STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DONALD J. TRUMP, et al.,

Plaintiffs,

v. Case No. 20-CV-7092.

JOSEPH R. BIDEN, et al.,

Defendants.

# RESPONSE BRIEF OF THE WISCONSIN ELECTIONS COMMISSION AND COMMISSIONER ANN JACOBS TO PLAINTIFFS' MEMORANDUM IN SUPPORT OF JUDGMENT ON NOTICE OF APPEAL AND COMPLAINT

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## INTRODUCTION

This case is styled as a recount appeal under Wis. Sat. § 9.01. But as pleaded and pursued, it is not a normal recount proceeding. An ordinary recount examines ballots one-by-one to ensure they were counted correctly and cast in conformance with established state election rules. Here, Plaintiffs seek to hijack the recount procedure to attack statewide guidance issued by the Wisconsin Elections Commission (the "Commission") about how to administer Wisconsin's absentee voting laws. They contend that four pieces of Commission guidance were invalid and therefore that tens of thousands of absentee ballots, from two counties only, cast in reliance on that guidance should be invalidated.

That misuse of the recount procedure should be rejected. The statutory procedure under Wis. Stat. § 9.01 does not allow for the invalidation of entire categories of ballots based on legal challenges like Plaintiffs' here. Even if it did, the invalidation remedy that Plaintiffs seek should be denied. Their attempt to disenfranchise tens of thousands of Wisconsin voters by waiting until after an election to challenge the Commission's longstanding public guidance should be rejected on laches grounds. Such a remedy also would violate voters' due process rights. And because it would invalidate votes in only two counties while leaving untouched ballots cast in an identical manner elsewhere, that remedy would violate the Fourteenth Amendment's equal protection guarantee.

Plaintiffs' claims about state voting practices also fail on their merits. Local elections officials appropriately utilized a Commission-approved application form for in-person absentee voters that doubles as their ballot envelope. The Commission rightly advised local officials to complete address information on absentee ballot witness certifications, such as a missing city or zip code, using reliable information. As for indefinitely confined voters, the Wisconsin Supreme Court already blessed the Commission's guidance, and Plaintiffs offered no evidence during the recounts about any voters who did not satisfy the statutory requirement for that status. Lastly, the City of Madison's collection of completed absentee ballots at city parks was consistent with guidance about the use of absentee ballot drop boxes, collection devices that state legislative leaders described as "lawful."

Plaintiffs' request to invalidate tens of thousands of votes should be denied and the decisions of the Boards of Canvassers upheld.

## ISSUES PRESENTED

I. Whether Plaintiffs' request to exclude tens of thousands of ballots based on Commission pre-election advice on issues of election administration is outside the scope of the drawdown remedy under Wis. Stat. § 9.01, barred by laches, and would violate the due process and equal protection rights of voters.

II. If the Court reaches the merits, whether the Dane and Milwaukee canvassing boards correctly concluded that election officials had properly followed the law in

a. Counting ballots where in-person absentee voters applied to vote absentee using Commission form EL-122;

b. Counting ballots where clerks had supplemented address information on witness certifications, following longstanding Commission advice;

c. Counting ballots of indefinitely confined voters, where Plaintiffs offered no evidence that any voter improperly identified themselves as having that status; and

d. Counting ballots where the City of Madison collected absentee ballots at two "Democracy in the Park" events.

## STANDARD OF REVIEW

This case is a review of a recount determination of the Wisconsin Elections Commission confirming recounts conducted by two counties. Unless the court finds a ground for setting aside or modifying the determination of the Boards of Canvassers, it must affirm the Boards' determinations. Wis. Stat. § 9.01(8)(c). 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).

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).

## BACKGROUND ON COMMISSION GUIDANCE

Because Plaintiffs' recount appeal is really a challenge to four statewide election practices, the Commission provides some initial background on its role and the four challenged pieces of guidance.

The Wisconsin Elections Commission (the "Commission") is responsible for administering elections in Wisconsin. *See* Wis. Stat. § 5.05(1). One of the Commission's main responsibilities is to provide guidance regarding the requirements of state election law to local election officials and the voting public. *See, e.g.*, Wis. Stat. §§ 5.05(12), 7.08(3), 7.08(11). Although the Commission maintains the statewide list of registered voters (*see* Wis. Stat. §§ 5.05(15), 6.36), it does not have a direct role either in issuing in-person and absentee ballots to voters or in receiving and counting those ballots. That job is left to local election officials at the county and municipal level. *See generally* Wis. Stat. §§ 7.10 (county clerk duties), 7.15 (municipal clerk duties), 7.51–7.60 (local canvassing provisions). Once local officials complete those tasks, they transmit the results to the Commission, which in turn tallies up the statewide results and certifies them. *See* Wis. Stat. § 7.70.

Plaintiffs seek to challenge four statewide election administration practices related to absentee voting. The Commission has provided guidance on each of these issues.

*In-person absentee ballot applications*

In addition to returning completed absentee ballots through the mail or to the clerk, voters may both request and cast absentee ballots "in person at the office of the municipal clerk or at an alternate site under s. 6.855"—what is commonly called "in-person absentee voting." Wis. Stat. §§ 6.86(1)(a)2., 1(b). In order to obtain an absentee ballot while in-person absentee voting, the voter must "make [a] written application to the municipal clerk." Wis. Stat. § 6.86(1)(a).

The Commission has long advised election officials that they can combine the absentee ballot certification required by Wis. Stat. § 6.87(2) with the "written application" required by Wis. Stat. § 6.86(1)(a). To that end, the Commission publishes Form EL-122, the "Official Absentee Ballot Application/Certification." (Def. App. 7.) That form originated back in 2009, when the Commission's predecessor agency—the Government Accountability Board—unanimously voted to combine the separate application and certification forms into a single form for in-person absentee voting. (Def. App. 105–06.) The resulting form was sent to all municipal clerks in Wisconsin in May 2010 and has been used since then. (Def. App. 105–07.)

The Commission renewed that guidance in January 2016, for example, advising that, for in-person absentee voters, "the combination application/certification certificate envelope will suffice as the absentee application." (Wolfe Aff. Ex. B at 11.)

*Missing witness certification address information.*

When an absentee voter fills out an absentee ballot, an adult witness must be present to verify the voter's identity and other information. Wis. Stat. § 6.87(4)(b)1. To guarantee that a witness was actually present, absentee ballots contain a sworn certification that the witness must sign attesting to the absentee voter's identity and residency. Wis. Stat. § 6.87(2). Below that certification, the witness must sign their name and write their "address." *Id.*

Before the 2016 presidential election, the Commission advised local election officials statewide about how to handle missing address information on these witness certifications. (Def. App. 50–51.) The Commission first noted how, under Wis. Stat. § 6.87(6d), an absentee ballot may not be counted if the accompanying witness certification lacks an address. It then advised that clerks should "take corrective action in an attempt to remedy a witness address error" and suggested reliable ways to do so, including by filling in missing information when the voter and witness indicate they live at the same street address. (Def. App. 50–51.) In the Commission's view, this would "promote uniformity in the treatment of absentee ballots statewide." (Def. App. 51.) The

Commission unanimously approved this guidance in 2016, and staff reiterated it before the November 2020 election. (Wolfe Aff. ¶ 13, Ex. A at 3.)

