minn. 2008) (applying laches to bar election challenge where "[t]he processes about which petitioners complain are not new"); *State ex rel. SuperAmerica Grp. v. Licking Cnty.* Bd. of Elections, 685 N.E.2d 507, 510 (Ohio 1997) ("In election-related matters, extreme diligence and promptness are required. Extraordinary relief has been routinely denied in election-related

cases based on laches."); *Tully v. State*, 574 N.E.2d 659, 663 (Ill. 1991) (applying laches to bar challenge to an automatic retirement statute where a retired judge "was at least constructively aware of the fact that his seat was declared vacant" and an election had already taken place to replace him); *Lewis v. Cayetano*, 823 P.2d 738, 741 (Haw. 1991) ("We apply the doctrine of laches . . . because efficient use of public resources demand that we not allow persons to gamble on the outcome of the election contest then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process."); *Evans v. State Election Bd. of State of Okla.*, 804 P.2d 1125, 1127 (Okla. 1990) ("It is well settled that one who seeks to challenge or correct an error of the State Election Board will be barred by laches if he does not act with diligence."); *Thirty Voters of Kauai Cnty. v. Doi*, 599 P.2d 286, 288 (Haw. 1979) ("The general rule is that if there has been opportunity to correct any irregularities in the election process or in the ballot prior to the election itself, plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterward."); *Harding v. State Election Board*, 170 P.2d 208, 209 (Okla. 1946) (per curiam) ("[I]t is manifest that time is of the essence and that it was the duty of the petitioner to proceed with utmost diligence in asserting in a proper forum his claimed rights. The law favors the diligent rather than the slothful."); *Mehling v. Moorehead*, 14 N.E.2d 15, 20 (Ohio 1938) ("So in this case, the election, having been held, should not be disturbed when there was full opportunity to correct any irregularities before the vote was cast."); *Kewaygoshkum v. Grand Traverse Band Election Bd.*, 2008-1199-CV-CV, 2008-1200-CV-CV, 2008 WL 6196207, at *7 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary 2008) (en banc) ("In the instant case, nearly all of the allegations by both Plaintiffs against the Election Board relate to actions taken (or not taken) by the Election Board prior to the general election . . . . [T]hey are not timely raised at this point and should be barred under the doctrine of laches."); *Moore v. City of Pacific*, 534 S.W.2d 486, 498 (Mo. Ct. App. 1976) ("Where actionable election practices are discovered prior to the election, injured persons must be diligent in seeking relief."); *Kelly v. Commonwealth*, No. 68 MAP 2020, 2020 WL 7018314, at *1 (Penn. Nov. 28, 2020) (applying laches to

example of why. The relevant election officials, as well as Vice President Biden and Senator Harris, had no knowledge a claim to these broad categories of challenges would occur. The Campaign's delay in raising these issues was unreasonable in the extreme, and the resulting prejudice to the election officials, other candidates, voters of the affected counties, and to voters statewide, is obvious and immense. Laches is more than appropriate here; the Campaign is not entitled to the relief it seeks.

1. Unreasonable Delay

¶13 First, the respondents must prove that the Campaign unreasonably delayed in bringing the challenge. What constitutes an unreasonable delay varies and "depends on the facts of a particular case." *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶14, 393 Wis. 2d 308, 946 N.W.2d 101. As we have explained:

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bar a challenge to a mail-in voting law where challengers could have brought their claim anytime after the law's enactment more than a year prior but instead waited until after the 2020 General Election); *Bowyer v. Ducey*, CV-20-02321-PHX-DJH, 2020 WL 7238261, at *10 (D. Ariz. Dec. 9, 2020) (applying laches to bar claims where "affidavits or declarations upon which Plaintiffs rely clearly shows that the basis for each of these claims was either known well before Election Day or soon thereafter"); *King v. Witmer*, Civ. No. 20-13134, 2020 WL 7134198, at *7 (E.D. Mich. Dec. 7, 2020) ("If Plaintiffs had legitimate claims regarding whether the treatment of election challengers complied with state law, they could have brought their claims well in advance of or on Election Day – but they did not.").

> [U]nreasonable delay in laches is based not on what litigants know, but what they might have known with the exercise of reasonable diligence. This underlying constructive knowledge requirement arises from the general rule that ignorance of one's legal rights is not a reasonable excuse in a laches case. Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put a man of ordinary prudence upon inquiry. To be sure, what we expect will vary from case to case and litigant to litigant. But the expectation of reasonable diligence is firm nonetheless.

Wren, 389 Wis. 2d 516, ¶20 (citations and quotation marks omitted). Here, the Campaign unreasonably delayed with respect to all three categories of challenged ballots.

¶14 Regarding the Campaign's first challenge, Wisconsin law provides that a "written application" is required before a voter can receive an absentee ballot, and that any absentee ballot issued without an application cannot be counted. *See* Wis. Stat. § 6.86(1)(ar); Wis. Stat. § 6.84(2). The Campaign argues all in-person absentee votes in Dane and Milwaukee Counties were cast without the required application.

¶15 But both counties did use an application form created, approved, and disseminated by the chief Wisconsin elections agency. This form, now known as EL-122, is entitled "Official Absentee Ballot Application/Certification." It was created in 2010 in an effort to streamline paperwork following the 2008

election, and has been available and in use ever since.

¶16 The Campaign does not challenge that any individual voters' ballots lacked an application——an otherwise appropriate and timely issue. Rather, the Campaign argues this "application" is not an application, or that municipal clerks do not give this form to voters before distributing the ballot, in contravention of the statutes.[8] Regardless of the practice used, the Campaign would like to apply its challenge to the sufficiency of EL-122 to strike 170,140 votes in just two counties – despite the form's use in municipalities throughout the state.[9] Waiting until after an election to challenge the sufficiency of a form application in use statewide for at least a decade is plainly unreasonable.

¶17 The second category of ballots challenged are those with certificates containing witness address information added by a municipal clerk. Absentee ballots must be witnessed, and the witness must provide their name, signature, and address on the certification (printed on the back side of the envelope in which the absentee ballot is ultimately sealed). Wis. Stat. § 6.87(2), (4)(b)1., (6d). While a witness address must be provided on the certification for the corresponding ballot to be counted, the statute is silent as to what portion of an address the witness must provide. § 6.87(6d).

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[8] According to the findings of fact, the practice in Dane and Milwaukee Counties is that the application portion of the envelope is completed and shown to an official before the voter receives a ballot.

[9] In its findings of fact, the circuit court concluded that 651,422 voters throughout the state used Form EL-122 in the 2020 presidential election.

¶18 The process of handling missing witness information is not new; election officials followed guidance that WEC created, approved, and disseminated to counties in October 2016. It has been relied on in 11 statewide elections since, including in the 2016 presidential election when President Trump was victorious in Wisconsin. The Campaign nonetheless now seeks to strike ballots counted in accordance with that guidance in Milwaukee and Dane Counties, but not those counted in other counties that followed the same guidance. The Campaign offers no reason for waiting years to challenge this approach, much less after this election. None exists.

¶19 Finally, the City of Madison held events on September 27, 2020, and October 3, 2020, dubbed "Democracy in the Park." At these events, sworn city election inspectors collected completed absentee ballots. The city election inspectors also served as witnesses if an elector brought an unsealed, blank ballot. No absentee ballots were distributed, and no absentee ballot applications were accepted or distributed at these events.

¶20 The Campaign characterizes these events as illegal early in-person absentee voting. When the events were announced, an attorney for the Wisconsin Legislature sent a warning letter to the City of Madison suggesting the events were illegal. The City of Madison responded that the events were legally compliant, offering reasons why. Although these events and the legislature's concerns were widely publicized, the Campaign never challenged these events, nor did any other tribunal determine they were unlawful.

¶21 The Campaign now asks us to determine that all 17,271 absentee ballots collected during the

"Democracy in the Park" events were illegally cast. Once again, when the events were announced, the Campaign could have challenged its legality. It did not. Instead, the Campaign waited until after the election – after municipal officials, the other candidates, and thousands of voters relied on the representations of their election officials that these events complied with the law. The Campaign offers no justification for this delay; it is patently unreasonable.

¶22 The time to challenge election policies such as these is not after all ballots have been cast and the votes tallied. Election officials in Dane and Milwaukee Counties reasonably relied on the advice of Wisconsin's statewide elections agency and acted upon it. Voters reasonably conformed their conduct to the voting policies communicated by their election officials. Rather than raise its challenges in the weeks, months, or even years prior, the Campaign waited until after the votes were cast. Such delay in light of these specific challenges is unreasonable.

2. Lack of Knowledge

¶23 The second element of laches requires that the respondents lacked knowledge that the Campaign would bring these claims.[10] The respondents all assert

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[10] While our cases have identified this element as a general requirement for laches, it does not always appear to be applicable. To some extent, this requirement focuses on the ability of the asserting party to mitigate any resulting prejudice when notice is provided. But this may not be possible in all types of claims. Most jurisdictions do not identify lack of knowledge as a separate, required element in every laches defense. *See, e.g., Hart v. King*, 470 F. Supp. 1195, 1198 (D. Haw. 1979) (holding that laches barred relief in federal court notwithstanding plaintiffs'

they were unaware that the Campaign would challenge various election procedures after the election, and nothing in the record suggests otherwise. On the record before us, this is sufficient to satisfy this element. *See Brennan*, 393 Wis. 2d 308, ¶18.

3. Prejudice

¶24 Finally, the respondents must also prove that prejudice results from the Campaign's unreasonable delay. "What amounts to prejudice . . . depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position." *Wren*, 389 Wis. 2d 516, ¶32.

¶25 With respect to in-person absentee ballot applications, local election officials used form EL-122 in reliance on longstanding guidance from WEC. Penalizing the voters election officials serve and the other candidates who relied on this longstanding guidance is beyond unfair. The Campaign sat on its hands, waiting until after the election, despite the fact that this "application" form was in place for over a decade. To strike ballots cast in reliance on the guidance now, and to do so only in two counties, would violate every notion of equity that undergirds our electoral system.

¶26 As for the ballots to which witness address information was added, the election officials relied on this statewide advice and had no reason to question it. Waiting until after the election to raise the issue is highly prejudicial. Applying any new processes to two counties, and not statewide, is also unfair to nearly

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unsuccessful pre-election suit in state court). In any event, we have no difficulty finding this element satisfied here.

everyone involved in the election process, especially the voters of Dane and Milwaukee Counties.

¶27 Finally, the respondents, and indeed all voters, are prejudiced if the ballots collected at the "Democracy in the Park" events are invalidated. Voters were encouraged to utilize the events, and 17,000 voters did so in reliance on representations that the process they were using complied with the law. Striking these ballots would disenfranchise voters who did nothing wrong when they dropped off their ballot where their local election officials told them they could.

¶28 In short, if the relief the Campaign sought was granted, it would invalidate nearly a quarter of a million ballots cast in reliance on interpretations of Wisconsin's election laws that were well-known before election day. It would apply new interpretive guidelines retroactively to only two counties. Prejudice to the respondents is abundantly clear. Brennan, 393 Wis. 2d 308, ¶25.

4. Discretion

¶29 Whether to apply laches remains "within our equitable discretion." *Id.*, ¶26. Doing so here is more than equitable; it is the only just resolution of these claims.

¶30 To the extent we have not made this clear in the past, we do so now. Parties bringing election-related claims have a special duty to bring their claims in a timely manner. Unreasonable delay in the election context poses a particular danger – not just to municipalities, candidates, and voters, but to the entire administration of justice. The issues raised in this case, had they been pressed earlier, could have been resolved long before the election. Failure to do so

affects everyone, causing needless litigation and undermining confidence in the election results. It also puts courts in a difficult spot. Interpreting complicated election statutes in days is not consistent with best judicial practices. These issues could have been brought weeks, months, or even years earlier. The resulting emergency we are asked to unravel is one of the Campaign's own making.[11]

¶31 The claims here are not of improper electoral activity. Rather, they are technical issues that arise in the administration of every election. In each category of ballots challenged, voters followed every procedure and policy communicated to them, and election officials in Dane and Milwaukee Counties followed the advice of WEC where given. Striking these votes now – after the election, and in only two of Wisconsin's 72 counties when the disputed practices were followed by hundreds of thousands of absentee voters statewide – would be an extraordinary step for this court to take.[12] We will not do so.

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[11] Our decision that the Campaign is not entitled to the relief it seeks does not mean the legal issues presented are foreclosed from further judicial scrutiny. Wisconsin law provides sufficient mechanisms for challenging unlawful WEC guidance or unlawful municipal election practices. Nothing in our decision denying relief to the Campaign would affect the right of another party to raise substantive challenges.

[12] Granting the relief requested by the Campaign may even by unconstitutional. *See Bush v. Gore*, 531 U.S. 98, 104-05 (per curiam) ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

III. CONCLUSION

¶32 Our laws allow the challenge flag to be thrown regarding various aspects of election administration. The challenges raised by the Campaign in this case, however, come long after the last play or even the last game; the Campaign is challenging the rulebook adopted before the season began. Election claims of this type must be brought expeditiously. The Campaign waited until after the election to raise selective challenges that could have been raised long before the election. We conclude the challenge to indefinitely confined voter ballots is without merit, and that laches bars relief on the remaining three categories of challenged ballots. The Campaign is not entitled to relief, and therefore does not succeed in its effort to strike votes and alter the certified winner of the 2020 presidential election.

By the Court. – The judgment of the circuit court is affirmed.

¶33 REBECCA FRANK DALLET and JILL J. KAROFSKY, JJ. (*concurring*). As acknowledged by the President's counsel at oral argument, the President would have the people of this country believe that fraud took place in Wisconsin during the November 3, 2020 election. Nothing could be further from the truth. The President failed to point to even one vote cast in this election by an ineligible voter; yet he asks this court to disenfranchise over 220,000 voters. The circuit court, whose decision we affirm, found no evidence of any fraud.

¶34 The evidence does show that, despite a global pandemic, more than 3.2 million Wisconsinites performed their civic duty. More importantly as it relates to this lawsuit, these voters followed the rules that were in place at the time. To borrow Justice Hagedorn's metaphor, Wisconsin voters complied with the election rulebook. No penalties were committed and the final score was the result of a free and fair election.

¶35 For the foregoing reasons, we concur.

¶36 BRIAN HAGEDORN, J. (*concurring*). I agree, of course, with the majority opinion I authored holding that the petitioners[1] (collectively, the "Campaign") are not entitled to the relief they seek. But I understand the desire for at least some clarity regarding the underlying election administration issues. A comprehensive analysis is not possible or appropriate in light of the abbreviated nature of this review and the limited factual record in an action under Wis. Stat. § 9.01 (2017-18).[2] However, I do think we can be of some assistance, and will endeavor to address in some measure the categories of ballots the majority opinion properly applies laches to.

¶37 Beyond its challenge to indefinitely confined voters, an issue the court's opinion quickly and appropriately dispenses with, the Campaign raises challenges to three categories of ballots: (1) all in-person absentee ballots in Dane and Milwaukee Counties for want of an absentee ballot application; (2) all absentee ballots in Dane and Milwaukee Counties where municipal officials added witness address information on the certification; and (3) all ballots collected at two City of Madison "Democracy in the Park" events occurring in late September and early October. I begin with some background, and address each while remaining mindful of the limited nature of this review.

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[1] The petitioners are Donald J. Trump, Michael R. Pence, and Donald J. Trump for President, Inc.

[2] All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

I. LEGAL BACKGROUND

¶38 Elections in Wisconsin are governed by Chapters five through 12 of the Wisconsin Statutes. In applying these laws, we have a long history of construing them to give effect to the ascertainable will of the voter, notwithstanding technical noncompliance with the statutes. *Roth v. Lafarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶19, 268 Wis. 2d 335, 677 N.W.2d 599.[3] This longstanding practice is confirmed in statute. Wisconsin Stat. § 5.01(1) says, "Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." So generally, when ballots are challenged, they are counted if the will of the voter can be ascertained.

¶39 Wisconsin looks quite a bit more skeptically, however, at absentee ballots. Wisconsin Stat. § 6.84(2) provides:

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[3] *See also State ex rel. Wood v. Baker*, 38 Wis. 71, 89 (1875) ("It would be a fraud on the constitution to hold them disfranchised without notice or fault. They went to the election clothed with a constitutional right of which no statute could strip them, without some voluntary failure on their own part to furnish statutory proof of right. And it would be monstrous in us to give such an effect to the registry law, against its own spirit and in violation of the letter and spirit of the constitution."); *State ex rel. Blodgett v. Eagan*, 115 Wis. 2d 417, 421, 91 N.W. 984 (1902) ("when the intention of the voter is clear, and there is no provision of statute declaring that such votes shall not be counted, such intention shall prevail"); *Roth v. Lafarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶¶19-25, 268 Wis. 2d 335, 677 N.W.2d 599 (collecting cases).

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

This tells us that, to the extent an absentee ballot does not comply with certain statutory requirements, it may not be counted.[4]

¶40 Our review in this case is of the determinations of the board of canvassers and elections commission. The determination shall be "set aside or modif[ied]" if the board of canvassers or elections commission "has erroneously interpreted a provision of law and a correct interpretation compels a particular action." § 9.01(8)(d). We "may not substitute [our] judgment for that of the board of canvassers . . . as to the weight of the evidence on any disputed findings of fact." *Id.* However, findings of fact "not supported by substantial evidence" shall be set aside. *Id.* Legal conclusions made by the board of canvassers or elections commission are reviewed independently. *Roth*, 268 Wis. 2d 335, ¶15.

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[4] Wisconsin courts have had few opportunities to opine on this statute. The court appeals noted in a 2001 case: "Section 6.84(2)'s strict construction requirement, applicable to statutes relating to the absentee ballot process, is consistent with the guarded attitude with which the legislature views that process." *Lee v. Paulson*, 2001 WI App 19, ¶7, 241 Wis. 2d 38, 623 N.W.2d 577.

¶41 With this framework in mind, I turn to the three specific categories of ballots challenged here.

II. IN-PERSON ABSENTEE BALLOT APPLICATIONS

¶42 Wisconsin Stat. § 6.86(1)(ar) says that "the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality." The mandatory requirement is that each ballot be matched with an application.

¶43 The Wisconsin Elections Commission (WEC) has designed, approved, and distributed forms for statewide use by local election officials. Among the forms are a separate absentee ballot application (form EL-121) and a combined application and certification (form EL-122). Milwaukee and Dane Counties, like many other communities around the state, use form EL-122 for in-person absentee voters. The Campaign argues that form EL-122 is not an application, and that all 170,140 in-person absentee ballots cast in Dane and Milwaukee Counties therefore lacked the required "written application." This argument is incorrect.

¶44 "Written application" is not specially defined in the election statutes, nor is any particular content prescribed. EL-122 is entitled "Official Absentee Ballot *Application*/Certification." (Emphasis added). Beyond containing basic voter information also present on EL-121, Form EL-122 requires the elector to sign, stating: "I further certify that I requested this ballot." This would appear to satisfy the ordinary meaning of a written ballot application. *See Quick Charge Kiosk LLC v. Kaul*, 2020 WI 54, ¶18, 392 Wis. 2d 35, 944

N.W.2d 598 ("When statutory language is not specially defined or technical, it is given its 'common, ordinary, and accepted meaning.'" (quoting *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110)).

¶45 The record further bears out its function as an application. In both Milwaukee and Dane Counties, voters completed the application portion of EL-122 and showed it to an election official before receiving a ballot.[5] Then, after completing the ballot, the voter signed the certification portion of the form, which the clerk witnessed. Section 6.86(1)(ar) contains no requirement that the application and certification appear on separate documents, and the facts demonstrate that the application was completed before voters received a ballot. As best I can discern from this record, EL-122 is a "written application" within the meaning of § 6.86(1)(ar). That it also serves as a ballot certification form does not change its status as an application.[6]

¶46 Therefore, on the merits and the record before us, in-person absentee voters using form EL-122 in Dane and Milwaukee Counties did so in compliance

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[5] The Campaign appears to suggest a different sequence of events, but that is not what the record before us reflects.

[6] It is not unusual or inherently problematic for administrative forms to have multiple functions. The MV1, for example, serves as both an application for registration under Wis. Stat. § 341.08 and an application for a certificate of title under Wis. Stat. § 342.06. *See* https://wisconsindot.gov/Documents/formdocs/mv1.pdf.

with Wisconsin law.[7]

III. WITNESS ADDRESSES

¶47 The Campaign also challenges several thousand absentee ballots cast in Milwaukee and Dane Counties where election officials added missing witness address information to the certification. This challenge is oddly postured and seems to miss the statutory requirements.

¶48 Absentee ballots cast in Wisconsin must be witnessed. Wis. Stat. § 6.87(4)(b)1. In order to comply with this requirement, voters place absentee ballots in an unsealed envelope, the back of which includes a certificate. § 6.87(2). The certificate must include a statement for the witness to certify, along with space for the witness's signature, printed name, and "[a]ddress." *Id.* The law states that the "witness shall execute" the relevant witness information – including, one would presume, the required address. *Id.* "If a certificate is missing the address of a witness, the ballot may not be counted." § 6.87(6d).

¶49 Although Wis. Stat. § 6.87(6d) requires an address, § 6.87(2) and (6d) are silent on precisely what makes an address sufficient. This is in stark contrast to other provisions of the election statutes that are more specific. For example, Wis. Stat. § 6.34(3)(b)2. requires an identifying document to contain "[a]

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[7] It is presently unclear whether the statutes would be better or more clearly effectuated by separating the application and certification, or whether certain retention practices may be problematic. The expedited nature of our review of this case does not permit a full examination of this question. But the mandatory procedure insofar as the voter is concerned – that he or she fill out a written application – is surely satisfied.

current and complete residential address, including a numbered street address, if any, and the name of the municipality" for the document to be considered proof of residence. Similarly, Wis. Stat. § 6.18 requires former residents to swear or affirm their Wisconsin address as follows: "formerly residing at . . . in the . . . ward . . . aldermanic district (city, town, village) of . . . County of . . . ."[8] While the world has surely faced more pressing questions, the contours of what makes an address an address has real impact. Would a street address be enough, but no municipality? Is the state necessary? Zip code too? Does it matter if the witness uses their mailing address and not the residential address (which can be different)?