Local election officials statewide followed the Commission's guidance during the November 2020 election. Plaintiffs focus solely on officials in Dane and Milwaukee counties, but officials elsewhere did the same thing. For instance, in connection with both the November 2020 and past elections, election officials in Green Bay also filled in missing address information on absentee witness certifications, whenever the information was reasonably ascertainable based on information on the absentee ballot envelope or other reliable sources. (Wayte Aff. ¶¶ 2–4.)

For the most part, the challenged ballots in this category involved a clerk correcting partial addresses, such as by completing the city, zip code, or state—not filling in envelopes that lacked all witness address information whatsoever. (Def. Joint Fact 44.)

*Indefinitely confined voters.*

Absentee voters ordinarily must submit proof of identification in order to obtain an absentee ballot. *See* Wis. Stat. §§ 6.86(1)(ac), (ar); 6.87(1). However, an exception exists for voters who are "indefinitely confined because of age, physical illness or infirmity or [are] disabled for an indefinite period." Wis. Stat. § 6.86(2)(a).

Soon after the COVID-19 crisis began, on March 29, 2020, the Commission issued guidance regarding when voters could appropriately claim to be "indefinitely confined." The Commission noted that "[d]uring 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." (Def. App. 62.) It emphasized that voters must make an "individual" decision based on their "current circumstance[s]" and that the status should "not be used . . . simply as a means to avoid the photo ID requirement." (Def. App. 61.) It also explained that Wis. Stat. § 6.86(2)(a) "does not require any voter to meet a threshold for qualification and indefinitely confined status need not be permanent." (Def. App. 61.)

In the course of litigation unconnected to this case, the Wisconsin Supreme Court reviewed the Commission's guidance and concluded that it "provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." (Def. App. 64–66.)

*Drop boxes at Madison "Democracy in the Park" events.*

To handle the expected increase in absentee voting during the November election, the Commission advised election officials statewide that they could set up secure drop boxes into which completed absentee ballots could be deposited. (Def. App. 70–73.) Hundreds of these drop boxes were used statewide to conduct the November election (Wolfe Aff. ¶ 17), and state legislative leaders "wholeheartedly support[ed] voters' use" of this "lawful" method (Def. App. 204–05). Wisconsin State. § 6.87(4)(b)1. permits absentee ballots to be returned through "deliver[y] in person, to the municipal clerk."

On two Saturdays before the November election—on September 26, 2020, and October 3, 2020—the City of Madison created a set of manned drop boxes at city parks. (Def. Joint Fact 68.) Election officials attended these events to register voters and provide secure ballot containers into which voters could deposit completed absentee ballots that they had already received by mail. (Def. Joint Fact 68, 72.) No absentee ballots were distributed, and officials could serve as witnesses only for absentee voters who brought unsealed, blank ballots. (Def. Joint Fact 69–71.) Both major political parties were invited to observe. (Def. Joint Fact 77.)

## ARGUMENT

### I. The vast majority of Plaintiffs' challenges are not properly brought under Wis. Stat. § 9.01, are barred by laches, and would violate voters' constitutional rights of due process and equal protection.

This is not an ordinary recount case. It is a challenge to four statewide election practices put in place well before the November 2020 election. Plaintiffs could seek prospective declaratory relief if they think those practices are incorrect, but they cannot use them post-election as a way to discard thousands of ballots and disenfranchise thousands of voters.

### A. Wis. Stat. § 9.01 is not a proper vehicle for challenging broad, state election policies.

Plaintiffs allege violations of statutory provisions related to absentee voting which, under Wis. Stat. § 6.84(2), require that the ballots "may not be counted" and "may not be included in the certified results of any election." (Pls.' Mem. 23.) Plaintiffs ask the Court not only to declare that the two county canvassing boards erred in rejecting their objections, but also to order use of the statutory drawdown mechanism under Wis. stat. § 9.01(1)(b)4. (Pls.' Mem. 23–24.) The recount drawdown remedy under Wis. Stat. § 9.01, however, is far more limited in scope than Plaintiffs suggest and is not an available remedy for the kinds of broad, categorical objections they have advanced.

Under Wis. Stat. § 9.01(1)(b)2., each county board of canvassers is required to examine any absentee ballot envelopes to which an objection is made and to determine whether any or all of those envelopes were defective. An absentee envelope is defective only if: (a) "it is not witnessed;" (b) "it is not signed by the voter;" or (c) the voter received the absentee ballot by facsimile transmission or electronic mail, and the certificate accompanying the ballot is missing. Once any such defective envelopes have been identified, the envelopes are to be marked, set aside, and preserved; and "[t]he number of voters shall be reduced by the number of ballot envelopes set aside." Wis. Stat. § 9.01(1)(b)2. After the number of voters has been reduced in this way, the number of ballots previously counted will exceed the reduced number of voters. Therefore, the board of canvassers next must apply the drawdown procedures in section 9.01(1)(b)4. to randomly select and remove a number of absentee ballots sufficient to bring the number of ballots back into agreement with the number of voters.

The limited statutory scope of the drawdown procedure forecloses the use of it Plaintiffs would make and demonstrates that Plaintiffs' challenges to the administration of the election are outside the scope of a post-election recount proceeding. The drawdown remedy applies only where an objection is made to an absentee ballot envelope and the envelope is found to be defective, as defined in section 9.01(1)(b)2. The overwhelming majority of absentee ballots to which Plaintiffs objected during the recount do not fall in that limited category.

Of the four broad categories of absentee ballots to which Plaintiffs object, three have no arguable relationship to any of the categories of defective absentee ballot envelopes defined in section 9.01(1)(b)2. Plaintiffs complain about in-person absentee ballots that were accompanied by a written absentee ballot application on form EL-122; absentee ballots cast by voters who claimed indefinitely confined status after March 25, 2020; and absentee ballots that were returned to the Madison City Clerk via that city's Democracy in the Park event. Those objections do not relate to unsigned ballots, ballots missing the accompanying certificate, or ballots that were not witnessed.

That leaves only Plaintiffs' fourth category, ballots where some witness address information was filled in by the municipal clerk. But Plaintiffs do not contend that the ballots were not witnessed or even that the witness failed to make the proper statutory certification.

The reason that Wis. Stat. § 9.01 provides no drawdown remedy for Plaintiffs' challenges is because post-election recount procedures are not the arena to challenge broad state election policies. The recount statute "does not contemplate a judicial determination by the board of canvassers of the legality of the entire election but of certain challenged ballots." *Clapp v. Joint Sch. Dist. No. 1*, 21 Wis. 2d 473, 478, 124 N.W.2d 678 (1963). And the scope of a court's review in a recount appeal proceeding like this one "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." *Id.* The recount mechanism under Wis. Stat. § 9.01 does not contemplate changing the results of an election based on wholesale challenges to general state election policies and practices that involve the validity of broad categories of ballots, rather than correcting errors in the initial counting of particular ballots. It not meant to involve canvassing boards or courts in allegations of erroneous state policies resulting in widespread irregularities in election procedures.