¶50 Based on the record before the court, it is not clear what information election officials added to what number of certifications. Wisconsin Stat. § 6.87(6d) would clearly prohibit counting a ballot if the entire address is absent from the certification. However, if the witness provided only part of the address——for example, a street address and municipality, but no state name or zip code——it is at least arguable that this would satisfy § 6.87(6d)'s address requirement. And, to the extent clerks completed addresses that were already sufficient under the statute, I am not aware of any authority that would allow such votes to

[8] "And 'absent textual or structural clues to the contrary' a particular word or phrase used more than once in the same act is understood 'to carry the same meaning each time.'" *Town of Delafield v. Central Transport Kriewaldt,* 2020 WI 61, ¶15 n.6, 392 Wis. 2d 427, 944 N.W.2d 819 (quoting *State ex rel. DNR v. Wis. Court of Appeals*, Dist. IV, 2018 WI 25, ¶30, 380 Wis. 2d 354, 909 N.W.2d 114).

be struck.[9]

¶51 The parties did not present comprehensive arguments regarding which components of an address are necessary under the statute. It would not be wise to fully address that question now. But I do not believe the Campaign has established that all ballots where clerks added witness address information were necessarily insufficient and invalid; the addresses provided directly by the witnesses may very well have satisfied the statutory directive. The circuit court's findings of fact reflect that many of these ballots contained additions of the state name and/or zip code. I conclude the Campaign failed to provide sufficient information to show all the witness certifications in the group identified were improper, or moreover, that any particular number of ballots were improper.

¶52 Although I do not believe the Campaign has offered sufficient proof on this record to strike ballots, this broader issue appears to be a valid election administration concern. WEC, other election officials, the legislature, and others may wish to examine the requirements of the statute and measure them against

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[9] The statute seems to suggest only the witness should fill in the information necessary to comply with the statute. *See* Wis. Stat. § 6.87(2) ("the witness shall execute . . . "). If a zip code is not required under the statute, for example, I'm not sure clerks would be prohibited from adding the zip code. Then again, I'm not sure why they would want to add anything to an already sufficient ballot, or what their authority would be to do so. It's possible WEC guidance to add witness information is aimed at complying with related WEC guidance that all aspects of a mailing address – including city, state, and zip code – should be included in the witness certification (arguably, information the statute does not always require). Regardless, this case is not well-postured to answer these questions.

the guidance and practice currently in place to avoid future problems.

IV. DEMOCRACY IN THE PARK

¶53 Finally, the Campaign challenges 17,271 ballots the City of Madison collected at "Democracy in the Park" events on September 27, 2020, and October 3, 2020. According to the record, at these events, sworn city election inspectors collected already completed absentee ballots and served as witnesses for absentee voters who brought an unsealed, blank ballot with them. During the events, no absentee ballots were distributed, and no absentee ballot applications were distributed or received.

¶54 Under the law, when a voter requests an absentee ballot, the voter must return the absentee ballot in a sealed envelope by mail or "in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. The phrase "municipal clerk" has a specific meaning in the election statutes. It is defined as "the city clerk, town clerk, village clerk and the executive director of the city election *commission and their authorized representatives*." Wis. Stat. § 5.02(10) (emphasis added).[10] A sworn city election inspector sent by the clerk to collect ballots would seem to be an authorized representative as provided in the definition. Even if "municipal clerk" were not a specially-defined term, the only reasonable reading of the law would allow those acting on a clerk's behalf to

[10] When words are "specially-defined" they are given their "special definitional meaning." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

receive absentee ballots, not just the clerk by him or herself. After all, many clerks manage a full office of staff to assist them in carrying out their duties. Accordingly, voters who returned ballots to city election inspectors at the direction of the clerk returned their absentee ballots "in person, to the municipal clerk" as required by § 6.87(4)(b)1.

¶55 The Campaign, however, asserts that the "Democracy in the Park" events were illegal in-person absentee voting sites that failed to meet the statutory requirements under Wis. Stat. § 6.855. Section 6.855(1) provides in relevant part:

> The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality *may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election*. . . . If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.

§ 6.855(1) (emphasis added).

¶56 An alternative absentee ballot site, then, must be a location not only where voters may return absentee ballots, but also a location where voters "may request and vote absentee ballots." Id. On the facts before the court, this is not what occurred at "Democracy in the Park" locations. Ballots were not

requested or distributed. Therefore, Wis. Stat. § 6.855 is not on point.

¶57 In short, based on the record before the court and the arguments presented, I see no basis to conclude the ballots collected at "Democracy in the Park" events were cast in contravention of Wisconsin law. This challenge fails.

V. CONCLUSION

¶58 The people of Wisconsin deserve confidence that our elections are free and fair and conducted in compliance with the law. Our elected leaders and election officials, including those at WEC, should continue to earn the trust of all Wisconsinites. The claims made by the Campaign in this case are not of widespread fraud or serious election improprieties. These are ordinary sorts of election administration issues – for example, challenging whether an "application" form in use statewide for a decade constitutes a sufficient application (it does). While this does not diminish the importance of the election procedures the legislature has chosen, Wisconsin's electorate should be encouraged that the issues raised in this case are focused on rather technical issues such as whether a witness must include their zip code as part of their address.

¶59 That does not mean there is nothing to improve or clarify or correct. But as explained in the majority opinion, the Campaign waited far too long to challenge guidance and practices established weeks, months, or years earlier. Laches rightly bars the relief the Campaign seeks. Even on the merits, however, the Campaign is either incorrect on the law, or does not provide sufficient proof to identify particular ballots

that were improperly cast. At the end of the day, nothing in this case casts any legitimate doubt that the people of Wisconsin lawfully chose Vice President Biden and Senator Harris to be the next leaders of our great country. While the Campaign has every right to challenge ballots cast out of compliance with the law, its efforts to make that showing in this case do not succeed.

¶60 I am authorized to state that Justice ANN WALSH BRADLEY joins this concurrence.

¶61 PATIENCE DRAKE ROGGENSACK, C.J. (dissenting). Elections have consequences. One candidate wins and the other loses, but in every case, it is critical that the public perceive that the election was fairly conducted.

¶62 In the case now before us, a significant portion of the public does not believe that the November 3, 2020, presidential election was fairly conducted. Once again, four justices on this court cannot be bothered with addressing what the statutes require to assure that absentee ballots are lawfully cast. I respectfully dissent from that decision. I write separately to address the merits of the claims presented.[1]

¶63 The Milwaukee County Board of Canvassers and the Dane County Board of Canvassers based their decisions on erroneous advice when they concluded that changes clerks made to defective witness addresses were permissible. And, the Dane County Board of Canvassers erred again when it approved the 200 locations for ballot collection that comprised Democracy in the Park. The majority does not bother addressing what the boards of canvassers did or should have done, and instead, four members of this court throw the cloak of laches over numerous problems that will be repeated again and again, until this court has the courage to correct them. The electorate expects more of us, and we are capable of

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[1] *See* Antonin Scalia, *The Dissenting Opinion*, 1994 J. Sup. Ct. Hist. 33 (1994) ("Legal opinions are important, after all, for the reasons they give, not the results they announce; results can be announced in judgment orders without opinion. An opinion that gets the *reasons* wrong gets *everything* wrong which is the function of an opinion to produce.").

providing it.[2] Because we do not, I respectfully dissent.

I. BACKGROUND

¶64 On November 3, 2020, people across Wisconsin and across the country exercised their constitutional right to vote. When the initial Wisconsin canvass was completed on November 17, 2020, Joseph R. Biden and Kamala D. Harris received 20,427 more votes than Donald J. Trump and Michael R. Pence.

¶65 On November 18, 2020, President Trump, Vice President Pence and the Trump campaign (the Petitioners) filed recount petitions in Milwaukee and Dane Counties. The recount petitions alleged that the following errors occurred during the election in both counties:

> (1) Municipal clerks improperly completed missing information on absentee ballot envelopes related to witness addresses;
>
> (2) In-person absentee voters did not submit written applications for an absentee ballot; and

[2] *See, e.g, Texas v. Pennsylvania*, 592 U.S. ____, ____ (slip op., at 1) (Dec. 11, 2020) (order denying motion to file bill of complaint) (Alito and Thomas, J.J., statement on the denial of Texas's motion to file a bill of complaint) ("In my view we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. . . . I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue")(internal citation omitted).

(3) Voters who were not indefinitely confined claimed "indefinitely confined" status for the purposes of obtaining an absentee ballot without having to show a photo identification.

¶66 In addition to the above allegations raised during both recounts, in Dane County, the Petitioners alleged error in counting all ballots received during Democracy in the Park events in Madison on September 26, 2020, and October 3, 2020.

¶67 The recount lasted from November 20, 2020, to November 29, 2020.[3] During the recount process, the Petitioners objected to irregularities in how the voting was conducted pursuant to Wis. Stat. § 9.01(5) (2017-18).[4] Many irregularities were grounded in Wisconsin Elections Commission (WEC) advice on voting process. The boards of canvassers overruled all of the Petitioners' irregularity objections.

¶68 As they relate to each alleged irregularity, the counties rejected the Petitioners' arguments for the following reasons:

(1) Municipal clerks improperly completed missing information on absentee ballot envelopes related to witness addresses.

The Milwaukee County Board of Canvassers moved to accept ballots from envelopes with

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[3] Milwaukee County completed and certified its results on November 27, 2020, and Dane County completed and certified its recount results on November 29, 2020.

[4] All further references to the Wisconsin Statutes are to the 2017-18 version.

> witness addresses that had been completed by clerks consistent with specific guidance by the WEC, which the Board viewed as consistent with Wis. Stat. § 6.87(6d).
>
> The Dane County Board of Canvassers also declined to "exclude envelopes that had a witness address added by the clerk."

(2) In-person absentee voters did not submit written applications for an absentee ballot.

> The Milwaukee County Board of Canvassers determined that there are multiple forms of application for an absentee ballot that can be made by absentee in-person voters and that the absentee ballot envelope provided to absentee in-person voters – which has the word "application" stated on it and must be completed by the voter – is an application for an absentee ballot. The Milwaukee Board thus rejected the Trump Campaign's challenge to ballots cast by in-person absentee voters.
>
> The Dane County Board of Canvassers voted not to exclude or draw down any absentee ballots on the basis that they "do not have an attached or identifiable application." . . . The Dane County Board of Canvassers concluded that review of absentee ballot applications is not a part of the statutory recount process under Wis. Stat. § 9.01(1)(b) and therefore the applications were not relevant to the recount.

(3) Voters who were not indefinitely confined claimed "indefinitely confined" status for the purposes of obtaining an absentee ballot without having to show a photo identification.

> The Milwaukee County Board of Canvassers found that "a designation of an indefinitely confined status is for each individual voter to make based upon their current circumstances" and that "no evidence of any voter in Milwaukee County [was] offered that has abused this process and voted through this status . . . not even an allegation that there was a single voter who abused this process to vote without providing proof of their ID, but eliminating proof that anyone did so. So there's no allegation . . . no proof . . . no evidence." . . . The Board voted to overrule any challenge to a voter with the status of "indefinitely confined."
>
> The Dane County Board of Canvassers also rejected the Trump Campaign's challenge that would have required invalidating the ballots of all electors in Dane County who declared indefinitely confined status. The Board specifically declined to separate or "draw down" the ballots cast by electors who declared indefinitely confined status.

(4) Ballots received during democracy in the park.

> The Dane County Board of Canvassers denied the challenge, ruling that the Democracy in the Park events were the equivalent of a

human drop box and valid under the statute.

¶69 On December 1, 2020, the Petitioners filed a petition for leave to file an original action with us. We denied that petition on December 3, 2020. That same day, the Petitioners filed two notices of appeal of the recount determinations pursuant to Wis. Stat. § 9.01(6)(a). Those cases were consolidated in Milwaukee County and the Honorable Stephen Simanek was assigned to the appeal pursuant to § 9.01(6)(b).

¶70 The circuit court held a hearing on December 11, 2020. At the conclusion of oral argument, the circuit court affirmed the recount determinations and, in so doing, adopted pages one through thirty of the Respondents' Joint Proposed Findings of Fact and Conclusions of Law. After the circuit court entered its final written decision, the Petitioners filed a notice of appeal. The Petitioners also filed a petition for bypass under Wis. Stat. § 809.60(1). Thereafter, we granted the petition for bypass and assumed jurisdiction over this appeal.

II. DISCUSSION

A. Standard of Review

¶71 In a Wis. Stat. § 9.01 proceeding, post election challenges "are permissible provided that they may affect the election results." *Logerquist v. Board of Canvassers for Town of Nasewaupee*, 150 Wis. 2d 907, 916, 442 N.W.2d 551 (Ct. App. 1989). In such a proceeding, we review the determinations of the board of canvassers, not those of the circuit court. *Id.* at 917. "On appellate review of a [] § 9.01(1) proceeding, the question is whether the board [of canvasser's] findings

are supported by substantial evidence.[5] *Carlson v. Oconto Bd. of Canvassers*, 2001 WI App 20, ¶5, 240 Wis. 2d 438, 623 N.W.2d 195 (citing *Logerquist*, 150 Wis. 2d at 912).

¶72 This appeal also requires us to interpret and apply Wisconsin statutes. We interpret and apply statutes independently as questions of law, while benefitting from the discussion of the circuit court. *Voces De La Frontera, Inc. v. Clarke*, 2017 WI 16, ¶12, 373 Wis. 2d 348, 891 N.W.2d 803.

B. Alleged Irregularities

¶73 "If WEC has been giving advice contrary to statute, those acts do not make the advice lawful. WEC must follow the law. We, as the law declaring court, owe it to the public to declare whether WEC's advice is incorrect. However, doing so does not necessarily lead to striking absentee ballots that were cast by following incorrect WEC advice. The remedy Petitioners seek may be out of reach for a number of reasons." *Trump v. Evers*, No. 2020AP1917-OA, unpublished order (Wis. Dec. 3, 2020) (Roggensack, C.J., dissenting from the denial of the petition for leave to commence an original action).

¶74 This case is guided by Wis. Stat. § 6.84 which provides:

> The legislature finds that voting is a constitutional right, the vigorous exercise of

[5] In the matter before us, the material facts are not disputed. Rather, it is the legal consequences that follow from these facts that forms the controversy.

> which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.
>
> Notwithstanding s. 5.01, with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

Accordingly, the provisions that relate to obtaining and voting absentee ballots must be carefully examined as a recount proceeds.[6]

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[6] *See also Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) ("Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting. In this respect absentee voting is to voting in person as a take-home exam is to a proctored one." (internal citations omitted)).

C. Witness Addresses

¶75 Wisconsin Stat. § 6.87(2) provides that absentee ballots must be accompanied by a certificate. The certificate may be printed on the envelope in which an absentee ballot is enclosed. Section 6.87(2) provides a model certificate, and directs that certificates must be in "substantially" the same form as the model. The model provides:

> The witness shall execute the following:
>
> I, the undersigned witness, subject to the penalties of s. 12.60 (1)(b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.
>
> ....(Printed name)
>
> ....(Address)
>
> Signed ...."[7]

Accordingly, the plain language of § 6.87(2) requires that it is the witness who must affix his or her signature and write in his or her name and address. Section 6.87(2) does not mention an election official

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[7] Asterisks removed.

taking any action.

¶76 Wisconsin Stat. § 6.87(9) explains what an election official may do if an absentee ballot is received with an improperly completed certificate or no certificate:

> [T]he clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).

Section 6.87(9)'s plain language authorizes election officials to return the ballot to "the elector" to correct "the defect." It does not authorize election officials to make corrections, i.e., to write anything on the certificate.

¶77 In addition, Wis. Stat. § 6.87(6d) provides that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." This language is clear. And furthermore, its legislative history confirms its plain meaning. *Westmas v. Creekside Tree Serv., Inc.*, 2018 WI 12, ¶20, 379 Wis. 2d 471, 907 N.W.2d 68 (quoting *State v. Grunke*, 2008 WI 82, ¶22, 311 Wis. 2d 439, 752 N.W.2d 769) (explaining that courts may consult legislative history to confirm a statute's plain meaning). This subsection was added by 2015 Wis. Act 261. A memorandum prepared by the Legislative Council provides that "Act 261 . . . requires an absentee ballot to have a witness address to be counted. An absentee ballot voter must complete the certification and sign the certification in the presence

of a witness, and the witness must sign the certificate and provide his or her name and address." Wis. Legis. Council Act Memo, 2015 Wis. Act 261, at 2, https://docs.legis.wiscinsin.gov/2015/related/lcactmemo/act261.pdf.

¶78 The contention that ballots with defective addresses cannot be counted is supported by more than the plain meaning of Wis. Stat. § 6.87(6d). The requirement that such ballots not be counted is found in Wis. Stat. § 6.84(2), which provides that the provisions in § 6.87(6d) are "mandatory."

¶79 Notwithstanding the plain, clear requirements of two statutes, WEC's guidance explicitly directs municipal clerks that they "*must* take corrective actions in an attempt to remedy a witness address error." WEC guidance states, "municipal clerks shall do all that they can reasonably do to obtain any missing part of the witness address." Then in addition, the WEC instructs clerks to add witness address information even though the guidance acknowledges that "some clerks have expressed [concern] about altering information on the certificate envelope, especially in the case of a recount."

¶80 The WEC ignores that the legislature provided only one act an election official may take in regard to a defective witness address: mail the defective ballot back to the elector to correct the error. Wis. Stat. § 6.87(9). That the legislature made one choice about correcting a defective witness address excludes other methods of correction. "[T]he express mention of one matter excludes other similar matters [that are] not mentioned." *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287 (quoting *Perra v. Menomonee Mut. Ins. Co.*, 2000 WI App 215, ¶12, 239 Wis. 2d 26, 619 N.W.2d 123) (modifications in

the original). In addition, and similarly, § 6.87(2) states, "[t]he witness shall execute the following . . . (Address)." It does not state that clerks shall execute anything.

¶81 My conclusion that errors in the certification of absentee ballots require discarding those ballots is consistent with our precedent. In *Kaufmann v. La Crosse City Bd. of Canvassers*, 8 Wis. 2d 182, 98 N.W.2d 422 (1959), absentee ballots were returned to a municipal clerk without bearing a notary's signature on the accompanying certificate envelope, as required by statute at that time. The clerk added her signature to the certificates. *Id.* at 183. We explained that the electors' failure to ensure that the certificate complied with the statute invalidated the ballots. Additionally, we stated, "[t]he fact that the . . . clerk further complicated the matter by signing her name to the . . . certificate cannot aid the voter. The two wrongs cannot make a right." *Id.* at 186. The ballots were not counted. *Id.* In the case at hand, a defective witness address cannot be corrected by a clerk, just as the signature of the notary could not be completed by the clerk in *Kaufmann*.

¶82 *In Gradinjan v. Boho (In re Chairman in Town of Worchester*), 29 Wis. 2d 674, 139 N.W.2d 557 (1966), absentee ballots were issued without the municipal clerk's initials or signature, as required by statute at that time. We concluded that the ballots "should not have been counted." *Id.* at 683. Furthermore, we said that the statute that obligated the invalidation of these ballots survived constitutional attack. *Id.* at 683–84. We emphasized that absentee voting is subject to different statutory requirements than voting at a polling place, i.e., while a ballot cast at a polling place without initials or a signature may be countable, an

absentee ballot subject to an analogous defect is not. *Id.* at 684. As we stated, "[c]learly, the legislature could determine that fraud and violation of the sanctity of the ballot could much more readily be perpetrated by use of an absentee ballot than under the safeguards provided at a regular polling place." *Id.* In the case at hand, a witness address is a statutory requirement, mandated by law, just as the initials or signature of the municipal clerk was in Gradinjan.

¶83 The canvassing boards deferred to the WEC's guidance about defective signatures and it appears that the circuit court did so as well when interpreting Wis. Stat. § 6.87. The circuit court stated:

> Adding, the requisite information by the clerk has been in effect since before the 2016 election. The election which Trump prevailed in Wisconsin, I believe, after a recount. It's longstanding, I believe it's not prohibited by law, and it is therefore a reasonable interpretation to make sure, as the as the Court indicated earlier, that the will of the electors, the voters, are brought to fruition.

It is unfortunate that WEC has such sway, especially when its "guidance" is contrary to the plain meaning of two statutes.

¶84 Furthermore, we do not defer to administrative agencies when interpreting statutes. Wis. Stat. § 227.57(11); *see also Lamar Cent. Outdoor, LLC v. Div. of Hearings & Appeals*, 2019 WI 109, ¶9, 389 Wis. 2d 486, 936 N.W.2d 573 (quoting *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶108, 382 Wis. 2d 496, 914 N.W.2d 21). Accordingly, the issue is not whether the WEC adopted "a reasonable interpretation," as the

circuit court seems to have suggested. We follow the plain meaning rule when interpreting statutes, which we do independently. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id.*, ¶45 (quoting *Seider v. O'Connell*, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659).

¶85 And finally, guidance documents "are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions." *Service Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶102, 393 Wis. 2d 38, 946 N.W.2d 35. Guidance documents "impose no obligations, set no standards, and bind no one." Id. "Functionally, and as a matter of law, they are entirely inert." *Id.*

¶86 Administrative agencies, including the WEC, often treat their guidance as if it were law, but that does not make it so. *Id.*, ¶143 (Roggensack, C.J, concurring/dissenting). Such treatment is inappropriate – it confuses people by making them think that they have a legally cognizable reliance interest in WEC's guidance when they do not.

D. Written Applications

¶87 The Petitioners assert that during the two weeks that permit early in-person absentee voting 170,151 electors who did not submit a sufficient "written application" before receiving an absentee ballot cast votes. The crux of the Petitioners' argument is that the written application must be "separate" from the ballot and the certification.

¶88 The statutes provide that in the two weeks leading up to an election, electors may go to the municipal clerk's office and apply for an absentee ballot. Upon proof of identification, the elector receives a ballot, marks the ballot, the clerk witnesses the certification and the elector casts a vote by returning the absentee ballot to the municipal clerk. Wis. Stat. § 6.86(1)(b).

¶89 Pursuant to Wis. Stat. § 6.86(1)(ar), "the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector." Other statutes provide for similar requirements. *See, e.g.*, Wis. Stat. § 6.86(1)(a)1.-6. (stating that "[a]ny elector of a municipality who is registered to vote . . . and who qualifies . . . as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods," which are then listed); Wis. Stat. § 6.86(1)(ac) (stating that electors "may make written application to the municipal clerk for an official ballot by means of facsimile transmission or electronic mail").

¶90 We begin statutory interpretation with the language of the statute. *Kalal*, 271 Wis. 2d 633, ¶45. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*

¶91 None of the statutes in question contain the word "separate." Rather, a "written application" is required before the elector's identity is established with a photo identification and the elector receives an absentee ballot. *See* Wis. Stat. §§ 6.86(1)(a), (ac), (ar), (b), 6.86(2m). Furthermore, § 6.86(2m) provides that "The application form and instructions shall be

prescribed by the commission . . . ." Here, the statutes do not provide a form application; the statutes do not define what is required on an application, but simply that it be written. Form EL 122 was employed here to apply for a ballot in-person.

¶92 Form EL 122 requires the applicant for an absentee ballot to provide the applicant's name, street address, city, and zip code. It also asks for the date of the election for which the application is being made and the county and municipality in which the applicant votes. The substantive information that the application requests is substantially similar to form EL 121, which is titled "Wisconsin Application for Absentee Ballot." Each of these application forms requires writing prior to being submitted by electors in advance of an elector receiving an absentee ballot.[8]

E. Indefinitely Confined

¶93 Wisconsin Stat. § 6.86(2)(a) provides a manner by which some electors may obtain an absentee ballot outside of the mode outlined above. Those who are "indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period" may apply for an absentee ballot on that basis. *Id.* Those electors are then excused from the absentee ballot photo identification requirement. Wis. Stat. § 6.87(4)(b)1.

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[8] This order of operations was confirmed in several affidavits. The affiants asserted that before they received their ballots the clerk's office verified their photo identification and voter registration. The electors were then given an EL-122 envelope and instructed to complete it. Once the application was completed, the voters received their ballots

¶94 The Petitioners contend that all votes cast by electors claiming indefinitely confined status after March 25, 2020 (the date of McDonell's Facebook post)[9] are invalid. However, we have discussed the indefinitely confined status in *Jefferson v. Dane Cnty.*, 2020 WI 90, ___ Wis. 2d ___, ___ N.W.2d ____, which is released today, December 14, 2020.

¶95 In the pending matter, we do not have sufficient information about the 28,395 absentee voters who claimed this status in Milwaukee and Dane counties to determine whether they lawfully asserted that they were indefinitely confined prior to receiving an absentee ballot. Therefore, I go no further in addressing this contention.

F. Democracy in the Park

¶96 On September 26, 2020 and October 3, 2020, at more than 200 City of Madison parks,[10] the City of Madison held events called, "Democracy in the Park." During those events, poll workers, also referred to as "election inspectors," helped in the completion of ballot envelopes, acted as witnesses for voters and collected completed ballots.[11] 17,271 absentee ballots were voted

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[9] On March 25, 2020, Dane County Clerk, Scott McDonell, stated on Facebook that community members are encouraged to claim indefinitely confined status due to COVID-19 and Governor Evers' then-active Emergency Order #12.

[10] Affidavit of Maribeth Witzel-Behl, Madison City Clerk.

[11] Id.

and delivered to these poll workers.[12]

¶97 The poll workers who staffed Democracy in the Park were volunteers. They were not employees of the City of Madison Clerk's office.

¶98 Wisconsin Stat. § 6.87(4)(b)1. requires that when voting an absentee ballot "[t]he envelope [containing the ballot] shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." In addition, the plain words of Wis. Stat. § 6.84(2) specifically direct that the provisions of § 6.87(4)(b)1. "shall be construed as mandatory." Notwithstanding the use of "shall" in § 6.87(4)(b)1. and the "mandatory" requirement to comply with the terms of § 6.87(4)(b)1. in § 6.84(2), the 17,271 ballots that were collected in Madison parks did not comply with the statutes. Stated otherwise, they were not "delivered in person, to the municipal clerk."

¶99 It is conceivable that the 200 sites for Democracy in the Park could have become alternate absentee ballot sites. If the Madison Common Council had chosen to designate a site other than the municipal clerk's office as the location from which voters could request and to which they could return absentee ballots, an alternate absentee ballot site could have been established. Wis. Stat. § 6.855(1). The statute also provides that the governing body of a municipality may designate more than one alternate site. § 6.855(5).[13]

¶100 However, if Democracy in the Park were held to be 200 alternate absentee ballot sites, then "no function related to voting and return of absentee

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[12] Id.

[13] However, 200 alternate sites does seem a bit much.

ballots. . . . may be conducted in the office of the municipal clerk." Wis. Stat. § 6.855(1). This requirement does not fit the facts because the Madison clerk's office continued to provide and accept return of absentee ballots. Therefore, these 200 park events do not meet the statutory criteria set out in § 6.855 for alternate absentee ballot sites.

¶101 One wonders, what were they? It is contended that they were "human drop boxes." That gives little comfort because drop boxes are not found anywhere in the absentee voting statutes. Drop boxes are nothing more than another creation of WEC to get around the requirements of Wis. Stat. § 6.87(4)(b)1. The plain, unambiguous words of § 6.87(4)(b)1. require that voted ballots "shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Drop boxes do not meet the legislature's mandatory directive.

¶102 However, because drop boxes are not separately identified as a source of illegal voting in this lawsuit, I will not dwell on the accountability problems they create, but I do not doubt that challenges to drop boxes in general and in specific instances will be seen as problems in future elections. Therefore, we may have the opportunity to examine them in a case arising from a subsequent election.[14]

[14] We had the opportunity to examine the use of drop boxes in *Mueller v. Jacobs*, 2020AP1958-OA, but the court refused to grant review, from which decision Annette Kingsland Ziegler, J., Rebecca Grassl Bradley, J. and I dissented.

¶103 It is also Respondent's contention that the poll workers who staffed these events were agents[15] of the city clerk; and therefore, delivery of ballots to them was personal delivery to the clerk within the meaning of Wis. Stat. § 6.87(4)(b)1. This is an amazing contention. Without question, delivery to voluntary poll workers is not "delivered in person to the municipal clerk," as § 6.87(4)(b)1. requires.

¶104 The legislature prescribed the absentee voting procedure in Wis. Stat. § 6.87(4)(b)1. and commanded that those procedures are "mandatory" in Wis. Stat. § 6.84(2). Gatherings in 200 city parks did not meet the statutory requirements for lawful absentee voting. They also lack the safety and solemnity that are attached to personally delivering absentee ballots to the municipal clerk.

III. CONCLUSION

¶105 The Milwaukee County Board of Canvassers and the Dane County Board of Canvassers based their decisions on erroneous advice when they concluded that changes clerks made to defective witness addresses were permissible. And, the Dane County Board of Canvassers erred again when it approved the 200 locations for ballot collection that comprised Democracy in the Park. The majority does not bother addressing what the boards of canvassers did or

[15] I would be amazed if the City of Madison agreed that all the volunteer poll workers who staffed Democracy in the Park were legally agents of the city clerk given the exposure to liability such a determination would bring. *Lang v. Lions Club of Cudahy Wis., Inc.*, 2020 WI 25, ¶25, 390 Wis. 2d 627, 939 N.W.2d 582 (lead opinion).

should have done, and instead, four members of this court throw the cloak of laches over numerous problems that will be repeated again and again, until this court has the courage to correct them. The electorate expects more of us, and we are capable of providing it. Because we do not, I respectfully dissent.

¶106 I am authorized to state that Justices ANNETTE KINGSLAND ZIEGLER, and REBECCA GRASSL BRADLEY join this dissent.

¶107 ANNETTE KINGSLAND ZIEGLER, J. (*dissenting*). We are called upon to declare what the law is. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Once again, in an all too familiar pattern, four members of this court abdicate their responsibility to do so. They refuse to even consider the uniquely Wisconsin, serious legal issues presented. The issues presented in this case, unlike those in other cases around the United States, are based on Wisconsin statutory election law. Make no mistake, the majority opinion fails to even mention, let alone analyze, the pertinent Wisconsin statutes. Passing reference to other states' decisionmaking is of little relevance given the Wisconsin legal issues at stake. *See* Roggensack, C.J., dissent, *supra*; Rebecca Grassl Bradley, J., dissent, *infra*. The people of Wisconsin deserve an answer – if not for this election, then at least to protect the integrity of elections in the future. Instead of providing clarity, the majority opinion is, once again, dismissive of the pressing legal issues presented.

¶108 The majority author's concurrence is even more dismissive of the need for clarity in Wisconsin election law stating that he "understand[s] the desire for at least some clarity regarding the underlying election administration issues . . . [but] its just not possible." Hagedorn, J., concurrence, ¶36. Indeed, we are presented with a rare opportunity to meaningfully engage in, among other things, a known conflict between guidance, given by an unelected committee, and what the law requires. These are more than mere "election administration issues." *See* Rebecca Grassl Bradley, J., dissent, *infra*. This case presents not just a "desire" for clarity in the law, our constitutional duty

requires us to declare what the law is. Quite obviously, defaulting to laches and claiming that it is "just not possible," is directly contradicted by the majority author's own undertaking. If it is important enough to address in his concurrence, then it should also satisfy the discretionary standard which overcomes the application of laches. Instead of undertaking the duty to decide novel legal issues presented, this court shirks its institutional responsibility to the public and instead falls back on a self-prescribed, previously unknown standard it calls laches.

¶109 Stated differently, the majority claims the petitioners were too late, should have acted earlier and therefore, the court is neutered from being able to declare what the law is. The majority basically reiterates respondents' soundbites. In so doing, the majority seems to create a new bright-line rule that the candidates and voters are without recourse and without any notice should the court decide to later conjure up an artificial deadline concluding that it prefers that something would have been done earlier. That has never been the law, and it should not be today. It is a game of "gotcha." I respectfully dissent, because I would decide the issues presented and declare what the law is.

I. ABDICATION OF CONSTITUTIONAL DUTY

¶110 Unfortunately, our court's adoption of laches as a means to avoid judicial decisionmaking has become a pattern of conduct. A majority of this court decided not to address the issues in this case, when originally presented to us by way of an original action. *Trump v. Evers*, No. 2020AP1971-OA, unpublished order (Wis. Dec. 3. 2020). In concluding that it is again

paralyzed from engaging in pertinent legal analysis, our court unfortunately provides no answer or even any analysis of the relevant statutes, in the most important election issues of our time. *See Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877; *Trump v. Evers*, No. 2020AP1971-OA (Rebecca Grassl Bradley, J., dissenting); *Mueller v. Jacobs*, No. 2020AP1958-OA, unpublished order (Wis. Dec. 3, 2020) (Roggensack, C.J., Ziegler, and Rebecca Grassl Bradley, JJ. dissenting); *Wis. Voters Alliance v. Wisconsin Elections Comm'n*, No. 2020AP1930-OA, unpublished order (Wis. Dec. 4, 2020) (Roggensack, C.J., dissenting).

¶111 Instead, the majority relies on what only can be viewed as a result-oriented application of the equitable doctrine of laches to avoid declaring what the law is. To be clear, I am not interested in a particular outcome. I am interested in the court fulfilling its constitutional responsibility. While sometimes it may be difficult to undertake analysis of hot-button legal issues – as a good number of people will be upset no matter what this court does – it is our constitutional duty. We cannot hide from our obligation under the guise of laches. I conclude that the rule of law and the equities demand that we answer these questions for not only this election, but for elections to come. I have concern over this court's pattern of indecision because that leaves no court declaring what Wisconsin election law is. *See* Roggensack, C.J., dissent, *supra*; Rebecca Grassl Bradley, J., dissent, *infra*. We can and should do better for the people of Wisconsin and for the nation, which depends on Wisconsin following its election laws.

¶112 Regarding this court's continued pattern of abdicating its responsibility concerning election issues,

earlier this term in *Hawkins*, the same members of the court relied on laches, without any analysis whatsoever of that doctrine, and denied a rightful candidate the opportunity to be placed on the ballot as a presidential candidate. Thus, the court likewise denied the voters the opportunity to choose that candidate's name amongst the others on the ballot. *See Hawkins*, 393 Wis. 2d 629 (Ziegler, J., dissenting).[1] The court in Hawkins, about two months before the November election, declared that it was unable to act, citing the doctrine of laches, and applied a newly invented and previously unknown, self-imposed, result-oriented, laches-based deadline as an excuse for inaction. *Id.*

II. LACHES DOES NOT AND SHOULD NOT BAR THIS CASE

¶113 Once again, the majority imposes its definition of laches, which is tailored to its judicial preference rather than based on well-established legal principles. The majority must know that under this court's previous laches jurisprudence, it should nonetheless address the merits of the issues. As this court has consistently held, "[l]aches is an affirmative,

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[1] In 2016, the Green Party candidates received 31,072 votes. *See Certificate of Ascertainment for President, Vice President and Presidential Electors General Election – November 8, 2016*, available at https://www.archives.gov/files/electoral-college/2016/ascertainment-wisconsin.pdf. In 2020, the Green Party candidates received only 1,089 votes. *See WEC Canvass Results for 2020 General Election*, available at https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount %29.pdf.

equitable defense designed to bar relief when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim." *Wisconsin Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶11, 393 Wis. 2d 308, 946 N.W.2d 101. In Wisconsin, a defendant must prove three elements for laches to bar a claim: "(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay." *Id.*, ¶12. Even if respondents carry their burden of proving all three elements of laches, "application of laches is left to the sound discretion of the court asked to apply this equitable bar." *Id.*

¶114 The petitioners raised four allegations regarding election administration: Absentee ballots lacking a separate application; absentee envelopes that are missing or have a defective witness address; indefinitely confined voters/faulty advice from election officials; and ballots cast at Madison's Democracy in the Park/ballot drop boxes. The respondents cannot demonstrate that laches bars a single one of these claims, and, even if they could, the court could still and should exercise its discretion to hear these issues.

A. No Unreasonable Delay

¶115 The first element of a laches defense requires the respondents to prove the petitioners unreasonably delayed in making their allegations. "What constitutes a reasonable time will vary and depends on the facts of a particular case." *Wisconsin Small Bus. United*, 393 Wis. 2d 308, ¶14.

¶116 Convenient to its purpose, the majority frames this case to meet its preferred outcome. The

majority characterizes this suit as a challenge to general election policies rather than what it is: this lawsuit is a challenge to specific ballots that were cast in this election, contrary to the law. The majority states, "[t]he time to challenge election policies such as these is not after all ballots in the election have been cast and the votes tallied." Majority op., ¶22. According to the majority, "[s]uch delay in light of these specific challenges is unreasonable." *Id.* The majority misses the mark.

¶117 In other words, contrary to the majority's characterizations, this case is not about general election procedure: it is about challenging specific ballots. In Wisconsin, while voting is a right, absentee voting is a privilege, not a right. Wis. Stat. § 6.84(1). The Wisconsin Legislature has created a set of mandatory rules to which *the voters* must adhere for their absentee ballots to count.[2] Consistent with express mandatory rules, the petitioners allege that certain ballots were cast that did not adhere to the law and, therefore, should not be counted. It is a specific question: Were the ballots cast according to the law as stated in the statutes and if not, what, if any, remedy, exists?

¶118 With this proper framing of the issue, it is clear that the petitioners did not unreasonably delay in challenging the ballots. To somehow require that challenges must be made and legal relief given before

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[2] *See* Wis. Stat. § 6.84(2) ("Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.").

an election, before the ballots are cast and before a recount is absurd. No recount would ever amount to relief if that is the lodestar.

¶119 Thus, the petitioners did not unreasonably delay in filing this suit, and this element of laches has not been demonstrated as to any of the four allegations of election irregularity.

B. Respondents Knew Ballots Would Be Challenged.

¶120 The second element of laches addresses the knowledge of the party asserting laches. *See Wis. Small Bus. United*, 393 Wis. 2d 308, ¶18. If the party lacks knowledge of claim, the respondents have satisfied this element. Id. The majority summarily accepts, without any analysis, that "[t]he respondents all . . . were unaware that the Campaign would challenge various election procedures after the election . . . ." Majority op., ¶23. Virtually nothing is in the record to support this assertion other than the parties' statements. In other words, the majority accepts one side's statements as fact in order to disallow the other side its day in court.

¶121 As explained above, this is a challenge to the ballots cast in this election. The President tweeted numerous times shortly after Wisconsin announced the election results that he would challenge the results and prove certain ballots were impermissibly cast.[3] The majority chose to accept the respondents' assertion that they did not see this lawsuit coming

[3] *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 28, 2020, 2:00 p.m.), https://twitter.com/ realDonaldTrump/ status/1332776310196883461.

despite the record to the contrary.

¶122 Moreover, the majority is incorrect that "nothing in the record suggests" that the respondents knew what the petitioners would be challenging. Majority op., ¶23. In fact, Wisconsin law mandates that the petitioners expressly declare on what grounds they plan to challenge the ballots in a recount. Wis. Stat. § 9.01(1). In the petitioners' recount petition, the petitioners specifically laid out these claims.

¶123 Thus, the majority's conclusion with respect to this element is particularly lean given the record. It is at least more than plausible that respondents had knowledge that the petitioners would challenge the ballots in a lawsuit.

C. Respondents Lack Prejudice.

¶124 Even if the respondents could prove the first two elements, the respondents themselves are not prejudiced by this delay. "What amounts to prejudice . . . depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position." *Wis. Small Bus. United*, 393 Wis. 2d 308, ¶19. The party seeking to apply laches must "prove that the unreasonable delay" prejudiced the party, not a third party. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶32, 389 Wis. 2d 516, 936 N.W.2d 587. This court recognizes two different types of prejudice: evidentiary and economic. *Id.*, ¶33. Evidentiary prejudice is where "the defendant is impaired from successfully defending itself from suit given the passage of time." *Id.*, ¶33 n.26. Economic prejudice occurs when "the costs to the defendant have significantly increased due to the delay." *Id.*

¶125 The majority abandons these principles of laches and instead focuses on the prejudice to third parties. The majority states that "[t]o strike ballots cast in reliance on the guidance now, and to do so in only in two counties, would violate every notion of equity that undergirds our electoral system." Majority op., ¶25. This is a new manner in which to approach the legal analysis of prejudice. The majority does not explain how this potential remedy prevents us from hearing the merits of this case. The majority does not explain how these notions are either evidentiary or economic prejudice, nor does it consider how it prejudices the actual parties in this case. It is unusual to conclude that overwhelming prejudice exists such that the court is paralyzed from considering whether the law was followed. In other words, the majority seems to be saying that they do not wish to grant relief and therefore they will not analyze the law. This remedy-focused analysis is not typical to laches.

¶126 Neither type of prejudice applies to the respondents in this case. None of the respondents claimed that they were unable to successfully defend themselves. All respondents filed briefs in this court addressing the merits. The circuit court's opinion addresses the merits. Accordingly, evidentiary prejudice does not apply. Furthermore, no respondents have claimed that the costs of defending this claim have "significantly increased due to the delay." Accordingly, economic prejudice does not apply.

¶127 At a more fundamental level, the respondents must *prove* each of the elements. The court cannot presume that the elements are met. Similarly, the court cannot assume that a party cannot successfully defend itself nor that a party faces "significantly increased" costs. To do so forces this court to step out

of our role as a neutral arbiter. *See Service Emp. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d.

¶128 Therefore, the respondents cannot prove and did not even allege that they are prejudiced. Accordingly, the majority determination in this regard is flawed.

D. Equitable Discretion

¶129 Even if the majority was correct that the elements of laches are met here, it still has the discretion to reach the merits. *See Wis. Small Bus. United*, 393 Wis. 2d 308, ¶12. The majority claims that the "only just resolution of these claims" is to use laches to not address the merits of this case. Majority op., ¶29. Not so. Our constitutional responsibility is to analyze the law and determine if it was followed regardless of whether any remedy might be available. In this way future elections benefit from our analysis. Curiously, it is unclear whether there is an actual majority given the fact that the writer does exercise his discretion to address the issues – again, a lack of clarity.

¶130 This court should address the merits because we should declare what the law is. The public has serious concerns about the election and about our election laws. Recent polls suggest that the American public, regardless of party affiliation, has serious questions about the integrity of the November 2020 election.[4] Our court has an opportunity to analyze the

[4] *See* Rasmussen Reports, *61% Think Trump Should Concede to Biden* (Nov. 19, 2020) https://www.rasmussenreports.com/public_content/politics/elections/election_2020/61_think_tr

law and answer the public's concerns, but it unfortunately declines this opportunity for clarification.

¶131 The majority should declare what the law is. Every single voter in this state is harmed when a vote is cast in contravention of the statutes. *See* Wis. Stat. § 6.84(1). This court should conduct a rigorous analysis, and determine whether the law was followed.