The statutory drawdown mechanism is appropriate for defective absentee ballot envelopes because the remedy is directly proportional to concrete evidence of particular absentee ballots that were incorrectly counted. Broad challenges to general election administration policies, in contrast, have no comparable anchoring in actual evidence of specific ballots that have been incorrectly counted.

Recognizing the proper scope of Wis. Stat. § 9.01 does not leave challengers like Plaintiffs without a remedy. They can seek appropriate, forward-looking declaratory relief if they believe the Commission has misinterpreted the election laws. But the time for challenging election administration policies which, if not corrected, are liable to result in large but indeterminate numbers of improperly counted ballots is before an election is held and ballots are counted under those policies, not afterwards.

### B. Laches bars Plaintiffs' claims.

Laches is an equitable defense premised on the simple proposition 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 (citation omitted); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (noting that court called upon to grant relief in election cases "should act and rely upon general equitable principles"). In Wisconsin, laches may properly bar a party's claims where the balance of equities favors its application and where the party asserting laches establishes three elements: (1) unreasonable delay in bringing a claim; (2) the defending party's lack of knowledge that the first party would raise the claim; and (3) prejudice to the defending party caused by the delay. *Wisconsin Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 12, 393 Wis. 2d 308, 946 N.W.2d 101.

Laches plays an important role in, and is routinely applied to, election-related matters. *E.g., In re Price*, 191 Wis. 17, 210 N.W. 844, 845–46 (1926) (finding petitioner challenging county canvass "guilty of laches" and noting that delay in seeking relief left inadequate time to remedy alleged defect without disruption to election process); *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988) (noting that laches may bar post-election challenges "in order to create an appropriate incentive for parties to bring challenges to state election procedures when the defects are most easily cured"). As one court explained, the enforcement of laches in the election context prevents perverse, undemocratic outcomes: "[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.'" *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (1983) (citation omitted).

Plaintiffs' belated challenge to election practices known and used for months, if not years, merits the application of laches.

**1. Unreasonable delay.**

First, Plaintiffs unreasonably delayed in bringing these claims. "In the context of elections, . . . any claim against a state electoral procedure must be expressed expeditiously." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990). Here, Plaintiffs can offer no excuse that would justify failing to present *before* the election their claims, premised as they are on procedures established *before* the election to carry out the election in accordance with Wisconsin law. Plaintiffs waited to challenge widely known procedures until after millions of voters cast their ballots in reliance on those procedures. That delay is unreasonable under both the law and common sense.

To understand Plaintiffs' lack of diligence, consider each of their challenges in turn.

First, Plaintiffs dispute in-person absentee ballots cast with a combined application and envelope. But that form was first issued over *ten years ago* and has been used statewide since then. (Def. App. 105–07.) And the Commission has since issued public guidance on this issue, including back in 2016. (Wolfe

Aff. Ex. B at 11 (advising that the "combination application/certification certificate envelope will suffice as the absentee application")).

Second, Plaintiffs assert that clerks should not have filled in address information in absentee witness certifications. That statewide advice originated over four years ago when the Commission unanimously approved guidance that local clerks should "take corrective action in an attempt to remedy a witness address error." (Def. App. 50–51; Wolfe ¶ 13.) And that guidance was reiterated about a month before the November 2020 election. (Wolfe Aff. Ex. A at 3.)

Third, Plaintiffs challenge certain absentee voters who claimed to be indefinitely confined. But other plaintiffs pursued litigation on that issue before the Wisconsin Supreme Court back in March of this year. (Def. App. 64–66.) And the relevant guidance from the Commission that the Wisconsin Supreme Court approved came out on March 29, 2020. (Def. App. 61–63.)

Fourth, Plaintiffs object to absentee ballots deposited at the so-called "Democracy in the Park" events in the City of Madison. Those events were widely publicized and ended a month before election day.

On every one of these four issues, everything Plaintiffs would have needed to know to file a prospective declaratory judgment claim was available long before the November election. Sitting on those claims and then springing them on unsuspecting voters after they already cast their ballots in reliance on Commission guidance was entirely unreasonable.

None of Plaintiffs' excuses for their delay are persuasive.

First, they say that they could not have brought the claims earlier because the "violations discovered during the recount necessarily occurred during the election, not before." (Dkt. 45:25.) The idea that these issues were discovered during the recount is simply untrue.

The absentee ballot request form, EL-122, has been utilized for over ten years and is available on the Commission's website. The Commission's advice regarding witness addresses dated back to 2016. Both pieces of guidance were in effect when President Trump participated in the 2016 Presidential election. Regarding indefinite confinement, other plaintiffs initiated prospective declaratory judgment litigation on the indefinite confinement issue soon after the relevant local clerk guidance became publicly available. *See Jefferson v. Dane County*, No. 2020AP557-OA (Wis. Sup. Ct.). The City of Madison's Democracy in the Park program was widely publicized in advance.

Plaintiffs complain that requiring prospective, pre-election challenges would place too much of a burden on candidates. That objection is hard to take seriously. If these issues are important enough to spend millions of dollars on post-election litigation, they were surely important enough to come to Plaintiffs' attention before the election.

### 2. Lack of notice.

The second laches requirement—lack of notice to Defendants—is also met here. Plaintiffs' failure to present these claims when they would reasonably be expected to do so—before the election—is sufficient to satisfy the second laches element. *See Brennan*, 393 Wis. 2d 308, ¶ 18 n.10 (noting that failure to bring claim within reasonable time supports conclusion that party asserting laches lacked knowledge); *Schafer v. Wegner*, 78 Wis. 2d 127, 133, 254 N.W.2d 193 (1977) (same). In the context of election litigation, where arrangements must be made and procedures put in place well before an election so that electors can effectively exercise their right to vote, it is expected that legal challenges will be presented with sufficient time to adjust course. *See Fulani*, 917 F.2d at 1031 ("[A]ny claim against a state electoral procedure must be expressed expeditiously."); *cf. Republican Nat. Comm. v. Democratic Nat. Comm.*, 140 S. Ct. 1205, 1207 (2020) (observing that the Supreme Court has "repeatedly emphasized" that courts should not alter election rules "on the eve of an election"). Plaintiffs made no such effort here.

### 3. Prejudice.

Lastly, the prejudice caused by Plaintiffs' delay is obvious and profound. Plaintiffs sat on their claims, allowing the Commission to issue guidance and local officials to carry out the state election in accordance with their understanding of the law, allowing millions of Wisconsinites to vote in reliance on those procedures, only to attack those decisions after they became irreversible. *See Fulani*, 917 F.2d at 1031 ("As time passes, the state's interest in proceeding with the election increases in importance as . . . irrevocable decisions are made."). This is precisely the type of prejudice the laches doctrine exists to prevent.

The supreme court has recognized that impermissible prejudice occurs when a party unreasonably delays in pursuing an election challenge. *See*, e.g., *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877 ("[I]t is too late to grant Plaintiffs any form of relief that would be feasible and that would not cause confusion and undue damage to both the Wisconsin electors who want to vote and the other candidates in all of the various races on the general election ballot."); *In re Price*, 191 Wis. 17, 210 N.W. 844, 845–46 (1926) (finding petitioner challenging county canvass "guilty of laches" and noting that delay in seeking relief left inadequate time to remedy alleged defect while complying with election deadlines).[1]

[1] *See also Williams v. Rhodes*, 393 U.S. 23, 34–35 (1968) (upholding denial of equitable relief to litigant seeking ballot access, noting that delay in pursuing claim created potential for "serious disruption of election process"); *Kelly v. Pennsylvania*, No. 68 MAP 2020, 2020 WL 7018314, at *1 (Pa. Nov. 28, 2020) ("[I]t is beyond cavil that Plaintiffs failed to act with due diligence . . . . Equally clear is the substantial prejudice arising from [Plaintiffs'] failure to institute promptly a facial challenge to the mail-in voting statutory scheme, as such inaction would result in the disenfranchisement of millions of Pennsylvania voters."); *Liddy v. Lamone*, 398 Md. 233, 245, 919 A.2d 1276 (2007) (noting in context of challenges to state election procedure claims must be pursued "without unreasonable delay, so as to not cause

The equities weigh heavily in favor of applying laches here. Nothing less than the right of every Wisconsinite to have their vote for President counted is at stake if Plaintiffs' requests are granted. It is difficult to imagine an equitable consideration favoring Plaintiffs that could outweigh so fundamental a right. *See State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949) ("The right of a qualified elector to cast a ballot for the election of a public officer . . . is one of the most important of the rights guaranteed to him by the constitution."); *see also Roth v. Lafarge School Dist. Bd. of Canvassers*, 2004 WI 6, ¶ 19, 268 Wis. 2d 335, 677 N.W.2d 599 ("Wisconsin courts have consistently noted that they do not want to deprive voters of the chance to have their votes counted.").

As the U.S. Supreme Court has recognized, "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). "If citizens are deprived of th[e] right [to vote], which lies at the very basis of our Democracy, we will soon cease to be a Democracy." *Frederick*, 254 Wis. at 613. One could not shake

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prejudice to the defendant" and collecting cases); *Blankenship v. Blackwell*, 103 Ohio St. 3d 567, 572–74, 817 N.E.2d 382 (2004) ("If relators had acted more diligently, the Secretary of State would have had more time to defend against relators' claims . . . ."); *Marsh v. Holm*, 238 Minn. 25, 55 N.W.2d 302 (1952) ("One who intends to question the form or contents of an official ballot to be used at state elections must realize that serious delays, complications, and inconvenience must follow any action he may take and that, unless a reasonable valid excuse be presented, . . . he should not be permitted to complain.").

the public's confidence in our electoral process more vigorously than by allowing unforeseeable post-election legal challenges to nullify an entire state's election for President.

In light of Plaintiffs' inexcusable delay, equitable considerations must bar the relief Plaintiffs seek—the categorical disenfranchisement of thousands of Wisconsin voters.

### C. Granting the remedy Plaintiffs seek would violate due process.

Even if laches did not bar Plaintiffs' claims, the remedy they seek—the exclusion of hundreds of thousands of absentee ballots—would be unlawful because it would violate Wisconsinites' federal due process rights by retroactively overriding election procedures that those voters relied on.

Once a state legislature has directed that the state's electors are to be appointed by popular election, the people's "right to vote as the legislature has prescribed is fundamental." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). That fundamental right to vote includes "the right of qualified voters within a state to cast their ballots and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941). Thus, the power that Article II vests in the state legislature is necessarily "subject to the limitation that [it] may not be exercised in a way that violates other specific provisions of the Constitution," including provisions that protect the fundamental right to vote. *Williams v.*

*Rhodes*, 393 U.S. 23, 29 (1968). And while Article II unquestionably allows a state legislature to change the method for choosing the state's electors, it cannot make changes in such a manner or under circumstances that would violate the Due Process Clause of the Fourteenth Amendment. So while the Wisconsin Legislature could seek to amend the existing Wisconsin statutes to provide in *future* presidential contests for direct legislative appointment of presidential electors, the guarantee of due process forbids this Court from enforcing the type of post-election rule changes the Plaintiffs seek. *See Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (retroactive invalidation of absentee ballots violated due process).

In general, a due process violation exists where two elements are present: "(1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures." *Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998). As relevant here, Wisconsin voters who reasonably relied on the established voting procedures that Plaintiffs only now challenge will be disenfranchised by the thousands, raising serious concerns of a due process violation. This Court should avoid granting a remedy that will create a constitutional violation. *See Wright v. Sumter Cty. Bd. of Elections & Registration*, 361 F. Supp. 3d 1296, 1301 (M.D. Ga. 2018) (declining to adopt remedial redistricting plan proposed by plaintiff, and noting "the obligation of the Court to ensure that a remedial plan is constitutional"), *aff'd*, No. 18-11510, 2020 WL 6277718 (11th Cir. Oct. 27, 2020); *Baber v. Dunlap*, 349 F. Supp. 3d 68, 77-78 (D. Me. 2018) (observing "a certain degree of irony because the remedy Plaintiffs seek could deprive more than 20,000 voters of what they understood to be a right to be counted with respect to the contest between [two candidates]," and noting that "such a result would [raise equal protection concerns about "valuing one class of voters . . . over another"); *see also Ford v. Tennessee Senate*, No. 06-2031, 2006 WL 8435145, at *14 (W.D. Tenn. Feb. 1, 2006) ("Voters whose right to vote is challenged must be afforded minimal, meaningful due process to include, notice and opportunity to be heard before they can be disenfranchised").

Federal courts have exhibited sensitivity to the reliance interests of voters in considering injunctive relief in response to election challenges. For example, in *Griffin*, the First Circuit held that a Rhode Island Supreme Court decision unexpectedly changed state law after voters had relied on their absentee ballots being counted, and that "due process is implicated where the entire election process including as part thereof the state's administrative and judicial corrective process fails on its face to afford fundamental fairness." 570 F.2d at 1078.

Similarly, in *Northeast Ohio Coalition for Homeless v. Husted*, the Sixth Circuit considered a case in which wrong-precinct and deficient-affirmation provisional ballots were disqualified because of poll-worker error that caused the ballot deficiencies. 696 F.3d 580, 585 (6th Cir. 2012). The court noted that the Due Process Clause protects against "extraordinary voting restrictions that render the voting system 'fundamentally unfair,'" *id.* at 597 (citation omitted), and concluded that "[t]o disenfranchise citizens whose only error was relying on poll-worker instructions appears to us to be fundamentally unfair," *id.* at 597. Accordingly, the Sixth Circuit affirmed a preliminary injunction entered by the district court that required ballots cast incorrectly as a result of poll-worker error to be counted. *Id.* at 589–90.

Because Plaintiffs made no effort to pursue these challenges earlier, thousands of Wisconsinites cast their votes in reliance on the procedures dictated to them by election officials. Widespread disenfranchisement for following the rules does not comport with due process or a healthy democracy.