¶132 To counter these clear equities counseling us

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ump_should_concede_to_biden (finding 47% of those who polled believe that Democrats stole votes or destroy pro-Trump ballots in several states to ensure that Biden would win); Politico, *National Tracking Poll*, Project 201133 (Nov. 6-9, 2020), https://www.politico.com/f/?id=00000175- b306-d1da-a775-bb6691050000 (finding 34% of those polled believed the election was not free and fair); Jill Darling et al.*, USC Dornsife Daybreak Poll Topline* at 14 (Nov. 19, 2020), Post-Election Poll UAS318, https://dornsife-center-for-political-future.usc.edu/past-polls-collection/2020-polling/ (finding that those polled are only 58% confident that all votes in the election were accurately counted); R. Michael Alvarez, et al., *Voter Confidence in the 2020 Presidential Election: Nationwide Survey Results* (Nov. 19, 2020), The Caltech/MIT Voting Technology Project Monitoring the Election, 2020 Presidential Election Survey Reports & Briefs, https://monitoringtheelection.us/2020-survey (finding 39% of those polled are not confident that votes nationally were counted as the voter intended); Yimeng Li, *Perceptions of Election or Voter Fraud in the 2020 Presidential Election: Nationwide Survey Results* (Nov. 23, 2020), The Caltech/MIT Voting Technology Project Monitoring the Election, 2020 Presidential Election Survey Reports & Briefs, https://monitoringtheelection.us/2020-survey (finding between 29% and 34% of those polled believe voter fraud occurs); *Sharp Divisions on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct*, Pew Research Center, U.S. Politics & Policy (Nov. 20, 2020), https://www.pewresearch.org/politics/2020/11/20/sharp-divisions-on-vote-counts-as-biden-gets-high-marks-for-his-post-election-conduct/ (finding that 41% of hose polled believe the elections were run and administered not well).

to reach the merits, the majority nonetheless seemingly declines the opportunity in favor of a self-divined rule which would make it nearly impossible to know when and how such a claim could be made. The majority asserts that "[f]ailure to [raise these claims earlier] affects everyone, causing needless litigation and undermining confidence in the election results. It also puts courts in a difficult spot. Interpreting complicated election statutes in days is not consistent with best judicial practices." Majority op., ¶30. A claim post-recount is always going to be tight on timing.

¶133 Under the majority's new rule, a candidate will have to monitor all election-related guidance, actions, and decisions of not only the Wisconsin Elections Commission, but of the 1,850 municipal clerks who administer the election at the local level. And that is just in one state! Instead of persuading the people of Wisconsin through campaigning, the candidate must expend precious resources monitoring, challenging, and litigating any *potential* election-related issue hoping that a court might act on an issue that may very well not be ripe. Moreover, it would be nonsensical for a candidate, or worse, a disenfranchised voter, to challenge an election law. Thus, the majority's new rule does not prevent "needless litigation"; it spawns it in the form of preventative lawsuits to address any possible infraction of our election laws. We have the opportunity to answer important legal questions now and should do so.

¶134 Similarly, the majority claims by not analyzing the law it is bolstering public confidence. I disagree. As explained, the American public has serious questions about the previous election. *See supra*, ¶23 n.4. Instead of addressing these serious

questions, the majority balks and says some other party can bring a suit at a later date. *See* majority op., ¶31 n.11. Lawsuits are expensive and time-consuming and require that the person bringing one has a claim. These issues are presented here before us today. If they are important enough to answer at a later date, they are important to answer in this pending lawsuit today. Addressing the merits of this case would bolster confidence in this election and future elections. Even if the court does not conclude that relief should be granted, this lawsuit is the opportunity to declare what the law is – which is our constitutional duty – and will help the public have confidence in the election that just occurred and confidence in future elections. An opinion of this court on the merits would prevent any illegal or impermissible actions of election officials going forward. *See* Roggensack, C.J., dissent, *supra*; Rebecca Grassl Bradley, J., dissent, *infra*. Accordingly, I fail to see how addressing the merits in this case would undermine confidence in the election results. If anything, addressing the merits will reassure the people of Wisconsin and our nation that our elections comport with the law and to the extent that the legislature might need to act, it is clear where the law might be that needs correction. The court's indecision creates less, not more clarity.

¶135 The majority's decision not to address the merits suffers from an even more insidious flaw – it places the will of this court and the will of the Wisconsin Elections Commission above the express intent of the legislature. The majority uses the potential remedy, striking votes, as an equitable reason to deny this case. Majority op., ¶31. But the majority ignores that the legislature specifically set forth a remedy that absentee ballots cast in

contravention of the statute not be counted. *See* Wis. Stat. § 6.84(2). When the law is not followed, the counting of illegal ballots effectively disenfranchises voters. This past election, absentee voting was at an extraordinarily high level.[5] Perhaps this is why it mattered more now than ever that the law be followed. Also this might explain why the process has not been objected to before in the form of a lawsuit like this one. The majority gives virtually no consideration to this fact.

¶136 Despite the fact that the majority relies on laches to not declare the law in nearly all respects of the challenges raised, it nonetheless segregates out the indefinitely confined voter claim to analyze. Notably absent is any explanation why this claim is not treated like the other challenges.

¶137 Therefore, the majority's application of laches here is unfortunate and doomed to create chaos, uncertainty, undermine confidence and spawn needless litigation. Instead of declaring what the law is, the majority is legislating its preferred policy. It disenfranchises those that followed the law in favor of those who acted in contravention to it. This is not the rule of law; it is the rule of judicial activism through inaction.

III. CONCLUSION

¶138 As I would not apply laches in the case at issue and instead would analyze the statutes and available remedies as well as the actions of the Wisconsin Elections Commission, I respectfully

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[5] In 2016, 830,763 electors voted using absentee ballots. In 2020, 1,957,514 electors voted using absentee ballots.

dissent.

¶139 I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice REBECCA GRASSL BRADLEY join this dissent.

¶140 REBECCA GRASSL BRADLEY, J. (*dissenting*). Once again, the majority of the Wisconsin Supreme Court wields the discretionary doctrine of laches as a mechanism to avoid answering questions of law the people of Wisconsin elected us to decide. Although nothing in the law compels its application, this majority routinely hides behind laches in election law cases no matter when a party asserts its claims. Whether election officials complied with Wisconsin law in administering the November 3, 2020 election is of fundamental importance to the voters, who should be able to rely on the advice they are given when casting their ballots. Rather than fulfilling its duty to say what the law is, a majority of this court unconstitutionally converts the Wisconsin Elections Commission's mere advice into governing "law," thereby supplanting the actual election laws enacted by the people's elected representatives in the legislature and defying the will of Wisconsin's citizens. When the state's highest court refuses to uphold the law, and stands by while an unelected body of six commissioners rewrites it, our system of representative government is subverted.

I

¶141 In Wisconsin, we have a constitution, and it reigns supreme in this state. "By section 1 of article 4 the power of the state to deal with elections except as limited by the Constitution is vested in the senate and assembly to be exercised under the provisions of the Constitution; therefore *the power to prescribe the manner of conducting elections is clearly within the province of the Legislature*." *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 906 (1930) (emphasis added). The

Wisconsin Elections Commission (WEC) possesses no authority to prescribe the manner of conducting elections; rather, this legislatively-created body is supposed to *administer* and *enforce* Wisconsin's election laws. Wis. Stat. §§ 5.05(1) and (2m). While WEC may not create any law, it may "[p]romulgate rules under ch. 227 . . . for the purpose of *interpreting* or *implementing* the laws regulating the conduct of elections . . . ." Wis. Stat. § 5.05(1)(f) (emphasis added). It is undisputed that the advice rendered by WEC was not promulgated by rule but took the form of guidance. "A guidance document does not have the force of law." Wis. Stat. § 227.112(3). WEC's guidance documents are merely "communications *about* the law – they are not the law itself." *Serv. Employees Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶102, 393 Wis. 2d 38, 946 N.W.2d 35. The majority casts aside this black letter law, choosing to apply the majority's subjective concept of "equity" in order to reach the outcome it desires.[1] In doing so, the majority commits grave error by according WEC guidance the force of law.

¶142 Chapters 5 through 12 of the Wisconsin Statutes contain the state's enacted election laws. Section 5.01(1) states that "[e]xcept as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions."

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[1] During oral arguments in this case, Justice Jill J. Karofsky made the following statement (among others) to the President's attorney: "You want us to overturn this election so that your king can stay in power, and that is so un-American." When a justice displays such overt political bias, the public's confidence in the integrity and impartiality of the judiciary is destroyed.

This *substantial* compliance provision does not apply to absentee balloting procedures, however: "*Notwithstanding s. 5.01(1)*, with respect to matters relating to the *absentee* ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. *shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election*." Wis. Stat. § 6.84(2) (emphasis added).

¶143 "Section 6.84(2)'s strict construction requirement, applicable to statutes relating to the absentee ballot process, is consistent with the guarded attitude with which the legislature views that process." *Lee v. Paulson*, 2001 WI App 19, ¶¶7-8, 241 Wis. 2d 38, 623 N.W.2d 577. The legislature expressed its "guarded attitude" toward absentee balloting in no uncertain terms, drawing a sharp distinction between ballots cast in person versus those cast absentee: "The legislature finds that *voting is a constitutional right*, the vigorous exercise of which should be strongly encouraged. *In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place*. The legislature finds that *the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse*; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses." Wis. Stat. § 6.84(1) (emphasis added). While the ascertainable will of the election-day voter may prevail over a "failure to fully comply" with "some of"

the provisions governing conventional voting (§ 5.01), any "[b]allots cast in contravention of" the law's absentee balloting procedures "may not be counted." Wis. Stat. § 6.84(2). This court has long recognized that in applying Wisconsin's election laws, "an act done in violation of a *mandatory* provision *is void*." *Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 269 Wis. 299, 303, 69 N.W.2d 235 (1955) (emphasis added) (citation omitted).

¶144 In order "to prevent the potential for fraud or abuse" associated with absentee voting, the legislature requires the laws governing the absentee balloting process to be followed. Wis. Stat. § 6.84(1). If an absentee ballot is cast "in contravention" of the absentee balloting procedures, it "may not be counted." Wis. Stat. § 6.84(2). If an absentee ballot is counted "in contravention" of the absentee balloting procedures, it "may not be included in the certified result of any election." *Id.* Long ago, this court understood that "we are obliged to conclude that if absentee ballots are improperly delivered in contravention of [Wisconsin's statutes], the Board of Canvassers is under duty to invalidate and not include such ballots in the total count, *whether they are challenged at the election*, or not." *Olson v. Lindberg*, 2 Wis. 2d 229, 238, 85 N.W.2d 775 (1957) (emphasis added). Accordingly, if absentee ballots were counted in contravention of the law, the people of Wisconsin, through their elected representatives, have commanded the board(s) of canvassers to exclude those absentee ballots from the total count, independent of any legal challenge an aggrieved candidate may (or may not) bring.

¶145 The majority carelessly accuses the President of asking this court to "disenfranchise" voters. Majority op., ¶27; Justices Rebecca Frank Dallet's and Jill J.

Karofsky's concurrence, ¶33. In the election context, "disenfranchise" means to deny a voter the right to vote.[2] Under Article III, Section 1 of the Wisconsin Constitution, "[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." This court possesses no authority to remove any qualified elector's constitutionally-protected right to vote. But it is not "disenfranchisement" to uphold the law. "It is true that the right of a qualified elector to cast his ballot for the person of his choice cannot be destroyed or substantially impaired. However, the legislature has the constitutional power to say how, when and where his ballot shall be cast . . . ." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 472, 37 N.W.2d 473, 480 (1949). And the judiciary has the constitutional responsibility to say whether a ballot was cast in accordance with the law prescribed by the people's representatives.

¶146 Each of the President's legal claims challenge the counting of certain absentee ballots, which the President argues were cast in contravention of the Wisconsin Statutes. The majority misconstrues Wisconsin law in asserting that "[t]hese issues could have been brought weeks, months, or even years earlier." Majority op., ¶30. Section 9.01(11) of the Wisconsin Statutes provides that "[t]his section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed

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[2] Disenfranchise: "To deprive (someone) of a right, esp. the right to vote; to prevent (a person or group of people) from having the right to vote. — Also termed disfranchise." *Disenfranchise*, Black's Law Dictionary (11th ed. 2019).

during the voting or canvassing process." Only a "candidate voted for at any election who is an aggrieved party" may bring an action under Chapter 9. Wis. Stat. § 9.01(1)(a). Surely the majority understands the absurdity of suggesting that the President should have filed a lawsuit in 2016 or anytime thereafter. Why would he? He was not "an aggrieved party" – he won. Obviously, the President could not have challenged any "irregularity, defect or mistake committed during the voting or canvassing process" related to the November 3, 2020 election until that election occurred.

¶147 The respondents recognize that under Chapter 9, the "purpose of a recount . . . is to ensure that the voters, clerks and boards of canvassers followed the rules in place at the time of the election." Misunderstanding what the governing rules actually are, the respondents argue that having this court declare the law at this point would "retroactively change the rules" after the election. Justice Brian Hagedorn embraces this argument, using a misapplied football metaphor that betrays the majority's contempt for the law: "the [President's] campaign is challenging the rulebook adopted before the season began." Majority op., ¶32. Justices Rebecca Frank Dallet and Jill J. Karofsky endorse the idea that this court should genuflect before "the rules that were in place at the time." Justices Dallet's and Karofsky's concurrence, ¶34. How astonishing that four justices of the Wisconsin Supreme Court must be reminded that it is THE LAW that constitutes "the rulebook" for any election – not WEC guidance – and election officials are bound to follow the law, if we are to be governed by the rule of law, and not of men.

¶148 As the foundation for one of the President's claims, Wis. Stat. § 6.87(6d) provides that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." The only statutorily-prescribed means to correct that error is for the clerk to "return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized." Wis. Stat. § 6.87(9). Contrary to Wisconsin law, WEC guidance says "the clerk should attempt to resolve any missing witness address information prior to Election Day if possible, and this can be done through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness)."[3] WEC's "Election Administration Manual for Wisconsin Municipal Clerks" erroneously provides that "[c]lerks may add a missing witness address using whatever means are available. Clerks should initial next to the added witness address."[4] Nothing in the election law statutes permits a clerk to alter witness address information. WEC's guidance in this regard does not administer or enforce the law; it flouts it.

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[3] Memorandum from Meagan Wolfe to Wisconsin County and Municipal Clerks (Oct. 19, 2020), at https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Spoiling%20Ballot%20Memo%2010.2020.pdf.

[4] Wisconsin Elections Commission, Election Administration Manual for Wisconsin Municipal Clerks (Sept. 2020), at https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Election%20Administration%20Manual%20%282020-09%29.pdf.

II

¶149 Under the Wisconsin Constitution, "all governmental power derives 'from the consent of the governed' and government officials may act only within the confines of the authority the people give them. Wis. Const. art. I, § 1." *Wis. Legislature v. Palm*, 2020 WI 42, ¶66, 391 Wis. 2d 497, 942 N.W.2d 900 (Rebecca Grassl Bradley, J., concurring). The confines of the authority statutorily conferred on the WEC limit its function to administering and enforcing the law, not making it. The Founders designed our "republic to be a *government of laws, and not of men* . . . bound by fixed laws, which the people have a voice in making, and a right to defend." John Adams, *Novanglus: A History of the Dispute with America, from Its Origin, in 1754, to the Present Time, in Revolutionary Writings of John Adams* (C. Bradley Thompson ed. 2000) (emphasis in original). Allowing any person, or unelected commission of six, to be "bound by no law or limitation but his own will" defies the will of the people. *Id.*

¶150 The judiciary is constitutionally compelled to safeguard the will of the people by interpreting and applying the laws duly enacted by the people's representatives in the legislature. "A democratic state must therefore have the power to . . . prevent all those practices which tend to subvert the electorate and substitute for a government of the people, by the people and for the people, a government guided in the interest of those who seek to pervert it." *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 905 (1930). The majority's abdication of its judicial duty to apply the election laws of this state rather than the WEC's "rulebook" precludes any legislative recourse short of

abolishing the WEC altogether.

¶151 While some will either commend or condemn the court's decision in this case based upon its impact on their preferred candidate, the importance of this case transcends the results of this particular election. "A correct solution of the questions presented is of far greater importance than the personal or political fortunes of any candidate, incumbent, group, faction or party. We are dealing here with laws which operate in the political field – a field from which courts are inclined to hold aloof – a field with respect to which the power of the Legislature is primary and is limited only by the Constitution itself." *Id.* The majority's decision fails to recognize the primacy of the legislative power to prescribe the rules governing the privilege of absentee voting. Instead, the majority empowers the WEC to continue creating "the rulebook" for elections, in derogation of enacted law.

¶152 "The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards." *State v. Conness*, 106 Wis. 425, 82 N.W. 288, 289 (1900). Instead of determining whether the November 3, 2020 election was conducted in accordance with the legal standards governing it, the majority denies the citizens of Wisconsin any judicial scrutiny of the election whatsoever. "Elections are the foundation of American government and their integrity is of such monumental importance that any threat to their validity should trigger not only our concern but our prompt action." *State ex rel. Zignego v. Wis. Elec. Comm'n*, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)). The majority

instead belittles the President's claims of law violations as merely "technical issues that arise in the administration of every election." Majority op., ¶31. The people of Wisconsin deserve a court that respects the laws that govern us, rather than treating them with such indifference.

¶153 "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The majority takes a pass on resolving the important questions presented by the petitioners in this case, thereby undermining the public's confidence in the integrity of Wisconsin's electoral processes not only during this election, but in every future election. Alarmingly, the court's inaction also signals to the WEC that it may continue to administer elections in whatever manner it chooses, knowing that the court has repeatedly declined to scrutinize its conduct. Regardless of whether WEC's actions affect election outcomes, the integrity of every election will be tarnished by the public's mistrust until the Wisconsin Supreme Court accepts its responsibility to declare what the election laws say. "Only . . . the supreme court can provide the necessary clarity to guide all election officials in this state on how to conform their procedures to the law" going forward. *State ex rel. Zignego v. Wis. Elec. Comm'n*, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)).

¶154 This case represents only the majority's latest evasion of a substantive decision on an election law controversy.[5] While the United States Supreme

[5] Hawkins v. WEC, 2020 WI 75, ¶¶84, 86, 393 Wis. 2d 629, 948 N.W.2d 877 (Rebecca Grassl Bradley, J., dissenting) ("The

Court has recognized that "a state indisputably has a compelling interest in preserving the integrity of its election process[,]" *Burson v. Freeman*, 504 U.S. 191, 199 (1992), the majority of this court repeatedly demonstrates a lack of any interest in doing so, offering purely discretionary excuses like laches, or no reasoning at all. This year, the majority in *Hawkins v. WEC* declined to hear a claim that the WEC unlawfully kept the Green Party's candidates for President and Vice President off of the ballot, ostensibly because the majority felt the candidates' claims were brought "too late."[6] But when litigants have filed cases involving voting rights well in advance of Wisconsin elections, the court has "take[n] a pass" on those as well, thereby unfailingly and "irreparably den[ying] the citizens of Wisconsin a timely resolution of issues that impact voter rights and the integrity of our elections." *State ex rel. Zignego v. Wis. Elec. Comm'n*, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)). Having neglected to identify any principles guiding its decisions, the majority leaves Wisconsin's voters and candidates guessing as to when, exactly, they should

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majority upholds the Wisconsin Elections Commission's violation of Wisconsin law, which irrefutably entitles Howie Hawkins and Angela Walker to appear on Wisconsin's November 2020 general election ballot as candidates for President and Vice President of the United States . . . . In dodging its responsibility to uphold the rule of law, the majority ratifies a grave threat to our republic, suppresses the votes of Wisconsin citizens, irreparably impairs the integrity of Wisconsin's elections, and undermines the confidence of American citizens in the outcome of a presidential election.").

[6] Hawkins v. Wis. Elec. Comm'n, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (denying the petition for leave to commence an original action).

file their cases in order for the majority to deem them worthy of the court's consideration on the merits.

¶155 The consequence of the majority operating by whim rather than law is to leave the interpretation of multiple election statutes in flux – or worse yet, in the hands of the unelected members of the WEC. "To be free is to live under a government by law . . . . Miserable is the condition of individuals, danger is the condition of the state, if there is no certain law, or, which is the same thing, no certain *administration* of the law[.]" *Judgment in Rex v. Shipley*, 21 St Tr 847 (K.B. 1784) (Lord Mansfield presiding) (emphasis added). The Wisconsin Supreme Court has an institutional responsibility to interpret law——not for the benefit of particular litigants, but for citizens we were elected to serve. Justice for the people of Wisconsin means ensuring the integrity of Wisconsin's elections. A majority of this court disregards its duty to the people of Wisconsin, denying them justice.

* * *

¶156 "This great source of free government, popular election, should be perfectly pure." Alexander Hamilton, Speech at New York Ratifying Convention (June 21, 1788), *in Debates on the Federal Constitution* 257 (J. Elliot ed. 1876). The majority's failure to act leaves an indelible stain on our most recent election. It will also profoundly and perhaps irreparably impact all local, statewide, and national elections going forward, with grave consequence to the State of Wisconsin and significant harm to the rule of law. Petitioners assert troubling allegations of noncompliance with Wisconsin's election laws by public officials on whom the voters rely to ensure free

and fair elections. It is our solemn judicial duty to say what the law is. The majority's failure to discharge its duty perpetuates violations of the law by those entrusted to administer it. I dissent.

¶157 I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice ANNETTE KINGSLAND ZIEGLER join this dissent.