### D. Granting the remedy Plaintiffs seek would violate the equal protection rights of voters in the recounted counties.

Plaintiffs ask this Court to invalidate votes cast only in Dane and Milwaukee counties—and nowhere else. But their legal arguments for throwing out ballots implicate election practices that were carried out statewide. Plaintiffs would therefore have this Court throw out purportedly unlawful votes cast in Dane and Milwaukee counties but not those cast in the *exact same manner* elsewhere in Wisconsin. That kind of disparate treatment would violate the equal protection clause of the Fourteenth Amendment of the U.S. Constitution, meaning the relief they seek is constitutionally prohibited.

Applying different standards to different voters within a state is exactly the problem the U.S. Supreme Court identified in *Bush v. Gore*, 531 U.S. 98 (2000). There, the court held that a "recount cannot be conducted in compliance with the requirements of equal protection and due process" unless there are "adequate statewide standards for determining what is a legal vote." *Id.* at 110. One kind of "uneven treatment" on which the court frowned was "counties us[ing] varying standards to determine what was a legal vote." *Id.* That created impermissible "arbitrary and disparate treatment [of] voters in . . . different counties." *Id.* at 107. These county-by-county differences violated the Fourteenth Amendment's requirement that "[h]aving 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." *Id.* at 104–05.

Plaintiffs' request to invalidate votes only in Dane and Milwaukee counties would violate these basic equal protection principles recognized in *Bush*. Each category of allegedly "illegal" votes they identify rests on statewide practices and guidance. But Plaintiffs, presumably for partisan reasons, have picked only two counties in which to invalidate votes. That is constitutionally impermissible.

On the issues related to in-person absentee ballot applications and incomplete witness addresses, the Commission gave guidance for local election officials to use statewide. (Def. App. 50–51, 105–07; Wolfe Aff. Exs. A, B.) And the facts indicate that local election officials did so during the November election. For instance, the City of Green Bay followed the Commission's guidance to fill in missing witness address information and used the combined application/certification for in-person absentee voting. (Wayte Aff. ¶¶ 5–7.) So, even if votes in Dane and Milwaukee counties were invalidated on this basis, votes cast in Green Bay with these same issues would remain counted.

The same is true for indefinitely confined voters—around 165,000 of the 240,000 voters claiming that status reside outside Dane and Milwaukee counties. (Wolfe Aff. ¶¶ 8–10.) Plaintiffs would leave all those votes in place, invalidating only votes cast by indefinitely confined voters in Dane and Milwaukee counties.

Likewise, Plaintiffs challenge only votes cast at the "Democracy in the Park" events in Madison. But, from the perspective of Plaintiffs' legal argument, those votes are not materially different from the ones cast using the 451 drop boxes in 66 other counties throughout Wisconsin. (Wolfe Aff. ¶ 17.)

Plaintiffs, again, would have this Court invalidate votes in one county only, leaving equivalent votes elsewhere untouched.

Invalidating votes in these four categories only in Dane and Milwaukee counties would result in the kind of "arbitrary and disparate treatment [of] voters in . . . different counties" rejected in *Bush*, 531 U.S. at 107. It would impermissibly result in "uneven treatment" through "varying standards to determine what [is] a legal vote" from county to county. *Id.*; *see also Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 242 (6th Cir. 2011) (citing *Bush* for the proposition that "[s]tatewide equal-protection implications could arise" when equivalently situated votes are counted in some counties but not others); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008) (a state may not "arbitrarily deny [residents] the right to vote depending on where they live").

Because Plaintiffs' requested relief would impose a patchwork of rules that invalidate ballots depending solely on where a voter lives, the Fourteenth Amendment's equal protection clause prohibits it.

## II. Even if the remedy Plaintiffs seek were within the scope of section 9.01 and not precluded by laches and constitutional principles, their claims about Wisconsin law are meritless.

Even if Plaintiffs could assert their challenges to state election policy through a recount proceeding, their claims would fail on the merits. Wisconsin elections law does not function they way they envision.

### A. EL-122 is a written application for an absentee ballot.

Wisconsin offers "a variant of early voting:" up to 14 days before the election and no later than the Sunday preceding the election, qualified voters may request, receive, and vote a ballot in person at the clerk's office or at an alternate site under Wis. Stat. § 6.855. *See* Wis. Stat. §§ 6.86(1)(a)2, (1)(ar)-(b), 6.87(3)(a), (4)(b)1; *Luft*, 963 F.3d at 669.

In order to obtain an absentee ballot while in-person absentee voting, the voter must "make [a] written application to the municipal clerk." Wis. Stat. § 6.86(1)(a). Here, as they have in past elections and like voters elsewhere in the State, in-person absentee voters in Dane and Milwaukee counties received their ballots by appearing in person at a properly designated site, requesting a ballot, providing photo ID, and completing form "EL-122 Official Absentee Ballot Application/Certification." (Def. App. 7.)

Plaintiffs say these voters did not apply for an absentee ballot. They recognize that the voters completed Form EL-122—a document with "Application" in the title. (Pl. Memo. at 7–8.) But in their view, the voters instead needed to fill out Form EL-121, a slightly different form that contains the same basic information. (*Compare* Def. App. 7, *with* Wolfe Aff. Ex. D.)

Plaintiffs are mistaken. They erroneously read into the "written application" requirement additional and imagined conditions that they say prohibit using the combined "Application/Certification."[2]

Statutes should be interpreted "reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

Plaintiffs' position badly misreads the "written application" requirement. The entire relevant provision provides 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." Wis. Stat. § 6.86(1)(ar). The statute is silent regarding the use of a combined application/certification form, the substance of the application, criteria for whether a submitted application is sufficient, or a standardized form. It certainly does not mandate the use of Form EL-121, which Plaintiffs now claim is required. Had the Legislature intended to prescribe a specific form with specific contents, it would have done so explicitly. *See, e.g.*, Wis. Stat. § 6.33(1) (describing mandated voter registration forms in detail); Wis. Stat. § 6.87(2)

[2] Plaintiffs' citation to *Lee v. Paulson*, 241 Wis. 2d 38, 2001 WI App 19, in which the court excluded five absentee ballots where it was undisputed that they "were issued without written applications," does not support their position and simply begs the question. *Id.* ¶¶ 1, 8. Unlike *Lee*, this case does not involve a complete failure to make a written application. Instead, Plaintiffs here challenge whether the form voters admittedly completed satisfies the written application requirement.

(providing that absentee ballot certificate "shall be in substantially the following form" and prescribing specific language for the certificate).

Finding no explicit textual support for their position in Wis. Stat. § 6.86(1)(ar), Plaintiffs cite irrelevant statutory and non-statutory sources to achieve their desired outcome. For example, Plaintiffs argue that their preferred Form EL-121 exists to "facilitate" the written application process and that some municipal clerks require in-person absentee voters to request a ballot using this preferred form. (Pl. Memo. at 5, 8.) These facts do not prohibit other clerks from using other forms, including the combined application/certification. Similarly, the fact that the Commission contemplated that the EL-121 could be used by in-person absentee voters does not prevent the use of another form for the same purpose.

Lacking statutory support to require the use of a specific application form, Plaintiffs raise another, equally unsupported argument: that the application required under Wis. Stat. § 6.86(1)(ar) must exist as a stand-alone document, separate from the absentee ballot certification required under Wis. Stat. § 6.87(2). Plaintiffs seem to draw their inference from an assumption that the statutes require a strict sequence of events that preclude the two documents from being on a single piece of paper or envelope:—first, one fills out an application, and only later, the certification. But the statutes don't require that, either.

Wisconsin Stat. § 6.86(1)(ar)'s "written application" requirement applies both to in-person absentee and at-home absentee voters. For voters who request that a ballot be sent to them, there is necessarily a separated sequence of events from when voter sends the application, the clerk sends the ballot, and the voter returns the completed ballot. In-person absentee voters, on the other hand, complete every step in a single transaction, making it possible to complete an application and the certification in one visit. Wisconsin Stat. § 6.86(1)(ar) governs these two functionally distinct absentee voting methods but requires no strict sequencing. Again, if the Legislature had wanted to require that, it would have said so. *See, e.g.,* Wis. Stat. § 6.87(4)(b)1 ("The absent elector, in the presence of the witness, shall mark the ballot . . . . The elector shall <u>then</u>, still in the presence of the witness, fold the ballot[] . . . and deposit [it] in the proper envelope . . . . The return envelope shall then be sealed").[3]

Using a combined application/certification is also consistent with the requirement that the clerk "verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application." Wis. Stat. § 6.86(1)(ar). An in-person absentee voter must, when she appears

[3] Even under Plaintiffs' theory, voters could follow the exact sequence they desire: the application could be completed, a ballot could then be issued, and the certificate (appearing below the application) could then be executed. (Def. App. 10–41.) Plaintiffs lack any evidence that particular ballots did not follow this sequence.

to request and cast her ballot, show photographic identification. Wis. Stat. § 6.86(1)(ar). It makes no difference whether the clerk compares the name on the ID to the name atop a separate application or the name at the top of the combined application/certification (which actually provides a place for the clerk to indicate compliance with the photo ID requirement). The point is that the ballot is issued and cast in the name of the person who requested it. And the fact that the statutes discuss the written application and the ballot envelope certificate in separate statutory provisions does not establish that the two cannot exist on a single piece of paper.

Plaintiffs also contend that a certification and application must be separate documents because of unrelated statutes relating to retention and transmission of envelopes after voting. Wisconsin Stat. § 6.86(1)(ar) requires "[t]he clerk [to] retain each absentee ballot application until destruction is authorized under s. 7.23(1),"[4] and Wis. Stat. § 7.52(4)(i) requires clerks to transmit certificate envelopes to the county clerk for the county canvass. Taking these two together, Plaintiffs conclude that the municipal clerk cannot "retain" the application if it doubles as the certificate and is sent to the county clerk for the canvass.

[4] Wisconsin Stat. § 7.23(1), in turn, simply provides that the applications, along with "other records and papers requisite to voting at any federal election," such as certificate envelopes, may be destroyed 22 months after the election.

But this retention statute is nothing more than a command that the applications not be destroyed except pursuant to the cited document destruction schedule. Plaintiffs' contention that the clerks fail to "retain" the written applications by transmitting the used combination application requires reading the statute out of context. Municipal clerks do not impermissibly destroy the combined application/certification envelopes when they are sent to the county. To the contrary, the county either saves those envelopes per the retention schedule or returns them to the municipality so it can do so, after the canvass is completed. (Wolfe Aff. ¶ 16.)

At bottom, Plaintiffs relies on the proposition that voters who filled out a document titled "Application" did not, in fact, fill out a "written application" under Wis. Stat. § 6.86(1)(ar). Wisconsin law requires no such absurd construction.

### B. Ballots with corrected witness addresses were properly counted.

Plaintiffs complain that some absentee ballots in the two counties at issue should not have been counted either because the voter certification on the absentee ballot envelope did not include the address of the absentee voter's witness, or because local election officials unlawfully filled in missing witness address information, as the Commission advised them to do. (Dkt. 1 ¶¶ 235–80.) Plaintiffs are incorrect.

When an absentee voter fills out an absentee ballot, an adult witness must be present to verify the voter's identity and other information. Wis. Stat. § 6.87(4)(b)1. To guarantee that a witness was actually present, absentee ballots contain a sworn certification that the witness must sign attesting to the absentee voter's identity and residency. Wis. Stat. § 6.87(2).

The witness does not attest to his address. Below the certification, the witness signs their name and writes their "address." *Id.* "If a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d). If a clerk receives an absentee ballot "with an improperly completed certificate or with no certificate," the clerk may return the ballot to the voter for correction. Wis. Stat. § 6.87(9).

Since before the 2016 presidential election, the Commission has advised local election officials statewide that clerks should "take corrective action in an attempt to remedy a witness address error" and suggested reliable ways to do so, including by filling in missing information when the voter and witness indicate they live at the same street address. (Def. App. 50–51.) For the most part, this involves a clerk correcting information that included street addresses, such as by completing the city, zip code, or state—not filling in envelopes that lacked all witness address information whatsoever. (Def. Joint Fact 44.)

Plaintiffs argue that, if the witness address information on an absentee envelope is incomplete, then the certificate is "missing the address of a witness" and "the ballot may not be counted" under Wis. Stat. § 6.87(6d). Plaintiffs fail to define what constitutes a complete address for purposes of section 6.87(6d), which speaks only of an address being "missing," but does not define the word "address" or specify how much address information is required. Without knowing how much address information is statutorily required, Plaintiffs' assertions about "incomplete" address information operate in a legal void.

Terms that are not statutorily defined and that do not have a technical or peculiar legal meaning are to be interpreted according to common and approved usage. Wis. Stat. § 990.01(1). The common and approved usage of a term can be found in recognized dictionaries. *Town of Madison v. Cty. of Dane*, 2008 WI 83, ¶ 17, 311 Wis. 2d 402, 752 N.W.2d 260. Here, the definition of "address" in both Black's Law Dictionary and in recognized non-legal dictionaries is essentially the same.

Black's defines "address" as: "Place where mail or other communications will reach person." Black's Law Dictionary 38. A standard online non-legal dictionary similarly defines "address," in pertinent part, as "a direction as to the intended recipient, written on or attached to a piece of mail," and as "the place or the name of the place where a person, organization, or the like is located or may be reached." Dictionary.com, "Address." Notably, neither of those definitions provides that an address must include specific pieces of information, such as a street number, street name, name of municipality, name of state, or zip code. The definitions are instead functional: they define an address as the information about a person's location that is necessary in order for mail or other communications to reach that person. It follows that a witness address is not "missing" from an absentee ballot envelope, as long as the envelope contains sufficient information about the witness's location to enable someone to reasonably locate the witness.[5]

This broad, functional definition of "address" is consistent with the statutory purpose of protecting against potential voter fraud by requiring absentee voters to certify their actions in the presence of a witness. The purpose of a witness is to attest to the genuineness of the absentee voter's certification and to be available, if necessary, to personally testify as to the matters witnessed. A witness can perform those functions only if she can be contacted, if needed. A witness's address, in the above functional sense, is thus necessary for a person to properly act as a witness. But as long as the address information is sufficient to make it possible to contact a witness, the statutory

[5] Commission staff, in considering the guidance it would provide regarding the address requirement, acknowledged that the statute did not provide a precise definition and suggested clerks look for "street number, street name and name of municipality." (Def. App. 50.)

purpose of the witness requirement is satisfied. Neither the text of the statute nor a reasonable inference from that text demands that a list of specific items of information must be included in every address. Ultimately, the purpose of the witness address requirement is to make it possible to contact a witness at need, not to create technical procedural traps for invalidating votes.