Appendix B

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You are hereby notified that the Court has entered the following order:

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No. 2020AP1971-OA *Trump v. Evers*

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a supporting legal memorandum, and an appendix have been filed on behalf of petitioners, Donald J. Trump, et al. Responses to the petition have been filed by (1) Governor Tony Evers; (2) the Wisconsin Elections Commission and its Chair, Ann S. Jacobs; (3) Scott McDonell, Dane County Clerk, and Alan A. Arnsten and Joyce Waldrop, members of the Dane County

Board of Canvassers; and (4) George L. Christensen, Milwaukee County Clerk, and Timothy H. Posnanski, Richard Baas, and Dawn Martin, members of the Milwaukee County Board of Canvassers. A non-party brief in support of the petition has been filed by the Liberty Justice Center. A motion to intervene, a proposed response of proposed respondents-intervenors, and an appendix have been filed by the Democratic National Committee (DNC) and Margaret J. Andrietsch, Sheila Stubbs, Ronald Martin, Mandela Barnes, Khary Penebaker, Mary Arnold, Patty Schachtner, Shannon Holsey, and Benjamin Wikler (collectively, "the Biden electors"). The court having considered all of the filings,

IT IS ORDERED that the petition for leave to commence an original action is denied. One or more appeals from the determination(s) of one or more boards of canvassers or from the determination of the chairperson of the Wisconsin Elections Commission may be filed by an aggrieved candidate in circuit court. Wis. Stat. § 9.01(6); and

IT IS FURTHER ORDERED that the motion to intervene is denied as moot.

BRIAN HAGEDORN, J. (*concurring*). I understand the impulse to immediately address the legal questions presented by this petition to ensure the recently completed election was conducted in accordance with the law. But challenges to election results are also governed by law. All parties seem to agree that Wis.

Stat. § 9.01 (2017–18)[1] constitutes the "exclusive judicial remedy" applicable to this claim. § 9.01(11). After all, that is what the statute says. This section provides that these actions should be filed in the circuit court, and spells out detailed procedures for ensuring their orderly and swift disposition. *See* § 9.01(6)–(8). Following this law is not disregarding our duty, as some of my colleagues suggest. It is following the law.

Even if this court has constitutional authority to hear the case straightaway, notwithstanding the statutory text, the briefing reveals important factual disputes that are best managed by a circuit court.[2] The parties clearly disagree on some basic factual issues, supported at times by competing affidavits. I do not know how we could address all the legal issues raised in the petition without sorting through these matters, a task we are neither well-positioned nor institutionally designed to do. The statutory process assigns this responsibility to the circuit court. Wis. Stat. § 9.01(8)(b) ("The [circuit] court shall separately treat disputed issues of procedure, interpretations of law, and findings of fact.").

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[1] All subsequent references to the Wisconsin Statutes are to the 2017–18 version.

[2] The legislature generally can and does set deadlines and define procedures that circumscribe a court's competence to act in a given case. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶9–10, 273 Wis. 2d 76, 681 N.W.2d 190. The constitution would obviously override these legislative choices where the two conflict.

We do well as a judicial body to abide by time-tested judicial norms, even — and maybe especially — in high-profile cases. Following the law governing challenges to election results is no threat to the rule of law. I join the court's denial of the petition for original action so that the petitioners may promptly exercise their right to pursue these claims in the manner prescribed by the legislature.

PATIENCE DRAKE ROGGENSACK, C.J. (*dissenting*). Before us is an emergency petition for leave to commence an original action brought by President Trump, Vice President Pence and Donald Trump for President, Inc., against Governor Evers, the Wisconsin Elections Commission (WEC), its members and members of both the Milwaukee County Board of Canvassers and the Dane County Board of Canvassers. The Petitioners allege that the WEC and election officials caused voters to violate various statutes in conducting Wisconsin's recent presidential election. The Petitioners raised their concerns during recount proceedings in Dane County and Milwaukee County. Their objections were overruled in both counties.

The Respondents argue, in part, that we lack subject matter jurisdiction because of the "exclusive judicial remedy" provision found in Wis. Stat. § 9.01(11) (2017-18).[3] Alternatively, the Respondents assert that we should deny this petition because fact-finding is required, and we are not a fact-finding tribunal.

I conclude that we have subject matter jurisdiction that enables us to grant the petition for original action

[3] All subsequent references to the Wisconsin Statutes are to the 2017–18 version.

pending before us. Our jurisdiction arises from the Wisconsin Constitution and cannot be impeded by statute. Wis. Const., art. VII, Section 3(2); *City of Eau Claire v. Booth*, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738. Furthermore, time is of the essence.

However, fact-finding may be central to our evaluation of some of the questions presented. I agree that the circuit court should examine the record presented during the canvasses to make factual findings where legal challenges to the vote turn on questions of fact. However, I dissent because I would grant the petition for original action, refer for necessary factual findings to the circuit court, who would then report its factual findings to us, and we would decide the important legal questions presented.

I also write separately to emphasize that by denying this petition, and requiring both the factual questions and legal questions be resolved first by a circuit court, four justices of this court are ignoring that there are significant time constraints that may preclude our deciding significant legal issues that cry out for resolution by the Wisconsin Supreme Court.

I. DISCUSSION

The Petitioners set out four categories of absentee votes that they allege should not have been counted because they were not lawfully cast: (1) votes cast during the 14-day period for in-person absentee voting at a clerk's office with what are alleged to be insufficient written requests for absentee ballots, pursuant to Wis. Stat. § 6.86(1)(b); (2) votes cast when a clerk has completed information missing from the ballot envelope, contrary to Wis. Stat. § 6.87(6d); (3) votes cast by those who obtained an absentee ballot

after March 25, 2020 by alleging that they were indefinitely confined; and (4) votes cast in Madison at "Democracy in the Park" events on September 26 and October 3, in advance of the 14-day period before the election, contrary to Wis. Stat. § 6.87.

Some of the Respondents have asserted that WEC has been advising clerks to add missing information to ballot envelopes for years, so the voters should not be punished for following WEC's advice. They make similar claims for the collection of votes more than 14 days before the November 3 election.

If WEC has been giving advice contrary to statute, those acts do not make the advice lawful. WEC must follow the law. We, as the law declaring court, owe it to the public to declare whether WEC's advice is incorrect. However, doing so does not necessarily lead to striking absentee ballots that were cast by following incorrect WEC advice. The remedy Petitioners seek may be out of reach for a number of reasons.

Procedures by which Wisconsin elections are conducted must be fair to all voters. This is an important election, but it is not the last election in which WEC will be giving advice. If we do not shoulder our responsibilities, we leave future elections to flounder and potentially result in the public's perception that Wisconsin elections are unfair. The Wisconsin Supreme Court can uphold elections by examining the procedures for which complaint was made here and explaining to all where the WEC was correct and where it was not.

I also am concerned that the public will misunderstand what our denial of the petition means. Occasionally, members of the public seem to believe that a denial of our acceptance of a case signals that the petition's allegations are either false or not serious.

Nothing could be further from the truth. Indeed, sometimes, we deny petitions even when it appears that a law has been violated. *Hawkins v. Wis. Elec. Comm'n*, 2020 WI 75, ¶¶14–16, 393 Wis. 2d 629, 948 N.W.2d 877 (Roggensack, C.J., dissenting).

II. CONCLUSION

I conclude that we have subject matter jurisdiction that enables us to grant the petition for original action pending before us. Our jurisdiction arises from the Wisconsin Constitution and cannot be impeded by statute. Wis. Const., art. VII, Section 3(2); *City of Eau Claire*, 370 Wis. 2d 595, ¶7. Furthermore, time is of the essence.

However, fact-finding may be central to our evaluation of some of the questions presented. I agree that the circuit court should examine the record presented during the canvasses to make factual findings where legal challenges to the vote turn on questions of fact. However, I dissent because I would grant the petition for original action, refer for necessary factual findings to the circuit court, who would then report its factual findings to us, and we would decide the important legal questions presented.

I am authorized to state that Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

REBECCA GRASSL BRADLEY, J. (*dissenting*). "It is emphatically the province and duty of the Judicial Department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Wisconsin Supreme Court forsakes its duty to the people of Wisconsin in declining to decide whether election officials complied with Wisconsin's election laws in administering the November 3, 2020 election. Instead, a majority of this court passively permits the Wisconsin Elections Commission (WEC) to decree its own election rules, thereby overriding the will of the people as expressed in the election laws enacted by the people's elected representatives. Allowing six unelected commissioners to make the law governing elections, without the consent of the governed, deals a death blow to democracy. I dissent.

The President of the United States challenges the legality of the manner in which certain Wisconsin election officials directed the casting of absentee ballots, asserting they adopted and implemented particular procedures in violation of Wisconsin law. The respondents implore this court to reject the challenge because, they argue, declaring the law at this point would "retroactively change the rules" after the election. It is THE LAW that constitutes "the rules" of the election and election officials are bound to follow the law, if we are to be governed by the rule of law, and not of men.

Under the Wisconsin Constitution, "all governmental power derives 'from the consent of the governed' and government officials may act only within the confines of the authority the people give them. Wis. Const. art. I, § 1." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶66, 391 Wis. 2d 497, 942 N.W.2d 900 (Rebecca Grassl Bradley, J., concurring). The

Founders designed our "republic to be *a government of laws, and not of men* . . . bound by fixed laws, which the people have a voice in making, and a right to defend." John Adams, *Novanglus: A History of the Dispute with America, from Its Origin, in 1754, to the Present Time*, in *Revolutionary Writings of John Adams* (C. Bradley Thompson ed. 2000) (emphasis in original). Allowing any person, or unelected commission of six, to be "bound by no law or limitation but his own will" defies the will of the people. *Id.*

The importance of having the State's highest court resolve the significant legal issues presented by the petitioners warrants the exercise of this court's constitutional authority to hear this case as an original action. *See* Wis. Const. Art. VII, § 3. "The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards." *State v. Conness*, 106 Wis. 425, 82 N.W. 288, 289 (1900). While the court reserves this exercise of its jurisdiction for those original actions of statewide significance, it is beyond dispute that "[e]lections are the foundation of American government and their integrity is of such monumental importance that any threat to their validity should trigger not only our concern but our prompt action." *State ex rel. Zignego v. Wis. Elec. Comm'n*, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)).

The majority notes that an action "may be filed by an aggrieved candidate in circuit court. Wis. Stat. § 9.01(6)." Justice Hagedorn goes so far as to suggest that § 9.01 "constitutes the 'exclusive judicial remedy' applicable to this claim." No statute, however, can

circumscribe the constitutional jurisdiction of the Wisconsin Supreme Court to hear this (or any) case as an original action. "The Wisconsin Constitution IS the law — and it reigns supreme over any statute." *Wisconsin Legislature v. Palm*, 391 Wis. 2d 497, ¶67 n.3 (Rebecca Grassl Bradley, J., concurring). "The Constitution's supremacy over legislation bears repeating: 'the Constitution is to be considered in court as a paramount law' and 'a law repugnant to the Constitution is void, and . . . courts, as well as other departments, are bound by that instrument.' *See Marbury [v. Madison]*, 5 U.S. (1 Cranch) [137] at 178, 180 [1803])." *Mayo v. Wis. Injured Patients and Families Comp. Fund*, 2018 WI 78, ¶91, 383 Wis. 2d 1, 914 N.W.2d 678 (Rebecca Grassl Bradley, J., concurring). Wisconsin Statute § 9.01 is compatible with the constitution. While it provides an avenue for aggrieved candidates to pursue an appeal to a circuit court after completion of the recount determination, it does not foreclose the candidate's option to ask this court to grant his petition for an original action. Any contrary reading would render the law in conflict with the constitution and therefore void. Under the constitutional-doubt canon of statutory interpretation, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 247. *See also Wisconsin Legislature v. Palm*, 391 Wis. 2d 497, ¶31 ("[W]e disfavor statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration.").

While some will either celebrate or decry the court's inaction based upon the impact on their preferred candidate, the importance of this case

transcends the results of this particular election. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The majority takes a pass on resolving the important questions presented by the petitioners in this case, thereby undermining the public's confidence in the integrity of Wisconsin's electoral processes not only during this election, but in every future election. Alarmingly, the court's inaction also signals to the WEC that it may continue to administer elections in whatever manner it chooses, knowing that the court has repeatedly declined to scrutinize its conduct. Regardless of whether the WEC's actions affect election outcomes, the integrity of every election will be tarnished by the public's mistrust until the Wisconsin Supreme Court accepts its responsibility to declare what the election laws say. "Only . . . the supreme court can provide the necessary clarity to guide all election officials in this state on how to conform their procedures to the law" going forward. *State ex rel. Zignego v. Wis. Elec. Comm'n*, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)).

The majority's recent pattern of deferring or altogether dodging decisions on election law controversies[4] cannot be reconciled with its lengthy

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[4] *Hawkins v. Wis. Elec. Comm'n*, 2020 WI 75, ¶¶84, 86, 393 Wis. 2d 629, 948 N.W.2d 877 (Rebecca Grassl Bradley, J., dissenting) ("The majority upholds the Wisconsin Elections Commission's violation of Wisconsin law, which irrefutably entitles Howie Hawkins and Angela Walker to appear on Wisconsin's November 2020 general election ballot as candidates for President and Vice President of the United States . . . . In dodging its responsibility to uphold the rule of law, the majority

history of promptly hearing cases involving voting rights and election processes under the court's original jurisdiction or by bypassing the court of appeals.[5]

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ratifies a grave threat to our republic, suppresses the votes of Wisconsin citizens, irreparably impairs the integrity of Wisconsin's elections, and undermines the confidence of American citizens in the outcome of a presidential election"); *State ex rel. Zignego v. Wis. Elec. Comm'n*, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("In declining to hear a case presenting issues of first impression immediately impacting the voting rights of Wisconsin citizens and the integrity of impending elections, the court shirks its institutional responsibilities to the people who elected us to make important decisions, thereby signaling the issues are not worthy of our prompt attention."); *State ex rel. Zignego v. Wis. Elec. Comm'n*, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("A majority of this court disregards its duty to the people we serve by inexplicably delaying the final resolution of a critically important and time-sensitive case involving voting rights and the integrity of Wisconsin's elections.").

[5] *See, e.g.*, *NAACP v. Walker*, 2014 WI 98, ¶¶1, 18, 357 Wis. 2d 469, 851 N.W.2d 262 (2014) (this court took jurisdiction of appeal on its own motion in order to decide constitutionality of the voter identification act enjoined by lower court); *Elections Bd. of Wisconsin v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 653, 670, 597 N.W.2d 721 (1999) (this court granted bypass petition to decide whether express advocacy advertisements advocating the defeat or reelection of incumbent legislators violated campaign finance laws, in absence of cases interpreting applicable statutes); *State ex rel. La Follette v. Democratic Party of United States*, 93 Wis. 2d 473, 480-81, 287 N.W.2d 519 (1980) (original action deciding whether Wisconsin open primary system was binding on national political parties or infringed their freedom of association), rev'd, *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 548, 126 N.W.2d 551 (1964) (original action seeking to enjoin state from holding elections pursuant to legislative apportionment alleged to violate constitutional rights);

While the United States Supreme Court has recognized that "a state indisputably has a compelling interest in preserving the integrity of its election process[,]" *Burson v. Freeman*, 504 U.S. 191, 199 (1992), the majority of this court repeatedly demonstrates a lack of any interest in doing so, offering purely discretionary excuses or no reasoning at all. This year, the majority in *Hawkins v. Wis. Elec. Comm'n* declined to hear a claim that the WEC unlawfully kept the Green Party's candidates for President and Vice President off of the ballot, ostensibly because the majority felt the candidates' claims were brought "too late."[6] But when litigants have filed cases involving voting rights well in advance of Wisconsin elections, the court has "take[n] a pass," thereby "irreparably den[ying] the citizens of Wisconsin a timely resolution of issues that impact voter rights and the integrity of our elections." *State ex rel. Zignego v. Wis. Elec. Comm'n*, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)). Having neglected to identify

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State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 400, 52 N.W.2d 903 (1952) (original action to restrain the state from holding elections based on districts as defined prior to enactment of reapportionment law), *overruled in part by Reynolds*, 22 Wis. 2d 544; *State ex rel. Conlin v. Zimmerman*, 245 Wis. 475, 476, 15 N.W.2d 32 (1944) (original action to interpret statutes in determining whether candidate for Governor timely filed papers to appear on primary election ballot).

[6] *Hawkins v. Wis. Elec. Comm'n*, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (denying the petition for leave to commence an original action).

any principles guiding its decisions, the majority leaves Wisconsin's voters and candidates guessing as to when, exactly, they should file their cases in order for the majority to deem them worthy of the court's attention.

The consequence of the majority operating by whim rather than rule is to leave the interpretation of multiple election laws in flux — or worse yet, in the hands of the unelected members of the WEC. "To be free is to live under a government by law . . . . Miserable is the condition of individuals, danger is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of the law . . . ." *Judgment in Rex vs. Shipley*, 21 St Tr 847 (K.B. 1784) (Lord Mansfield presiding). The Wisconsin Supreme Court has an institutional responsibility to decide important questions of law—not for the benefit of particular litigants, but for citizens we were elected to serve. Justice for the people of Wisconsin means ensuring the integrity of Wisconsin's elections. A majority of this court disregards its duty to the people of Wisconsin, denying them justice.

"No aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶37, 376 Wis. 2d 147, 897 N.W.2d 384. Once again, a majority of this court instead "chooses to sit idly by,"[7] in a nationally important and time-sensitive case involving voting

[7] *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1609 (2016) (Thomas, J., dissenting from the denial of certiorari).

rights and the integrity of Wisconsin's elections, depriving the people of Wisconsin of answers to questions of statutory law that only the state's highest court may resolve. The majority's "refusal to hear this case shows insufficient respect to the State of [Wisconsin], its voters,"[8] and its elections.

"This great source of free government, popular election, should be perfectly pure." Alexander Hamilton, Speech at New York Ratifying Convention (June 21, 1788), *in Debates on the Federal Constitution* 257 (J. Elliot ed. 1876). The majority's failure to act leaves an indelible stain on our most recent election. It will also profoundly and perhaps irreparably impact all local, statewide, and national elections going forward, with grave consequence to the State of Wisconsin and significant harm to the rule of law. Petitioners assert troubling allegations of noncompliance with Wisconsin's election laws by public officials on whom the voters rely to ensure free and fair elections. It is not "impulse"[9] but our solemn judicial duty to say what the law is that compels the exercise of our original jurisdiction in this case. The majority's failure to embrace its duty (or even an impulse) to decide this case risks perpetuating violations of the law by those entrusted to follow it. I dissent.

I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice ANNETTE KINGSLAND ZIEGLER join this dissent.

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[8] *County of Maricopa, Arizona v. Lopez-Valenzuela*, 135 S. Ct. 2046, 2046 (2015) (Thomas, J., dissenting from the denial of certiorari).

[9] See Justice Hagedorn's concurrence.

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Appendix C

FILED
12-11-2020
John Barrett
Clerk of Circuit Court
2020CV007092

DATE SIGNED: December 11, 2020

Electronically signed by Judge Stephen A. Simanek
Circuit Court Judge

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

DONALD J. TRUMP,
MICHAEL R. PENCE, et al.

Plaintiffs/Appellants,

v.

JOSEPH R. BIDEN,
KAMALA D. HARRIS, et al.

Defendants/Appellees,

Milwaukee County Case No.: 2020CV7092
Dane County Case No.: 2020CV2514

FINAL ORDER

The matter having come before the Court, Reserve Judge Stephen A. Simanek, on December 11, 2020 on Plaintiffs' Motion for Judgment on their appeal under Wis. Stat. § 9.01(6) from the final recount determinations of the Dane County Board of Canvassers and Milwaukee County Elections Commission, the Court having considered the submissions by all parties, and having heard oral argument from all parties;

IT IS HEREBY ORDERED:

For the reasons set forth on the record, which are incorporated herein by reference, incorporating pages 1-30 of the Joint Proposed Findings of Fact and Conclusions of Law by Joseph R. Biden, Kamala D. Harris, the Dane County Defendants and the Milwaukee County Defendants (Doc. 89) as the Court's findings of fact and conclusions of law, and pursuant to Wis. Stat. § 9.01(8)(a), the determinations of the Dane County Board of Canvassers and Milwaukee County Elections Commission under review are **AFFIRMED**.

Costs will be taxed in favor of Respondents pursuant to Wis. Stat. § 9.01(7)(b).

THIS IS A FINAL ORDER
FOR PURPOSES OF APPEAL.

FILED
12-09-2020
John Barrett
Clerk of Circuit Court
2020CV007092

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

DONALD J. TRUMP,
MICHAEL R. PENCE, *et al.*

Plaintiffs,

v.

JOSEPH R. BIDEN, *et al.*,

Defendants.

Milwaukee County Case No. 20-CV-7092
Dane County Case No. 20-CV-2514
Consolidated

JOINT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW BY JOSEPH R. BIDEN, KAMALA D. HARRIS, THE DANE COUNTY DEFENDANTS AND MILWAUKEE COUNTY DEFENDANTS

Defendants, Joseph R. Biden, Kamala D. Harris, Milwaukee County Clerk George L.Christensen, Milwaukee County Elections Commission (named herein as the Milwaukee County Board of Canvassers), Dane County Clerk Scott McDonnell, and Dane County Board of Canvassers, by their undersigned counsel, submit these Joint Proposed Findings of Fact and Conclusions of Law for the Court's consideration.

PROPOSED FINDINGS OF FACT

A. Procedural History and Background

1. The 2020 Presidential election was conducted on November 3, 2020.

2. On November 17, 2020, the initial Wisconsin county canvasses of the election results were completed. The canvass results showed Joseph R. Biden and Kamala D. Harris won the State of Wisconsin by 20,427 votes.

3. On November 18, 2020, Plaintiffs filed a Recount Petition with the Wisconsin Elections Commission ("WEC") (Doc. 36).[1] Despite alleging that "mistakes and fraud were **[2]** committed throughout the state of Wisconsin," the petition sought recounts in just two of Wisconsin's 72 counties — Milwaukee and Dane Counties.