It is certainly possible, of course, to object to any particular absentee ballot envelope on the ground that it does not include enough address information to make it possible to contact the absentee voter's witness. Given the functional definition of "address," however, any such objection is necessarily fact specific in relation to the individual ballot.

Plaintiffs' second contention about witness addresses is that, where any address information is absent or incomplete, it may not be filled in or completed by election officials. (Pl. Memo. at 15.) Here, too, Plaintiffs read into § 6.87 a requirement that is not contained in its text. Section 6.87(6d) requires only that the address of a witness must be included on the envelope. It sets no requirement as to how that address information must be placed there, and it plainly authorizes rejecting an absentee ballot only if the address is "missing," not if that information is present, but was entered by an election official, or in some other way that Plaintiffs do not like.

Moreover, the witness certification language in section 6.87(2) requires the witness only to certify that she is a U.S. citizen, that the information contained in the *absentee voter's* certification is true, that the witness is not a candidate for any office on the ballot, and that the witness did not solicit or advise the voter to vote for or against any candidate or ballot measure. Notably, the witness is not required to certify anything about her own address information.

In contrast, when the Legislature wants a statute to require specific pieces of address information, or to require that certain information be provided by a particular person, it says so expressly in the statutory language. For example, proof of residence for voter registration purposes must include a document showing "[a] current and complete residential address, including a numbered street address, if any, and the name of a municipality." Wis. Stat. § 6.34(3)(b)2. Most tellingly, section 6.87(2) itself expressly requires the *absentee voter* to personally certify, among other things, that she is "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." Clearly, when the Legislature enacted section 6.87, it knew how to require a particular person to place on the certificate specifically enumerated items of address information, and it chose to impose such a detailed and personal requirement on the absentee voter, but not on her witness. The statute is simply silent about who may place witness address information on an envelope, and voters cannot be disenfranchised based on a non-existent statutory requirement.

Similarly, because section 6.87 does not require a witness address to include specific elements of address information, it is entirely possible that an election official who adds address information to a certificate may be supplying information that goes beyond what is statutorily mandated. For instance, there is nothing in section 6.87(6d) that would invalidate a ballot where the witness address included a street address and municipality, but omitted "Wisconsin" or a zip code. By the same token, there is nothing in the statute that would prohibit a helpful and conscientious clerk from adding the state or the zip code in such circumstances.

For the above reasons, if a clerk's office, prior to election day, receives an absentee ballot envelope that does not contain witness address information, or does not contain enough witness address information to make it possible to contact the witness, there is nothing in section 6.87 that prohibits the entry of the requisite information onto the envelope by an election official who is able to determine the information from other information on the envelope or from a reliable source.

Plaintiffs nonetheless try to infer such a prohibition from Wis. Stat. § 6.87(9), which provides that "[i]f 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 . . . whenever time permits the elector to correct the defect and return the ballot [by the time polls close on election day]." According to Plaintiffs, because the statute expressly allows a clerk to return an incomplete certificate for correction by the voter, it implicitly prohibits clerks from completing missing address information themselves. Plaintiffs' inference of such an implied prohibition, however, is neither logically necessary nor reasonable.

When a clerk receives an absentee ballot with an incomplete certificate—possibly weeks before election day—she need not sit on her hands knowing that the ballot ultimately will not be counted and the voter will be disenfranchised. Rather, if there is sufficient time for the voter to correct the defect and return the ballot, the clerk "may" return the ballot to the voter. The availability of this permissive—not mandatory—procedure makes it possible for a voter to supply her personal signature, or to add information that section 6.87(2) specifically requires the voter to personally enter and certify. In addition, if a witness's personal signature is missing, section 6.87(9) can afford the voter an opportunity to obtain that signature from the witness, who presumably is personally known to the voter.

Because those types of information are expressly required by the statute to personally come from either the voter or the witness, they could not be cured in any way other than by the type of mechanism that section 6.87(9) affords.[6] But it does not follow logically that that mechanism must be the exclusive method for correcting all deficiencies in a certificate, including deficiencies in information that the statute does not require to be entered by a particular person. Again, ballots cannot be rejected—and voters thereby disenfranchised—based on procedural requirements that are neither expressly stated in, nor reasonably implied by, the applicable statutory language.

### C. Plaintiffs provided no evidence indefinitely confined voters improperly claimed that status.

Plaintiffs also attempt to invalidate the ballots of voters who identified themselves as "indefinitely confined." Their argument rests on speculation and ignores the Wisconsin Supreme Court's approval of Commission advice.

Plaintiffs challenge the votes of all indefinitely confined voters who claimed that status after March 25, 2020. They choose that date because it is when election officials in Dane and Milwaukee counties issued disputed guidance for claiming that status. The incident resulted in the Wisconsin

[6] The need to expressly permit clerks to remedy incomplete or missing certificates by mailing the ballot back to the voter is because that statutes generally prohibit clerks from returning completed ballots once they have been received. *See* Wis. Stat. § 6.86(6) (providing that, once an elector returns completed absentee ballot, clerk "shall not return" ballot to the elector). Absent the exception provided by Wis. Stat. § 6.87(9), clerks would presumably be limited to attempting to get absentee electors to appear in the clerk's office to cure the defect.

Supreme Court accepting an original action petition challenging that guidance. (Def. App. 64–66.)

Four days after the challenged local guidance, on March 29, 2020, the Commission disseminated its own guidance concerning indefinitely confined status. The Commission guidance provided:

> 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.
>
> 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.

(Def. App. 61–63.) The Wisconsin Supreme Court concluded that it "provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." (Def. App. 64–66.)

Plaintiffs assert that the municipalities' March 25 guidance demanded further remedial action, specifically the exclusion of all ballots from Dane and Milwaukee indefinitely confined voters who claimed that status after March 25, 2020. They apparently assume that every single voter claiming to be indefinitely confined after March 25 did so improperly. But they do not offer a shred of evidence about a single voter who claimed that status improperly.