4. Plaintiff's Recount Petition (Doc. 36) alleged, on information and belief, that the following errors

[1] "Doc." refers to the e-filing document number associated with electronic filings in this consolidated case.

occurred in the two counties:

> a. Municipal clerks improperly completed missing information on absentee ballot envelopes related to witness addresses (Recount Petition, ¶ 4);
>
> b. In-person absentee voters did not submit written applications for an absentee ballot (Recount Petition, ¶ 5); and
>
> c. Voters who were not indefinitely confined claimed "indefinitely confined" status for the purposes of obtaining an absentee ballot without having to show photo identification (Recount Petition, ¶ 6).

5. While not raised in the Petition, Plaintiffs at the Dane County recount took issue with the City of Madison's Democracy in the Park program, during which election officials collected properly sealed and witnessed absentee ballots.

6. The recount process lasted from November 20, 2020 to November 29, 2020.

7. During the recount and on this appeal, the Trump Campaign seeks to disenfranchise no fewer than 221,323 voters in the two counties. Trump Proposed Findings (Doc. 62), ¶¶ 93-96. If the Trump Campaign's grounds for attempting to disqualify these ballots were applied throughout the state, more than 700,000 ballots cast by Wisconsin voters would

potentially be affected. (Def. App. 8-9).[2]

8. In both Dane and Milwaukee counties, the Trump Campaign challenged and sought to disqualify votes in the following categories, with the following result: **[3]**

> a. Ballots cast which had an absentee envelope where a witness address, or a portion of a witness address, had been completed by a clerk (e.g., where the ballot envelope was initially submitted with a witness address that was missing the state).
>
> i. The Milwaukee County Board of Canvassers moved to accept ballots from envelopes with witness addresses that had been completed by clerks consistent with specific guidance by the WEC, which the Board viewed as consistent with Wis. Stat. § 6.87(6d). (Milwaukee 11/20/20 126:23-128:17) (Doc. 37, pp. 126-128). The WEC guidance provides: "The WEC has determined that clerks must take corrective actions in an attempt to remedy a witness address error." (emphasis in original) (Def. App. 50).
>
> ii. The Dane County Board of Canvassers also declined to "exclude envelopes that had a witness address added by the clerk." (Dane 11/20/20 65:1-15) (Doc. 49, p. 17).

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[2] "Def. App." refers to the Defendants' Joint Appendix filed herewith.

b. All ballots cast by electors designating themselves as "indefinitely confined" after March 25, 2020.

i. The Milwaukee County Board of Canvassers found that "a designation of an indefinitely confined status is for each individual voter to make based upon their current circumstances" and that "no evidence of any voter in Milwaukee County [was] offered that has abused this process and voted through this status…not even an allegation that there was a single voter who abused this process to vote without providing proof of their ID, but eliminating proof that anyone did so. So there's no allegation…no proof…no evidence." (Milwaukee 11/21/20 145:2-146:2) (Doc. 39, pp. 14-15). **[4]** The Board voted to overrule any challenge to a voter with the status of "indefinitely confined." (Id. 146:9-147:19) (Doc. 39, pp. 15-16).

ii. The Dane County Board of Canvassers also rejected the Trump Campaign's challenge that would have required invalidating the ballots of all electors in Dane County who declared indefinitely confined status. The Board specifically declined to separate or "draw down"[3] the ballots cast by electors who

[3] When an absentee ballot envelope is rejected during a recount, the statutory remedy is to "randomly draw one absentee ballot" from the entire pool of absentee ballots and set it aside from the count. Wis. Stat. § 9.01(1)(b)(4)b. The process is random

declared indefinitely confined status. (Dane 11/20/20 65:18-66:9) (Doc. 49, pp. 17-18).

c. In Milwaukee County, all ballots cast through absentee in-person voting that, according to Plaintiffs, were obtained without a "written application."

i. The Milwaukee County Board of Canvassers determined that there are multiple forms of application for an absentee ballot that can be made by absentee in-person voters and that the absentee ballot envelope provided to absentee in-person voters – which has the word "application" stated on it and must be completed by the voter – is an application for an absentee ballot. The Milwaukee Board thus rejected the Trump Campaign's challenge to ballots cast by in-person absentee voters. (Milwaukee 11/21/20 183:15-187:10) (Doc. 39, pp. 52-56).

d. In Dane County, every absentee ballot on the basis that the Trump Campaign was not allowed to review the written absentee ballot applications during the recount **[5]** process, and also to all absentee in-person absentee ballots that, according to Plaintiffs, were obtained without a "written application."

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because ballots are not marked to correspond to individual voters, consistent with Wisconsin's right to privacy in voting. See Wis. Const. Art. III, Section 3. Thus, the remedy sought by the Trump Campaign would randomly disenfranchise hundreds of thousands of voters in the two targeted counties.

i. The Dane County Board of Canvassers voted not to exclude or draw down any absentee ballots on the basis that they "do not have an attached or identifiable application." (Dane 11/20/20 38:1-40:25) (Doc. 49, p. 11). The Dane County Board of Canvassers concluded that review of absentee ballot applications is not a part of the statutory recount process under Wis. Stat. § 9.01(1)(b) and therefore the applications were not relevant to the recount.

9. In addition to the challenges listed above, in Dane County only, the Trump Campaign sought to disqualify "all ballots received in the Democracy in the Park process" that elections officials conducted in Madison on September 26, 2020 and October 3, 2020. (Dane 11/24/20 52:7-11) (Doc. 51, p. 194). This challenge was a blanket challenge to 17,271 ballots. The Dane County Board of Canvassers denied the challenge, ruling that the Democracy in the Park events were the equivalent of a human drop box and valid under the statute. (Dane 11/24/20 53:13-25, 72:21-73:16) (Doc. 51, pp. 194, 199).

10. In Dane County, the Trump Campaign challenged nearly all of the absentee ballots in the Town of Westport (2,233 out of a total of 2,308) because the clerks failed to initial the absentee envelope reflecting that the voter submitted or showed a photo identification. The Dane County Board of Canvassers denied the challenge based on the testimony of the Town Clerk that "we check all photo ID" and "no ballots leave our office unless it has been

checked." (Dane 11/23/20 50:14-51:5, 52:16-21) (Doc. 51, p. 161). **[6]**

11. In Milwaukee County, the Board of Canvassers instructed tabulators to take the following steps as part of the recounts to accommodate Plaintiffs' standing challenges to categories of ballots:

> a. Set aside any absentee envelope that "has a different color on the address versus the actual witness signature;"
>
> b. Set aside any absentee envelope containing an "indefinite confinement" designation; and
>
> c. Set aside any envelope that is the subject of a specific challenge other than the two challenges listed above. (Milwaukee 11/20/20 66:20-67:7; 11/21/20 42:2-18) (Doc. 37, pp. 66-67; Doc. 38, p. 61).

12. The Milwaukee County Elections Commission certified the results of its recount on November 27, 2020. (Doc. 42, pp. 162-63).

13. The Dane County Board of Canvassers certified the results of its recount on November 29, 2020. (Doc. 51, p. 320).

14. On November 30, 2020, Ann Jacobs, the chairperson of the WEC, certified the results of the 2020 Wisconsin Presidential Election, after the results of the Milwaukee County and Dane County recounts, pursuant to Wis. Stat. § 7.70(3)(a). The certified

results showed Joseph R. Biden and Kamala D. Harris received 1,630,866 votes, and Donald J. Trump and Michael R. Pence received 1,610,184 votes. The final margin of victory was 20,682 votes.

15. On December 1, 2020, Plaintiffs filed a Petition for Original Action with the Wisconsin Supreme Court seeking to exclude several categories of ballots from the presidential election results in Wisconsin. **[7]**

16. On December 2, 2020, President Trump sued the WEC, its members, the mayors of Wisconsin's five largest cities, multiple clerks, the Governor, and the Secretary of State in federal court, seeking a declaration that "the constitutional violations of the Defendants likely tainted more than 50,000 ballots" and that the court "remand[ ] the case to the Wisconsin legislature." Trump v. Wisconsin Elections Commission, E.D. Wis. Case No. 2:20-cv-01785.

17. On December 3, 2020, the Wisconsin Supreme Court denied Plaintiffs' Petition for Leave to Commence an Original Action.

18. On December 3, 2020, hours after the Wisconsin Supreme Court denied the petition for leave to commence an original action and pursuant to Wis. Stat. § 9.01(6), Plaintiffs filed separate Notices of Appeal from the Recounts in Dane County and Milwaukee County. (Doc. 7, 9).

19. On December 3, 2020, Chief Justice Patience D. Roggensack consolidated the two appeals, Trump v. Biden, Milwaukee County Case No. 2020-cv-7072, and Trump v. Biden, Dane County Case No. 2020-cv-2514,

and assigned the consolidated appeal to Reserve Judge Stephen A. Simanek. (Doc. 9).

B. Challenged Procedures

a. Absentee Ballot Applications

20. A municipal clerk may not issue an absentee ballot without receiving "a written application therefor from a qualified voter of the municipality." Wis. Stat. § 6.86(1)(ar). The statute defines "written application…for an official ballot" to include a variety of "methods," including "[b]y mail," "[i]n person at the office of the municipal clerk," on request forms, and "[b]y electronic mail or facsimile transmission." Wis. Stat. § 6.86(1)(a).

21. For many years, the WEC has applied this broad definition to allow online ballot requests in multiple ways, including: **[8]**

> a. through the MyVote website, which generates an email and prompts a clerk to mail an envelope and ballot (Milwaukee 11/20/20 50:3-11) (Doc. 37, p. 50);
>
> b. by regular mail or e-mail (Milwaukee 11/20/20 49:2-4, 50:3-7, 76:6-25) (Doc. 37, pp. 49-50, 76);
>
> c. if done in-person, through completion of an official WEC multi-step form, EL-122, titled "Official Absentee Ballot Application/ Certification," which provides both an application and a certification. (Milwaukee

11/20/20 51:2-8) (Doc. 37, p. 51).

22. The WEC and its predecessor agency, the Government Accountability Board ("GAB"), have used Form EL-122 since May 2010. (Affidavit of Kevin J. Kennedy, ¶ 14) (Def. App. 106-107). Since that time, Form EL-122 has been accepted as a lawful application for an absentee ballot. Id.

23. Form EL-122 and its predecessor, Form GAB-122, originated from "inefficiencies experienced with in-person absentee voting" in the November 2008 presidential election. (Affidavit of Kevin J. Kennedy, ¶ 6, Exh. A) (Def. App. 104-105, 108-150).

24. On December 17, 2009, the GAB unanimously voted to eliminate the requirement for a separate written application for in-person absentee voters, and instead to incorporate the application into the in-person process. (Affidavit of Kevin J. Kennedy, ¶ 10) (Def. App. 105-106).

25. The GAB thereafter amended the official absentee ballot envelope, Form GAB- 122, to also act as the written application for those voters who voted absentee in-person during the "early voting" period. (Affidavit of Kevin J. Kennedy, ¶ 11) (Def. App. 106).

26. The new Form GAB-122, entitled "Official Absentee Ballot Application/Certification," was distributed to all Wisconsin municipal clerks on May 10, 2010, **[9]** and has been in use continually throughout Wisconsin since that time. (Affidavit of Kevin J. Kennedy, ¶ 11, Exhs. B-C) (Def. App. 151-154).

27. Consistent with statewide practice, municipalities and voters in Dane County and Milwaukee County use Form EL-122 for in-person absentee voting. The total number of in-person absentee votes cast in the state in the November 2020 Election using Form EL-122 was 651,422. WEC Absentee Ballot Report 11/3/20 General Election (Def. App. 8-9).

28. Plaintiffs' counsel James Troupis voted early in-person using Form EL-122. (Affidavit of Devin Remiker, Exhibit A) (Def. App. 169).

29. In Milwaukee County, when a voter requests an absentee ballot in person, the voter identifies himself or herself to the clerk, who then enters the request for the ballot into the WisVote system directly. (Milwaukee 11/20/20 46:7-21) (Doc. 37, p. 46). This generates "a record of application." (Milwaukee 11/20/20 85:14-17) (Doc. 37, p. 85). The system then generates a label for that envelope. The voter then shows the labeled envelope to an official to receive a ballot. The voter completes the ballot and signs a certification on the envelope, which a clerk witnesses. The vote is not cast until the day of the election. (Milwaukee 11/20/20 46:7-21) (Doc. 37, p. 46); (Dane Biden Exhs. 2-16; Milwaukee Biden Exhs. 798-809) (Def. App. 10-41) (affidavits of absentee inperson voters describing multi-step process).

30. The absentee in person process in Dane follows the same or similar procedures, whereby the application portion of the envelope is completed and shown to an official before the voter receives a ballot. (Def. App. 10-20)

31. The Dane County Board of Canvassers determined that 61,193 electors cast absentee ballots in person in Dane County using Form EL-122. (Dane 11/22/20 58:7-10). Each in-person **[10]** absentee voter completed an EL-122, which the Board concluded is legally sufficient to satisfy Wis. Stats. § 6.86(1)(ar). Id.

32. The Milwaukee County Board of Canvassers determined that the total number of voters who voted absentee in person in Milwaukee County using Form EL-122 was 108,947. (Milwaukee 11/21/20 184:14-19) (Doc. 39, p. 53).

33. At no time prior to the election on November 3, 2020 did the Trump Campaign assert that the use of Form EL 122 by voters and election officials in Wisconsin was in any way improper or inconsistent with Wisconsin law. The first time the Trump Campaign made that claim was in its recount petitions filed with Dane and Milwaukee counties on November 18, 2020, after election results showed that President Trump had lost the election in Wisconsin by more than 20,000 votes.

34. The Trump Campaign did not make any allegation that a single vote was cast in either county by an ineligible voter who applied via Form EL-122. There are no facts to support
such an allegation.

35. The Trump Campaign did not make any allegation that any fraud occurred relating to the use of Form EL-122 in either county. There are no facts to support such an allegation.

b. Witness Addresses

36. An absentee voter must complete their ballot and sign a "Certification of Voter" on the absentee ballot envelope in the presence of a witness. Wis. Stat. § 6.87(4)(b). The witness must then sign a "Certification of Witness" on the envelope, which must include the witness's address. Wis. Stat. § 6.87.

37. The witness-address requirement is "mandatory," id. § 6.84(2), and "[i]f a certificate is missing the address of a witness, the ballot may not be counted," id. § 6.87(6d). **[11]**

38. Since October 2016, the WEC has instructed municipal clerks that, while they may never add missing signatures, they "must take corrective action" to add missing witness addresses if they are "reasonably able to discern" that information by contacting the witnesses or looking up the addresses through reliable sources. 10/18/16 WEC Memo to Clerks "Missing or Insufficient Witness Address on Absentee Certificate Envelopes." (Def. App. 50-51).

39. Since then, the WEC has repeated these instructions in multiple guidance documents, including in the WEC Election Administration Manual (Sept. 2020), at 98 (clerks "may add a missing witness address using whatever means are available," and "should initial next to the added witness address") and an October 19, 2020 guidance memo.[4]

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[4] Available at https://elections.wi.gov/sites/elections. wi. gov/files/2020-10/Spoiling%20Ballot% 20Memo%2010.2020.pdf.

40. As a result, the WEC's guidance on the witness address issue has governed in eleven statewide races since then, including the 2016 presidential election and recount. Moreover, local election officials and voters throughout the State have relied on it, and it has never been challenged through Chapter 227 judicial review or otherwise. 11/10/20 WEC Release "Correcting Misinformation About Wisconsin's Election," No. 6 (Def. App. 55-56).

41. In November 2016, Candidate Donald Trump won a recount in which thousands of ballots were completed based upon the same WEC guidance on witness addresses used in the November 2020 election. (Milwaukee 11/20/20 117:15-25) (Doc. 37, p. 117). Neither Candidate Trump nor anyone else raised any objections to the use of that guidance in 2016. Id.

42. At no time prior to the election on November 3, 2020 did the Trump Campaign assert that the practice of election workers filling in missing, verifiable witness addresses was in any way improper or inconsistent with Wisconsin law. The first time the Trump Campaign made that claim was in its recount petitions filed with Dane and Milwaukee counties on November 18, **[12]** 2020, after election results showed that President Trump had lost the election in Wisconsin by more than 20,000 votes.

43. As the petition for recount admits, WEC guidance on completing addresses applies statewide, not just in Dane and Milwaukee counties. (Recount Petition, p. 1) (Doc. 36); (Dane County Transcript, 11/29/20 11:25) (Doc. 51, p. 320).

44. The witness address issue is not limited to situations in which absentee ballots are entirely missing address information for a witness. Instead, for the most part, clerks corrected partial addresses, such as by completing the city, zip code, or state. (Milwaukee 11/20/20 116:2-7; 11/21/20 271:3-6, 277:13-14) (Doc. 37, p. 116; Doc. 39, pp. 140, 146). As a result, the Trump Campaign objected to ballots that were witnessed, signed by a witness, and contained a witness' street address, but had the city, state, or zip code filled in by a clerk. (Id.; see also Milwaukee 11/20/20 125:2-5) (Doc. 37, p. 125).

45. In completing witness addresses, the City of Milwaukee "do[es]n't make guesses" if there are multiple persons with the name of a witness. In that situation, clerks do not fill in any missing witness address information. Instead, they contact the voter or mail the ballot back to the voter in an attempt to have the voter contact the witness and provide the missing information. (Milwaukee 11/20/20 117:1-7).

46. It is "very common" that an envelope will have a street address but that the address will not be "fill[ed] out completely." (Milwaukee 11/20/20 117:8-11) (Doc. 37, p. 117).

47. There is no evidence establishing beyond a reasonable doubt that adding missing witness address information to any particular voter's envelope was improper or in violation of Wisconsin law and thus no evidence establishing beyond a reasonable doubt that any absentee **[13]** ballots associated with envelopes containing added witness address information are improper or in violation of Wisconsin law.

c. "Indefinitely Confined" Voters

48. Voters who self-certify that they are "indefinitely confined because of age, physical illness or infirmity or…disabled for an indefinite period" are not required to submit photocopies of their photo IDs with their absentee ballot applications. Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)(2).

49. Voters who certify they are indefinitely confined and who do not provide proof of identification must submit with their ballot "a statement signed by the same individual who witnesses voting of the ballot which contains the name and address of the elector and verifies that the name and address are correct." Wis. Stat. § 6.87(4)(b)2.

50. In contrast, if a voter is not indefinitely confined and has not previously submitted voter identification, they must submit such identification. See Wis. Stat. § 6.87(1).

51. After the COVID-19 pandemic hit Wisconsin in March 2020 and the State issued a "Safer-at-Home Order" on March 24, 2020, the Dane County Clerk stated in a Facebook post that pursuant to the Safer-At-Home Order all Dane County voters could meet the definition of "indefinitely confined" for purposes of voting absentee in the April 7 spring election. Wis. Sup.Ct. Order, p. 2, Jefferson v. Dane Cty., No 2020AP557-OA (Mar. 31, 2020) (Def. App. 65).

52. The WEC was also considering the indefinite confinement issue in the context of COVID-19 and the Safer-At-Home Order prior to the April 7 election. On

March 29, 2020, the WEC issued a guidance memorandum to all clerks, stating in relevant part:

> 1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period. **[14]**
>
> 2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

March 29, 2020 WEC Guidance for Indefinitely Confined Voters (Def. App. 61).

53. The WEC's guidance goes on to explain:

> We understand the concern over the use of indefinitely confined status and do not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin. **During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates**. We have told clerks if they do not believe a voter understood the declaration they made when requesting an absentee ballot, they

> can contact the voter for confirmation of their status. They should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status. Any request for confirmation of indefinitely confined status should not be accusatory in nature.

March 29, 2020 WEC Guidance for Indefinitely Confined Voters (Def. App. 62).

54. Consistent with Wisconsin's decades-long legislative policy of taking voters at their word concerning indefinite confinement, the WEC's guidance emphasizes the importance of avoiding any "proof" requirements: "Statutes do not establish the option to require proof or documentation from indefinitely confined voters. Clerks may tactfully verify with voters that the voter understood the indefinitely confined status designation when they submitted their request, but they may not request or require proof." (Def. App. 62).

55. In a March 31, 2020 order, the Wisconsin Supreme Court granted the Republican Party of Wisconsin's motion for a temporary restraining order, directing the Dane County Clerk to "refrain from posting advice as the County Clerk for Dane County inconsistent with the above quote from the WEC guidance." Jefferson v. Dane Cty., No 2020AP557-OA (Mar. 31, 2020) (Def.App. 64-66). **[15]**

56. The Wisconsin Supreme Court's Order stated: "We conclude that the WEC's guidance quoted above provides the clarification on the purpose and proper

use of the indefinitely confined status that is required at this time." Id. at p. 2 (Def. App. 65).

57. Voters claiming "indefinite confinement" status increased significantly in 2020, during the COVID-19 pandemic, as compared to voters claiming that status in 2016 when there was no pandemic. The increases in voters designating themselves as indefinitely confined occurred statewide, not only in Dane and Milwaukee counties. See Dane County Board Exh. 2 (Def. App. 214-215).

58. Neither the WEC nor the Wisconsin Supreme Court provided further guidance about the criteria for voters to claim indefinitely confined status before the November 3, 2020 election, meaning the guidance in place for the election was the WEC guidance approved by the Wisconsin Supreme Court. (Def. App. 65). The Wisconsin Supreme Court heard oral argument in Jefferson on September 29, 2020, and has not issued a decision, which means the WEC guidance quoted above remains in place.

59. At no time prior to the election on November 3, 2020 did the Trump Campaign assert that the WEC guidance relating to indefinitely confined status was in any way improper or inconsistent with Wisconsin law. The first time the Trump Campaign made that claim was in its recount petitions filed with Dane and Milwaukee counties on November 18, 2020, after election results showed that President Trump had lost the election in Wisconsin by more than 20,000 votes.

60. Statewide, voters who indicated that they were indefinitely confined received a form letter from a

municipal clerk stating: "Identifying as an indefinitely confined voter is an individual choice based on your current situation and it does not require you to be permanently confined." The letter then gave the voter an option to (1) continue to claim indefinite confinement **[16]** status, (2) to opt out of the parameters of indefinitely confinement but still continue to receive absentee ballots for the remainder of 2020, or (3) cancel the voter's request to be designated as indefinitely confined. (Dane County Board of Canvassers Exh. 3) (Def. App. 200) (Dane 11/29/20 7:3-6).

61. The Milwaukee County Board of Canvassers did not determine how many voters
cast ballots while indefinitely confined that had not previously submitted an ID within the past year.

62. The Dane County Board of Canvassers did not determine how many voters cast ballots while indefinitely confined that had not previously submitted an ID within the past year.

63. No facts were presented to the Milwaukee County Board of Canvassers that any voter in the county cast a ballot as indefinitely confined that did not qualify as indefinitely confined. Specifically, "no evidence of any voter in Milwaukee County [was] offered that has abused this process and voted through this status…not even an allegation that there was a single voter who abused this process to vote without providing proof of their ID, but eliminating proof that anyone did so. So there's no allegation…no proof…no evidence." (Milwaukee 11/21/20 145:2-146:2) (Doc. 39, pp. 14-15).

64. No facts were presented to the Milwaukee County Board of Canvassers that any voter relied upon any statement made by County Clerk George Christensen to determine their eligibility as indefinitely confined. (Milwaukee 11/21/2020 136:8-16; 145:18–146:8) (Doc. 39, pp. 5, 14-15).

65. The Trump Campaign presented the Dane County Board with a list of "eight or nine Facebook posts" allegedly by persons whose names were also names of persons who had voted absentee as "indefinitely confined." (Dane 11/28/20 14:19-25) (Doc. 51, p. 288). **[17]**

66. The Trump Campaign did not challenge the ballots of these voters or seek a factual determination as to their indefinitely confined status. The Trump Campaign also did not provide evidence concerning whether the election clerk already had each voter's photo ID on file. Accordingly, no finding was alleged, requested, or made that any voter had improperly invoked indefinitely confined status.

67. There is no evidence establishing beyond a reasonable doubt that any voter cast a vote as indefinitely confined who did not qualify as indefinitely confined.

d. "Democracy in the Park"

68. On two Saturdays before the November 3, 2020 general election (September 26, 2020 and October 3, 2020), the City of Madison held "Democracy in the Park" events in 206 Madison parks. The events were designed to create a safe way for voters to personally

deliver absentee ballots to the City of Madison Clerk during the pandemic. (Affidavit of Maribeth Witzel-Behl, ¶¶ 4-6) (Def. App. 209).

69. No absentee ballots were distributed, and no absentee ballot applications were accepted or distributed at Democracy in the Park. (Affidavit of Michael Haas, ¶ 4) (Def. App. 202).

70. At the events, sworn city election inspectors collected sealed and properly witnessed absentee ballots that the voters had previously received. (Haas Aff., ¶ 4) (Def. App.202).

71. At the events, city election inspectors served as witnesses for absentee electors only if the elector brought an unsealed, blank ballot with them. (Haas Aff., ¶ 4) (Def. App. 202).

72. The Madison City Attorney emphasized in a letter to counsel for the Legislature that:

> The procedures that the City Clerk has established to secure ballots [at the Democracy in the Park events] are equivalent to the procedures used to secure all absentee ballots. … Sworn election **[18]** officials will retrieve ballots that have already been issued and will ensure that ballots are properly witnessed and are secured and sealed in absentee ballot envelopes and ballot containers with tamperevident seals, to be tabulated on Election Day. The election officials will maintain a chain of custody log that is open to public inspection. No new ballots will be issued

in the parks.

(Def. App. 204-205).

73. Neither the Madison City Attorney nor any other City official received any response to the letter to the counsel for the Legislature "and no further legal concerns regarding the Democracy in the Park program were communicated to [him]." (Haas Aff., ¶ 6) (Def. App. 203).

74. The City Clerk for the City of Madison designed the Democracy in the Park event "to comply with all applicable election laws." (Witzel-Behl Aff., ¶ 4) (Def. App. 209). There is no evidence that the Democracy in the Park events violated any Wisconsin election laws or resulted in any improper votes being cast.

75. In creating the program, the City Clerk for the City of Madison "sought to accommodate the unprecedented demand for absentee ballots, address concerns about the capacity of the U.S. Postal Service to deliver ballots by Election Day, and provide City of Madison voters with a secure and convenient means of returning their completed ballots and obtain a witness if necessary." (Witzel-Behl Aff., ¶ 4) (Def. App. 209).

76. Voters relied on the City of Madison's determination that the Democracy in the Park events complied with Wisconsin laws, and they cast their votes at the events based on that reliance. See, e.g., Affidavit of Michael Martin Walsh ("I dropped off my ballot based on the assurance from the City of Madison that doing so was legal and proper") (Biden Exh. 253)

(Def. Aff. 93). **[19]**

77. The City of Madison invited both major political parties to observe the entire process at the Democracy in the Park events. (Haas Aff., Exh. B) (Def. App. 204).

78. According to the City Clerk of the City of Madison, a total of 17,271 absentee ballots were collected during the Democracy in the Parks events. (Witzel-Behl Aff., ¶ 7) (Def.
App. 210).

79. The Democracy in the Park events did not function as in-person absentee voting sites. Voters could not obtain and vote ballots there; they could only return absentee ballots they had previously received in the mail. At the events, city election inspectors "collected completed, sealed, and properly witnessed absentee ballots." (Witzel-Behl Aff., ¶ 6) (Def. App. 209).

80. The 206 staffed locations were not "alternate absentee ballot sites" regulated under Wis. Stat. § 6.855. Instead, they were ballot return locations governed under Wis. Stat. § 6.87(4)(b)1 ("The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.").

81. The WEC has interpreted Wis. Stat. § 6.87(4)(b)1 to allow the use of secured ballot drop boxes in a variety of locations and circumstances. These include book slots at public libraries, mail slots used for payment of taxes and other government fees, "staffed temporary drive-through drop offs," and

"unstaffed 24-hour ballot drop boxes." August 19, 2020 WEC Guidance re Absentee Ballot Drop Box Information. (Def. App. 71-72).

82. The drop-offs that were used in the Democracy in the Park events were functionally identical in all respects to the "staffed" and "unstaffed" drop boxes endorsed by the WEC and Wisconsin legislature. Thus, deposit of a sealed ballot envelope in one of the drop boxes staffed by duly designated agents of the clerk constituted "deliver[y] in person, to the municipal clerk" within the meaning of Wis. Stat. § 6.87(4)(b)1. **[20]**

83. No allegations were made, and the Dane County Board of Canvassers did not find,that a single vote cast at Democracy in the Park was cast by an ineligible voter.

PROPOSED CONCLUSIONS OF LAW

1. Voting is a fundamental right:

> The right of a qualified elector to cast a ballot for the election of a public officer, which shall be free and equal, is one of the most important of the rights guaranteed to him by the constitution. If citizens are deprived of that right, which lies at the very basis of our Democracy, we will soon cease to be a Democracy. For that reason no right is more jealously guarded and protected by the departments of government under our constitutions, federal and state, than is the right of suffrage.

State ex rel. Frederick v. Zimmerman, 254 Wis. 600, 613, 37 N.W.2d 473, 480 (1949).

A. Standard of Review on Wis. Stat. § 9.01 Appeal

2. Unless the court finds grounds for setting aside or modifying the determination of the Board of Canvassers, it must affirm the Board's determination. Wis. Stat. § 9.01(8)(c).

3. The court must separately treat disputed issues of procedure, interpretations of law, and findings of fact. Wis. Stat. § 9.01(8)(b).

4. The court will set aside or modify the determination of the Board of Canvassers only if it finds that the Board of Canvassers has erroneously interpreted a provision of law and a correct interpretation compels a particular action. Wis. Stat. § 9.01(8)(c).

5. If the determination depends on any fact found by the Board, the court may not substitute its judgment for that of the Board as to the weight of the evidence on any disputed finding of fact. The court shall set aside the determination if it finds that the determination depends on any finding of fact that is not supported by substantial evidence. Wis. Stat. § 9.01(8)(c).

6. The Court will review questions of law de novo. *Clifford v. Sch. Dist. of Colby*, 143 Wis. 2d 581, 585, 421 N.W.2d 852, 853 (Ct. App. 1988). **[21]**

7. But, when a party tries to change the results of an election by disqualifying the votes of certain voters, the challenger must "demonstrate beyond a reasonable doubt that the person does not qualify as an elector or is not properly registered." *Logerquist v. Board of Canvassers for Town of Nasewaupee*, 150 Wis. 2d 907, 917, 442 N.W.2d 551, 555-56 (Ct. App. 1988).

8. Wisconsin courts have established a general rule that, in order to successfully challenge an election in a subsequent judicial appeal, the challenger must show that the outcome of the election would have been changed absent the challenged irregularity. *See Carlson v. Oconto County Board of Canvassers*, 2001 WI App 20, ¶ 10, 240 Wis. 2d 438, 444-45, 623 N.W.2d 195 ("Under the outcome test, to successfully challenge an election, the challenger must show the probability of an altered outcome, in the absence of the challenged irregularity…our supreme court has approved the outcome test for most election irregularities.").

9. Wisconsin courts have historically protected the right to vote and declined to disenfranchise voters for clerical errors by election officials where the voter acted in good faith. *See e.g. Ollmann v. Kowalewski*, 238 Wis. 574, 578, 300 N.W. 183, 186 (1941) ("The voter would not knowingly be doing wrong. And not to count his vote for no fault of his own would deprive him of his constitutional right to vote. ... A statute purporting so to operate would be void, rather than the ballots."); *Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 269 Wis. 299, 304, 69 N.W.2d 235, 238 (1955) (rejecting "purely technical" "complaint as to the delivery of the ballots"); *Lanser v. Koconis*, 62 Wis. 2d 86, 93, 214 N.W.2d 425, 428 (1974) ("[W]e are not

inclined to disenfranchise these voters who acted in conformance with the statutory requirements. There is absolutely no evidence from which it could be inferred that the method of delivery by the municipal clerk in any way affected their vote."); *Matter of Hayden*, 105 Wis. 2d 468, 478, 313 N.W.2d 869, **[22]** 873–74 (Ct. App. 1981) (construing mandatory language about delivery of ballots as directory because "[o]nly when the municipal clerk appears to have solicited voters, or when there is any evidence of fraud, will voters who acted in good faith be disenfranchised."); *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App 221, ¶ 27, 247 Wis.2d 708, 726, 634 N.W.2d 882, 889 ("A statute which merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election should be construed as directory.") (quoting *Matter of Hayden*, 105 Wis. 2d at 483).

10. While the provisions in Wis. Stat. §§ 6.86, 6.87 (3)-(7) and 9.01 (1) (b) 2. and 4 shall be construed as mandatory, the reason is "to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses." Wis. Stat. § 6.84 (1)-(2).

11. But where fraud or impropriety is not alleged, outside of §§ 6.86, 6.87 (3)-(7) and 9.01 (1) (b) 2. and 4, the will of the voter controls. *See, e.g., Lanser v. Koconis*, 62 Wis. 2d 86, 93-94, 214 N.W.2d 425, 429 (1974) (holding that technical noncompliance with a

statutory provision for delivery of absentee ballots and signature requirement did not render the ballots invalid and that voters were entitled to have their votes counted).

12. Except as otherwise provided, the Wisconsin Election Code shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to comply fully with some of its provisions. Wis. Stats. § 5.01 (1). In this context, the Wisconsin Supreme Court has "quite consistently" held mandatory language to in fact be permissive. Id. This is particularly true for absentee ballots. *Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 269 Wis. 299, 302, 69 N.W.2d 235, 237 (1955) ("The **[23]** number of absentee ballots is increasing rather than decreasing. Where possible our statute should be interpreted to enable these people to vote."). *See also Ollman v. Kowalewski*, 238 Wis. 574, 578, 300 N.W. 183, 185 (1941) (where a clerk erroneously placed his initials on ballots when initials from two clerks were required: "The voter would not knowingly be doing wrong. And not to count his vote for no fault of his own would deprive him of his constitutional right to vote. Any statute that purported to authorize refusal to count ballots cast under the instant circumstance would be unconstitutional. A statute purporting so to operate would be void, rather than the ballots.").

B. Plaintiffs' Legal Challenges to WEC Statewide Guidance are Not Within the Scope of a Recount Under Wis. Stat. § 9.01.

13. Post-election challenges under Wis. Stat. § 9.01 are limited in scope. This court may not wade into alleged statewide procedural irregularities underlying the election process itself. *Clapp v. Joint School Dist. No. 1*, 21 Wis. 2d 473, 478, 124 N.W.2d 678, 681-82 (1963) ("The statute does not contemplate a judicial determination by the board of canvassers of the legality of the entire election but of certain challenged ballots. ... True, there is an appeal from the board of canvassers to the circuit court but the scope of that appeal is no greater than the duties of the board of canvassers and does not reach a question of the illegality of the election as a whole.").

14. WEC is an agency of the executive branch. See State ex rel. *Zignego v. Wisconsin Elections Commission*, 2020 WI App 17, ¶ 38, 391 Wis. 2d 441, 463, 941 N.W.2d 284.

15. Among other duties, WEC administers all of Wisconsin's election laws. Wis. Stat. § 5.05(1).

16. Each one of the categories of absentee ballots challenged by Plaintiffs was accepted by the municipal clerks in reliance on published guidance documents issued by the WEC. The categories and associated WEC guidance documents include: **[24]**

a. *In-Person Absentee Voting Using EL-122 as the Written Application*: WEC Form EL-122 has been in use since May 2010. WEC's Form EL-122 (in use since 2010) and Election Administration Manual, p. 91 (Sept. 2020) provide that the absentee certificate envelope itself constitutes an in-person absentee voter's written absentee ballot application.

b. *Correcting Missing Witness Address Information*: The WEC's October 18, 2020 Memo to Clerks re: "Missing or Insufficient Witness Address on Absentee Certificate Envelopes" states that municipal clerks "must take corrective action" to add missing witness address information if they are "'reasonably able to discern'" that information. (Def. App. 50). The WEC Election Administration Manual states at p. 99 that: "Clerks may add a missing witness address using whatever means are available."

c. *Indefinitely Confined Voters*: The WEC's March 29, 2020 guidance (approved by the Wisconsin Supreme Court on March 31, 2020) stated that to claim "indefinitely confined" status, a voter need not suffer from a "permanent or total inability to travel outside of the residence"; that the decision "is for each individual voter to make based upon their current circumstance"; and that "many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the [pandemic] crisis abates."

d. *Democracy in the Park*: The WEC's "Absentee Ballot Drop Box Information" guidance dated August 19, 2020 expressly recommended "outdoor" "staffed" ballot drop boxes like those used in Madison's Democracy in the Park events. **[25]**

17. Plaintiffs only avenue to challenge a procedure contained in a WEC guidance document is pursuant to Wis. Stat. § 227.40. Wis. Stat. § 227.40(1) provides that "the exclusive means of judicial review of the validity of a[n] [agency's] rule or guidance document" shall be in the form of "an action for declaratory judgment . . .

brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides . . .” These exclusive review provisions “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).

18. The WEC documents attacked as “illegal” by the Plaintiffs are “guidance” documents under Chapter 227. See Wis. Stat. § 227.01(3m) (defining “guidance document” to include “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, . . . [or] (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 situated.”).

19. The Court therefore has no jurisdiction under Wis. Stat. § 9.01 to reject broad categories of ballots based upon Plaintiffs’ contention that the WEC’s statewide guidance was inconsistent with the statutes the agency is statutorily required to administer. **[26]**

C. Plaintiffs’ Challenges to Voters Relying on the WEC’s Guidance Fail on the Merits.

1. Absentee Ballot Applications

20. Wis. Stat. § 6.86(1)(ar) states: “Except as

authorized in s. 6.875(6), the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality."

21. No election statute requires any absentee application to take any particular form or structure.

22. WEC Form EL-122 is entitled "Official Absentee Ballot Application/Certification." When completed by a voter during the in-person absentee voting period, Form EL-122 operates as the voter's "written application" for an absentee ballot. See WEC Election Administration Manual (Sept. 2020), pp. 90-91 ("The applicant does not need to fill out a separate written request if they only wish to vote absentee for the current election. The absentee certificate envelope doubles as an absentee request and certification when completed in person in the clerk's office.").

23. WEC's use of Form EL-122 as the written application for in-person absentee voters is consistent with WEC's "responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections." Wis. Stat. § 5.05(1).

24. Plaintiff's position that Form EL-122 does not constitute a "separate written application" for an absentee ballot has no basis in Wisconsin's election laws. Form EL-122 is a separate document from the absentee ballot itself.

25. There is no statutory or other basis upon which to overturn either Board's finding that the Trump

Campaign's objections to the use of Form EL-122 should be overruled. **[27]**

2. Adding Missing Witness Address Information

26. WEC guidance in place for more than four years permits — and in some instances even requires — the practice of curing missing witness addresses based on reliable information.

27. The WEC's guidance to clerks to cure missing witness address information is not unlawful. On the contrary, the WEC's guidance is grounded in a reasonable interpretation of the Election Code. While Wis. Stat. § 6.87(9) states that a clerk "may" return an absentee ballot with an improperly completed certificate, the statute does not preclude a clerk from remedying a witness address deficiency herself. In addition, the statute is not mandatory. See Wis. Stat. § 6.84(2).

28. The law does not direct who may add or correct a witness's address on an envelope.

29. Plaintiffs' generalization that even corrected envelopes, where clerks filled in only the municipality, the state or the zip code in red ink, are "missing" an address is inconsistent with the plain language of Wis. Stat. § 6.87(6d), which states: "if a certificate is missing the address of a witness, the ballot may not be counted." (emphasis added). Wisconsin Statutes, court forms, and tax forms all treat one's "address" as distinct from the city, state or zip code. *See e.g.* Wis. Stats. § 801.095(1) (form of summons listing "Address,

city, state, zip code"); *Acuity Mut. Ins. Co. v. Olivas*, 2007 WI 12, ¶ 158, 298 Wis. 2d 640, 697, 726 N.W.2d 258, 287 (describing Form 1099 which asks for "Payer's name, street address, city, state, ZIP code, and telephone no."). And the absentee ballot envelope in question itself treats address, city, state, and zip code as distinct and in separate boxes for the voter's information in the top half the application. (Def. App 7). So too, does Form EL-121, which Plaintiffs endorse. (P. App. 24). To read into the statute that "missing the address" means missing a city, state, or zip code defies principles of statutory construction, internal consistency, and common sense. *State v. Kozel*, 2017 WI 3, ¶ 39, 373 Wis. 2d 1, 21-22, 889 N.W.2d 423, 433 (Court would not "require a specific type or degree of direction where the statute at issue does not so specify. We will not read into the statute a limitation the plain language **[28]** does not evidence.") (internal quotation omitted). Doing so ignores Wis. Stat. § 5.01, which requires giving effect to the will of the elector, which requirement is not overridden—even if § 6.87(6d) is mandatory—where an address but not a zip code or state appears and that zip code or state is readily ascertainable. See Wis. Stat. § 5.01 (1).

30. That an absentee envelope's witness address was completed by a clerk is not a statutory basis for objecting to or invalidating a vote during a recount. Wis. Stat. § 9.01(1)(b)2 ("An absentee ballot envelope is defective only if it is not witnessed or if it is not signed by the voter or if the certificate accompanying an absentee ballot that the voter received by facsimile transmission or electronic mail is missing.").

31. No allegation has been made and the court cannot find that any corrected witness address involved any fraud, impropriety or abuse by a municipal clerk, or allowed ineligible votes to be cast.

32. Therefore, the Milwaukee Elections Commission and the Dane County Board of Canvassers properly rejected the Plaintiffs' challenges to ballots where a clerk added missing witness address information.

3. "Indefinitely Confined" Voters

33. The substantive provision allowing absentee voting for "indefinitely confined" electors has been in place for more than forty years, and the relevant text of Wis. Stat. § 6.82(2)(a) has been unchanged since 1985. See Wis. Stat. § 6.86(2) (1985); 1985 Wisconsin Act 304.

34. On March 29, 2020, the WEC issued guidance on applying the "indefinitely confined" exemption during the pandemic.

35. On March 31, 2020, in considering a challenge to informal guidance provided on social media by certain county election officials, the Wisconsin Supreme Court held that the WEC's March 29, 2020 guidance "provide[d] the clarification on the purpose and proper use of **[29]** the indefinitely confined status that is required at this time." *Jefferson v. Dane Cnty.*, No.2020AP557-OA, at 2 (Mar.31, 2020). The WEC's guidance has remained unchanged since then and was effective for the 2020 general election.

36. During the recount proceedings, Plaintiffs submitted two pieces of evidence regarding indefinitely confined voters: (a) a spreadsheet with nineteen (19) names of voters and links to Facebook posts by each identified voter; and (b) a November 25, 2020 affidavit of Kyle Hudson attaching seven (7) purported "social media posts" by voters registered as "indefinitely confined" that show the individuals outside of their homes. None of the posts related to Milwaukee County electors.

37. Plaintiffs' evidence lacks proper foundation regarding the identity of the individual voters, whether they are the same persons with the social media accounts, the particular circumstances of the individuals at the time they registered as indefinitely confined and at the time of the election, and the posts are hearsay. See Wis. Stat. § 906.02 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); § 908.01(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'").