Plaintiffs' bald assumption does not provide sufficient reason to throw out thousands of votes.[7]

Not only do Plaintiffs lack any evidence, the statistics on indefinitely confined voters do not support them. Around 240,000 voters statewide received indefinite confinement status during the November 2020 election. In 2020, roughly 10% of voters across the State identified as indefinitely confined, roughly the same percentage of voters who did so in 2016. Roughly 75,000 of those voters resided in Dane in Milwaukee counties; the remaining 165,000 or so were spread throughout every other county in Wisconsin. The vast majority of these voters—around 199,000—were older than 50. (Wolfe Aff. ¶¶ 8–10.) In other words, the percentage of voters claiming that status did not dramatically increase, was not concentrated in the two counties, and was overwhelming an older population more likely to, due to "age" or "infirmity," appropriately identify as indefinitely confined.

In an effort to put their recount burden on the clerks, Plaintiffs claim that clerks in Dane and Milwaukee had a legal duty to remove these voters' indefinitely confined designation ahead of the election. (Pl. Memo. at 18-20.)

[7] Plaintiffs do not attempt to precisely define what circumstances would, in their view, justify an indefinitely confined designation. At most, they quote a federal court's paraphrasing of the relevant statutory language, a passage that provides no interpretive guidance. *See Frank v. Walker*, 17 F. Supp. 3d 837, 844 (E.D. Wis. 2014) ("The photo ID requirement [in Wisconsin election law] does not apply to: . . . absentee voters who are elderly, infirm, or disabled and indefinitely confined to their homes or certain care facilities. Wis. Stat. §§ 6.86(2), 6.875.").

Plaintiffs argue the ballots these voters cast are necessarily void because this purge was not undertaken. But no such duty exists. Only in certain situations, and sometimes only after following specific procedures, must a clerk affirmatively remove an indefinitely confined designation. Wis. Stat. § 6.86(2)(b); (*see also* Def. App. 62 (advising that clerks "may not request or require proof" of a voter claiming indefinite confinement)). While Plaintiffs cite to one such situation—"upon receipt [by the clerk] of reliable information that an elector no longer qualifies [as indefinitely confined]," Wis. Stat. § 6.86(2)(b)—they have failed to show any instance in which clerks actually received such information.

Given the complete lack of evidence that any voters in Dane or Milwaukee County improperly claimed indefinite confinement status, this claim also fails.

### D. Ballots collected at "Democracy in the Park" events were properly counted.

Finally, plaintiffs seek to throw out ballots collected at "Democracy in the Park" events in Madison. This also misses the mark. Their principal contention—that the events were impermissible alternate absentee ballot sites under Wis. Stat. § 6.855—does not square with the facts or the law.

To handle the expected increase in absentee voting during the November election cycle, the Commission advised election officials statewide that they could set up secure drop boxes into which completed absentee ballots could be deposited. (Def. App. 70–73) Hundreds of drop boxes were used statewide to conduct the November election (Wolfe Aff. ¶ 17), and state legislative leaders "wholeheartedly support[ed] voters' use" of this "lawful" method (Def. App. 204–05). Wisconsin Stat. § 6.87(4)(b)1. permits absentee ballots to be returned through "deliver[y] in person, to the municipal clerk."

On two Saturdays before the November election—on September 26, 2020, and October 3, 2020—the City of Madison created a set of manned drop boxes at city parks. (Def. Joint Fact 68.) Election officials attended these events to register voters and provide secure ballot containers into which voters could deposit completed absentee ballots that they had already received by mail. (Def. Joint Fact 68, 72.) No absentee ballots were distributed, and officials could serve as witnesses only for absentee voters who brought unsealed, blank ballots. (Def. Joint Fact 69–71.) Both major political parties were invited to observe. (Def. Joint Fact 77.)

Plaintiffs argue that the drop box locations in Madison were alternate ballot sites. They were not. As section 6.855(1) explains, alternate ballot sites are places where people vote: it provides that an alternate site is a location where "electors of the municipality may *request and vote absentee ballots* and to which voted absentee ballots shall be returned." (emphasis added). Indeed, when an absentee voter makes an in-person ballot request, either at the clerk's office or at an alternate site, the ballot must be voted and returned and "may not be removed by the elector." Wis. Stat. § 6.87(3)(a). The fact that an alternate site is also a location where voted absentee ballots are to be returned does not make any location where ballots are returned an alternative voting site. It is the ability to request and vote absentee ballots in person, activities that would otherwise be confined to the municipal clerk's office, that makes the alternate site designation significant.

The Democracy in the Park events were not alternate sites; they were not places where people could vote. Instead, they were places where voters could deliver their ballots to the clerk, which had designated the boxes for that purpose.

Plaintiffs' reliance on Wis. Stat. § 6.87(4)(b)1 is also misplaced, and *Olson v. Lindberg*, 2 Wis. 2d 229, 85 N.W.2d 775 (1957), gives them no support. At issue in *Olson* were 18 absentee ballots that the Court determined "may not be counted." *Id.* at 231, 238. It did so because "18 of the 24 absentee ballots cast were delivered *by the clerk to the applicants* at their homes." *Id.* at 231 (emphasis added).[8] At the time, the relevant statute provided that the clerk

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[8] *See also* at 233–34 ("[I]t must be considered that the total number of absentee ballots not shown to have been delivered by the town clerk contrary to the statute, is 6.") (emphasis added) and 236 (referring again to "the action of the town clerk in delivering 18 of the 24 absentee ballots to voters other than at his office contrary to [the relevant statute]").

"shall mail to the applicant, postage prepaid, said official ballot . . . or such officer shall deliver said ballot . . . to the applicant personally at the office of the clerk." *Id.* (internal quotations omitted). By delivering ballots to applicants at the applicants' homes, the clerk in *Olson* violated the relevant statute. How the voters returned those ballots was not an issue.

Here, the relevant statute does not prohibit returning ballots at events like "Democracy in the Park." Instead, it simply provides that "[t]he envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. The provision does not require delivery of the ballot to the municipal clerk to be performed at any statutorily-specified location. It is unlike other statutory provisions that do require an activity to take place at a specific place. *See* Wis. Stat. §§ 6.86(1)(a)2 (requiring that in-person absentee application be made "at the office of the municipal clerk or at an alternate site"), 6.87(3)(a) (providing that municipal clerk "shall deliver [in-person absentee ballot] to the elector personally at the clerk's office or at an alternate site"). If the legislature had meant to require delivery to the municipal clerk to occur at a precise location, it would have said so explicitly.

Moreover, to interpret section 6.87(4)(b)1 to require that the elector physically hand her absentee ballot to the clerk and only the clerk, rather than a designated agent of the clerk would constitute an absurd contortion of the statute. "Clerk" necessarily includes agents designated by the clerk to carry out those duties. For example, Wis. Stat. § 6.87(3)(a) requires that "the municipal clerk shall mail the absentee ballot to the elector[] . . . or shall deliver it to the elector personally at the clerk's office or at an alternate site." At least in more populous areas, it would not be possible for one clerk to do this all alone.

Accordingly, Wis. Stat. § 6.87(4)(b)1 allows both delivery of absentee ballots to the clerk at locations other than the clerk's office and to allow voters to accomplish delivery through an agent of the clerk.

## CONCLUSION

The factual and legal conclusions of the county canvassing boards should be affirmed.

Dated this 9th day of December 2020.

Respectfully submitted,

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