38. The court cannot draw any conclusions based upon this tenuous and inadmissible evidence and cannot extrapolate from the evidence a conclusion that over 28,000 Dane and Milwaukee County residents fraudulently identified themselves as indefinitely confined.

39. Ballots from voters who claimed indefinite confinement status in reliance of WEC rules and the Wisconsin Supreme Court's order are therefore lawful. **[30]**

40. The Milwaukee Elections Commission and Dane County Board of Canvassers properly denied Plaintiffs' challenges to indefinitely confined voters.

4. "Democracy in the Park"

41. Wis. Stat. § 6.87(4)(b)1 states that an absentee ballot envelope "shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." The statute does not restrict the manner in which a voter can return an absentee ballot to a municipal clerk.

42. The Democracy in the Park events conducted by the City of Madison were for the express purpose of allowing voters to deliver absentee ballots in person to the municipal clerk.

43. The affidavits of Maribeth Witzel-Behl and Michael Haas establish that the Democracy in the Park events were properly staffed by employees of the City of Madison Clerk, and that proper procedures were used to ensure the security of the ballots so delivered. (Def. App. 201-210).

44. The Democracy in the Park events were not "early voting" as Plaintiffs allege, because no absentee ballots were requested or issued at the events. *See* Wis. Stat. § 6.86(1) (b); Dane 11/24/20 53:14-19 (Doc. 51, p. 194). *See also* Haas Aff., ¶ 4 (Def. App. 202).

45. Plaintiffs do not allege and submitted no evidence that any ballot delivered to the City of Madison during the Democracy in the Park events was tampered with or cast by an ineligible voter.

46. The court therefore finds no statutory basis to disqualify more than 17,000 ballots personally delivered to the City of Madison Clerk at the Democracy in the Park events.

D. Plaintiffs' Legal Challenges to WEC's Guidance are Barred by Laches.

47. "A party who delays in making a claim may lose his or her right to assert that claim based on the equitable doctrine of laches." *Dickau v. Dickau*, 2012 WI App 111, ¶ 9, 344 Wis. 2d 308, 824 N.W.2d 142.

48. Laches has three elements: (1) the party asserting a claim unreasonably delayed in doing so; (2) a second party lacked knowledge that the first party would raise that claim; and (3) the delay prejudiced the second party. *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 12, 393 Wis. 2d 308, 318, 946 N.W.2d 101. All three elements are satisfied here.

49. Plaintiffs unreasonably delayed pursuing a legal challenge to the four categories of absentee voters targeted in the recount. Form EL-122 has been used as the "written application" for in-person early voters for more than 10 years and could have been challenged prior to the election. The WEC's guidance instructing municipal clerks to cure missing witness address information was created prior to the 2016 Presidential

election and for 10 additional statewide elections thereafter. The WEC's guidance regarding "indefinitely confined" voters during the pandemic is currently being challenged in court and Plaintiffs did not intervene in the case. Finally, the Democracy in the Park events were the subject of threatened litigation by the Wisconsin Legislature, and the City of Madison commenced a declaratory judgment action that the Plaintiffs did not attempt to join. (Def. App. 189-198).

50. Defendants had no way to anticipate Plaintiffs would pursue a post-election challenge seeking to disenfranchise hundreds of thousands of Wisconsinites based on participation in an election according to procedures of which Plaintiffs have been aware for years and never challenged. **[32]**

51. Allowing Plaintiffs to now challenge the WEC's forms and guidance, to invalidate the votes of voters in two out of seventy-two counties, would prejudice both the Defendants and the targeted voters. *Brennan*, 2020 WI 69, ¶ 19, 393 Wis. 2d at 322 ("What amounts to prejudice … depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position.") (citation omitted).

E. Plaintiffs are Equitably Estopped from Seeking to Disenfranchise Targeted Groups of Voters for Following the Guidance of Elections Officials.

52. Equitable estoppel doctrine "focuses on the conduct of the parties" and consists of four elements:

"(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." *Milas v. Labor Ass'n of Wisconsin, Inc.*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997). All four elements are met here.

53. Plaintiffs failed to act prior to the election to challenge any of the categories of votes challenged in this recount appeal, despite an opportunity to do so.

54. Plaintiffs' acquiescence in the manner in which the 2016 Presidential Election was conducted in Wisconsin induced reasonable reliance by voters, elections officials and opposing candidates that that the machinery for absentee voting during a pandemic – including use of the standard application Form EL-122, the clerk's curing of absentee ballot witness address information, the grounds for claiming indefinite confinement, and the use of mobile drop boxes – was legal.

55. Disenfranchising hundreds of thousands of Dane and Milwaukee County voters after the fact would be to their grave and constitutional detriment. *See 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 **[33]** 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).

F. Disenfranchising Dane and Milwaukee County Votes While Counting Similar Voters in Other Counties Would Violate Equal Protection.

56. The Equal Protection Clause forbids Wisconsin from, "by later arbitrary and disparate treatment, valu[ing] one person's vote over that of another." Bush v. Gore, 531 U.S. 98, 104-05 (2000) (per curiam); see also Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause."); State ex rel. Sonneborn v. Sylvester, 26 Wis. 2d 43, 54, 132 N.W.2d 249 (1965) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.").

57. Discarding the votes of Dane and Milwaukee County voters for use of the EL-122 absentee ballot application form, but allowing all other similarly situated voters to remain counted, would devalue the targeted voters in violation of the Equal Protect Clause.

58. Discarding the votes of over 28,000 Dane and Milwaukee County voters who self designated as "indefinitely confined," but allowing all other indefinitely confined voters to remain counted, would devalue the targeted voters in violation of the Equal Protect Clause.

59. Discarding the votes of over 4,000 Dane and Milwaukee County voters because municipal clerks corrected missing witness address information, but allowing all other voters whose absentee envelopes were similarly corrected pursuant to WEC guidance, would devalue the targeted voters in violation of the Equal Protect Clause. **[34]**

Dated this 9th day of December, 2020.

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Appendix D

PERTINENT STATUTES

TITLE 3, U.S. CODE: THE PRESIDENT

CHAPTER 1: PRESIDENTIAL ELECTIONS AND VACANCIES

§2. Failure to make choice on prescribed day

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

CHAPTER 5, WISCONSIN STATUTES: ELECTIONS — GENERAL PROVISIONS; BALLOTS AND VOTING SYSTEM

5.01 Scope.

(1) CONSTRUCTION OF CHS. 5 TO 12. Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.

CHAPTER 6, WISCONSIN STATUTES: THE ELECTORS

SUBCHAPTER III: VOTING

6.79 Recording electors.

(1m) SEPARATE POLL LISTS. The municipal clerk may elect to maintain the information on the poll list manually or electronically. If the clerk elects to maintain the list electronically, an election official at each election ward shall be in charge of and shall maintain the poll list. The system employed to maintain the list electronically is subject to the approval of the commission. If the clerk elects to maintain the information manually, 2 election officials at each election ward shall be in charge of and shall maintain 2 separate poll lists.

(2) VOTING PROCEDURE. (a) Unless information on the poll list is entered electronically, the municipal clerk shall supply the inspectors with 2 copies of the most current official registration list or lists prepared under s. 6.36 (2) (a) for use as poll lists at the polling place. Except as provided in subs. (6), (7), and (8), each eligible elector, before receiving a serial number, shall state his or her full name and address and present to the officials proof of identification. The officials shall verify that the name on the proof of identification presented by the elector conforms to the name on the poll list or separate list and shall verify that any photograph appearing on that document reasonably resembles the elector. The officials shall then require the elector to enter his or her signature on the poll list, supplemental list, or separate list maintained under par. (c) unless the elector is exempt from the signature requirement under s. 6.36 (2) (a). The officials shall

verify that the name and address stated by the elector conform to the elector's name and address on the poll list.

* * *

(3) REFUSAL TO PROVIDE NAME, ADDRESS, OR PROOF OF IDENTIFICATION.

(a) Except as provided in sub. (6), if any elector offering to vote at any polling place refuses to give his or her name and address, the elector may not be permitted to vote.

(b) If proof of identification under sub. (2) is not presented by the elector, if the name appearing on the document presented does not conform to the name on the poll list or separate list, or if any photograph appearing on the document does not reasonably resemble the elector, the elector shall not be permitted to vote, except as authorized under sub. (6) or (7), but if the elector is entitled to cast a provisional ballot under s. 6.97, the officials shall offer the opportunity for the elector to vote under s. 6.97.

SUBCHAPTER IV: VOTING ABSENTEE

6.84 Construction.

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

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

6.855 Alternate absentee ballot site.

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

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

(2) The municipal clerk or board of election commissioners shall prominently display a notice of the designation of the alternate site selected under sub. (1) in the office of the municipal clerk or board of election commissioners beginning on the date that the site is designated under sub. (1) and continuing through the period that absentee ballots are available for the election and for any primary under s. 7.15 (1) (cm). If the municipal clerk or board of election commissioners maintains a website on the Internet, the clerk or board of election commissioners shall post a notice of the designation of the alternate site selected under sub. (1) on the website during the same period that notice is displayed in the office of the clerk or board of election commissioners.

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

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

(5) A governing body may designate more than one alternate site under sub. (1).

6.86 Methods for obtaining an absentee ballot.

(1) (a) Any elector of a municipality who is registered to vote whenever required and who qualifies under ss. 6.20 and 6.85 as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods:

1. By mail.

2. In person at the office of the municipal clerk or at an alternate site under s. 6.855, if applicable.

3. By signing a statement and filing a request to receive absentee ballots under sub. (2) or (2m) (a) or s. 6.22 (4), 6.24 (4), or 6.25 (1) (c).

4. By agent as provided in sub. (3).

5. By delivering an application to a special voting deputy under s. 6.875 (6).

6. By electronic mail or facsimile transmission as provided in par. (ac).

(ac) Any elector qualifying under par. (a) may make written application to the municipal clerk for an official ballot by means of facsimile transmission or electronic mail. Any application under this paragraph need not contain a copy of the applicant's original signature. An elector requesting a ballot under this paragraph shall return with the voted ballot a copy of the request bearing an original signature of the elector as provided in s. 6.87 (4). Except as authorized in ss. 6.87 (4) (b) 2. to 5. and 6.875 (6), and notwithstanding s. 343.43 (1) (f), the elector shall transmit a copy of his

or her proof of identification in the manner provided in s. 6.87 (1) unless the elector is a military elector or an overseas elector or the elector has a confidential listing under s. 6.47 (2).

(ag) An elector who is unable to write his or her name due to physical disability may authorize an application to be made by another elector on his or her behalf. In such case, the application shall state that it is made on request and by authorization of a named elector who is unable to sign the application due to physical disability.

(ar) Except as authorized in s. 6.875 (6), the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality. The clerk shall retain each absentee ballot application until destruction is authorized under s. 7.23 (1). Except as authorized in s. 6.79 (6) and (7), if a qualified elector applies for an absentee ballot in person at the clerk's office, the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification. 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. The clerk shall then enter his or her initials on the certificate envelope indicating that the absentee elector presented proof of identification to the clerk.

* * *

6.87 Absent voting procedure.

(1) Upon proper request made within the period prescribed in s. 6.86, the municipal clerk or a deputy

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

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

sub. (4) (b) 2. or 3. The certificate shall be in substantially the following form:

[STATE OF ....

County of ....]

or

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

I, ..., certify subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, that I am a resident of the [.... ward of the] (town) (village) of ...., or of the .... aldermanic district in the city of ...., residing at ....* in said city, the county of ...., state of Wisconsin, and am entitled to vote in the (ward) (election district) at the election to be held on ....; that I am not voting at any other location in this election; that I am unable or unwilling to appear at the polling place in the (ward) (election district) on election day or have changed my residence within the state from one ward or election district to another later than 28 days before the election. I certify that I exhibited the enclosed ballot unmarked to the witness, that I then in (his) (her) presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and any person rendering assistance under s. 6.87 (5), Wis. Stats., if I requested assistance, could know how I voted.

Signed ....

Identification serial number, if any: ....

The witness shall execute the following:

I, the undersigned witness, subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen** and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for

any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

....(Printed name)

....(Address)***

Signed ....

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

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

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

***

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

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

the elector's vote is cast. The elector shall then, still in the presence of the witness, fold the ballots so each is separate and so that the elector conceals the markings thereon and deposit them in the proper envelope. If a consolidated ballot under s. 5.655 is used, the elector shall fold the ballot so that the elector conceals the markings thereon and deposit the ballot in the proper envelope. If proof of residence under s. 6.34 is required and the document enclosed by the elector under this subdivision does not constitute proof of residence under s. 6.34, the elector shall also enclose proof of residence under s. 6.34 in the envelope. Except as provided in s. 6.34 (2m), proof of residence is required if the elector is not a military elector or an overseas elector and the elector registered by mail or by electronic application and has not voted in an election in this state. If the elector requested a ballot by means of facsimile transmission or electronic mail under s. 6.86 (1) (ac), the elector shall enclose in the envelope a copy of the request which bears an original signature of the elector. The elector may receive assistance under sub. (5). The return envelope shall then be sealed. The witness may not be a candidate. The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots. If the envelope is mailed from a location outside the United States, the elector shall affix sufficient postage unless the ballot qualifies for delivery free of postage under federal law. Failure to return an unused ballot in a primary does not invalidate the ballot on which the elector's votes are cast. Return of more than one marked ballot in a primary or return of a ballot prepared under s. 5.655 or a ballot used with an electronic voting system in a primary which is marked for candidates of more than one party invalidates all

votes cast by the elector for candidates in the primary.

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

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

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

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

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(9) If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no

certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).

* * *

6.88 Voting and recording the absentee ballot.

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

CHAPTER 7, WISCONSIN STATUTES: ELECTION OFFICIALS; BOARDS; SELECTION AND DUTIES; CANVASSING

SUBCHAPTER I: SELECTION AND DUTIES

7.15 Municipal clerks.

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(2m) OPERATION OF ALTERNATE ABSENTEE BALLOT SITE. In a municipality in which the governing body has elected to establish an alternate absentee ballot site under s. 6.855, the municipal clerk shall operate such site as though it were his or her office for absentee ballot purposes and shall ensure that such site is adequately staffed.

CHAPTER 7, WISCONSIN STATUTES:
POST-ELECTION ACTIONS;
DIRECT LEGISLATION

9.01 Recount.

(1) PETITION; FEES; GENERAL PROCEDURES.

(a) 1. Any candidate voted for at any election who is an aggrieved party, as determined under subd. 5., or any elector who voted upon any referendum question at any election may petition for a recount. The petitioner shall file a verified petition or petitions with the proper clerk or body under par. (ar) not earlier than the time of completion of the canvass following canvassing of any valid provisional ballots under s. 6.97 (4) and, except as provided in this subdivision, not later than 5 p.m. on the 3rd business day following the last meeting day of the municipal or county board of canvassers determining the election for that office or on that referendum question following canvassing of all valid provisional ballots or, if more than one board of canvassers makes the determination,not later than 5 p.m. on the 3rd business day following the last meeting day of the last board of canvassers which makes a determination following canvassing of all valid provisional ballots. If the commission chairperson or chairperson's designee makes the determination for the office or the referendum question, the petitioner shall file the petition not earlier than the last meeting day of the last county board of canvassers to make a statement in the election or referendum following canvassing of all valid provisional ballots and not later than 5 p.m. on the 3rd business day following the day on which the commission receives the last statement from a county board of canvassers for the election or referendum

following canvassing of all valid provisional ballots. With regard to an election for president, the petitioner shall file the petition not later than 5 p.m. on the first business day following the day on which the commission receives the last statement from a county board of canvassers for the election following canvassing of all valid provisional ballots.

* * *

5. In this paragraph, "aggrieved party" means any of the following:

a. For an election at which 4,000 or fewer votes are cast for the office that the candidate seeks, a candidate who trails the leading candidate, as defined under par. (ag) 5., by no more than 40 votes, as determined under par. (ag) 5.

b. For an election at which more than 4,000 votes are cast for the office that the candidate seeks, a candidate who trails the leading candidate, as defined under par. (ag) 5., by no more than 1 percent of the total votes cast for that office, as determined under par. (ag) 5.

* * *

(5) OATHS; MINUTES; WITNESS FEES; TABULATORS; TIMING; PUBLICATION.

(a) The board of canvassers or the commission chairperson or the chairperson's designee shall keep complete minutes of all proceedings before the board of canvassers or the chairperson or designee. The minutes shall include a record of objections and offers of evidence. If the board of canvassers or the commission chairperson or the chairperson's designee

receives exhibits from any party, the board of canvassers or the chairperson or designee shall number and preserve the exhibits. The board of canvassers or the chairperson or chairperson's designee shall make specific findings of fact with respect to any irregularity raised in the petition or discovered during the recount. Any member of the board of canvassers or the chairperson or chairperson's designee may administer oaths, certify official acts, and issue subpoenas for purposes of this section. Witness fees shall be paid by the county. In the case of proceedings before the commission chairperson or chairperson's designee, witness fees shall be paid by the commission.

* * *

(6) APPEAL TO CIRCUIT COURT.

(a) Within 5 business days after completion of the recount determination by the board of canvassers in all counties concerned, or within 5 business days after completion of the recount determination by the commission chairperson or the chairperson's designee whenever a determination is made by the chairperson or designee, any candidate, or any elector when for a referendum, aggrieved by the recount may appeal to circuit court. The appeal shall commence by serving a written notice of appeal on the other candidates and persons who filed a written notice of appearance before each board of canvassers whose decision is appealed, or in the case of a statewide recount,before the commission chairperson or the chairperson's designee. The appellant shall also serve notice on the commission if the commission chairperson or the chairperson's designee is responsible for determining

the election. The appellant shall serve the notice by certified mail or in person. The appellant shall file the notice with the clerk of circuit court together with an undertaking and surety in the amount approved by the court, conditioned upon the payment of all costs taxed against the appellant.

(b) If an appeal is filed from a recount determination in an election which is held in more than one judicial circuit, the chief judge of the judicial administrative district in which the election is held shall consolidate all appeals relating to that election and appoint a circuit judge, who shall be a reserve judge if available, to hear the appeal. If the election is held in more than one judicial administrative district, the chief justice of the supreme court shall make the appointment.

(7) COURT PROCEDURES.

(a) The court with whom an appeal is filed shall forthwith issue an order directing each affected county, municipal clerk, or board, and the commission, to transmit immediately all ballots, papers and records affecting the appeal to the clerk of court or to impound and secure such ballots, papers and records, or both. The order shall be served upon each affected county, municipal clerk, or board, the commission, and all other candidates and persons who filed a written notice of appearance before any board of canvassers involved in the recount.

(b) The appeal shall be heard by a judge without a jury. Promptly following the filing of an appeal, the court shall hold a scheduling conference for the purpose of adopting procedures that will permit the court to determine the matter as expeditiously as possible. Within the time ordered by the court, the appellant shall file a complaint enumerating with

specificity every alleged irregularity, defect, mistake or fraud committed during the recount. The appellant shall file a copy of the complaint with each person who is entitled to receive a copy of the order under par. (a). Within the time ordered by the court, the other parties to the appeal shall file an answer. Within the time ordered by the court, the parties to the appeal shall provide the court with any other information ordered by the court. At the time and place ordered by the court, the matter shall be summarily heard and determined and costs shall be taxed as in other civil actions. Those provisions of chs. 801 to 806 which are inconsistent with a prompt and expeditious hearing do not apply to appeals under this section.

(8) SCOPE OF REVIEW. (a) Unless the court finds a ground for setting aside or modifying the determination of the board of canvassers or the commission chairperson or chairperson's designee,it shall affirm the determination.

(b) The court shall separately treat disputed issues of procedure, interpretations of law, and findings of fact.

(c) The court may not receive evidence not offered to the board of canvassers or the commission chairperson or the chairperson's designee except for evidence that was unavailable to a party exercising due diligence at the time of the recount or newly discovered evidence that could not with due diligence have been obtained during the recount, and except that the court may receive evidence not offered at an earlier time because a party was not represented by counsel in all or part of a recount proceeding. A party who fails to object or fails to offer evidence of a defect or irregularity during the recount waives the right to object or offer evidence before the court except in the

case of evidence that was unavailable to a party exercising due diligence at the time of the recount or newly discovered evidence that could not with due diligence have been obtained during the recount or evidence received by the court due to unavailability of counsel during the recount.

(d) The court shall set aside or modify the determination of the board of canvassers or the commission chairperson or the chairperson's designee if it finds that the board of canvassers or the chairperson or chairperson's designee has erroneously interpreted a provision of law and a correct interpretation compels a particular action. If the determination depends on any fact found by the board of canvassers or the commission chairperson or the chairperson's designee, the court may not substitute its judgment for that of the board of canvassers or the chairperson or designee as to the weight of the evidence on any disputed finding of fact. The court shall set aside the determination if it finds that the determination depends on any finding of fact that is not supported by substantial evidence.

(9) APPEAL TO COURT OF APPEALS.

(a) Within 30 days after entry of the order of the circuit court, a party aggrieved by the order may appeal to the court of appeals.

(b) If an appeal is filed in respect to an election which is held in more than one court of appeals district, the chief justice of the supreme court shall consolidate all appeals relating to that election and designate one district to hear the appeal, except that if an appeal is filed in respect to an election for statewide office or a statewide referendum, the appeal shall be heard by the 4th district court of appeals.

(c) The court of appeals shall give precedence to

the appeal over other matters not accorded similar precedence by law.

(10) STANDARD FORMS AND METHODS. The commission shall prescribe standard forms and procedures for the making of recounts under this section. The procedures prescribed by the commission shall require the boards of canvassers in recounts involving more than one board of canvassers to consult with the commission staff prior to beginning any recount in order to ensure that uniform procedures are used, to the extent practicable, in such recounts.

(11) EXCLUSIVE REMEDY. This section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process.