No. 20-3414

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONALD J. TRUMP, as candidate for
President of the United States of America,
Plaintiff-Appellant,

v.

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

Appeal from the United States District Court
for the Eastern District of Wisconsin, Milwaukee Division
Civil Action No. 2:20-cv-01785
Hon. Brett H. Ludwig

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Ultimately, this case is about preserving statewide elections for President of the United States. But, not in Wisconsin, not this year.

If there is one thing everyone in this case may agree upon (virtually all courts have, save the district court), it is that Article II, Section 1, Clause 2 and Article I, Section 4 of the U.S. Constitution entrust the state legislatures with setting the rules for selection to federal office in each state. Delegation to the state legislatures of the authority to set rules for selection to high federal office is a key separation of powers principle settled upon by the Constitution's framers. This principle has been under siege in Wisconsin this year.

While state legislatures' primacy in the administration of federal elections is generally accepted by federal courts, the means of enforcing that primacy, and the cost to a state that fails to respect the legislature's exclusive role is not as clear. Consequently, incentives for state actors to follow the Constitution's plan for federal elections lack robustness.

This case presents an important opportunity to reaffirm the constitutional order and assign a remedy that incentivizes following the Constitution's design. Without intervention by this Court, 2020 in Wisconsin will mark another low point in the slide towards anarchic federal elections which could further embolden local officials to usurp authority over federal elections that the framers wisely vested in the state legislatures.

An exhibit introduced by Wisconsin's Governor in the district court proceedings lists twenty-two election cases involving Wisconsin this year.[1] It is a lengthy but incomplete list.

The Governor's list illustrates the tug-of-war that ensues when rules of election administration are believed to be "in play." In an electoral world with shifting rules there are many who would play kingmaker. However, the best chance for the people's choice to prevail is if the body the framers recognized to be closest to the people sets the electoral rules – this is the state legislature.

ARGUMENT

A. The Electors Clause Forbids Overreach by Non-Legislative State Actors in the Conduct of a Presidential Election

Defendants do not take serious issue with the President's key premise that the Electors Clause forbids overreach by non-legislative state actors in the conduct of a presidential election, *i.e.*, that non-legislative actors must "act[] within the legislative scheme for administering elections." Gov't Defs. Br. at 23.[2] Notwithstanding their initial support for the district court's rationale that the Electors Clause does not address election administration, *id.* at 16-19, Defendants concede courts have held otherwise, *id.* at 22-23 (citing *Bush v. Gore*, 531 U.S. 98,

[1] ECF 119-5, p.2.

[2] Defendants did not coordinate and file a joint brief as requested by this Court, however, they did coordinate to brief different issues. Collectively, they are referred to here as "Defendants" and citations to briefs specify the author: The Government Defendants ("Gov't Defs."), Democratic National Committee ("DNC"), or Amici Curiae Christine Todd Whitman, John Danforth, Lowell Wiecker, et al. (collectively "Whitman").

120-21 (2000) and *Carson v. Simon*, 978 F.3d 1051, 1056 (8th Cir. 2020)[3]) and primarily contend that the Wisconsin Elections Commission (WEC) "did not depart from the legislative scheme...[but] operated expressly within it." Gov't Defs. Br. at 19. Defendants devote the vast majority of their argument to the contention their conduct fell within the parameters of the legislative scheme. *Id.* at 19-34.

The Electors Clause stands as a key separation of powers principle to ensure that Presidential elections are administered in the manner directed by the state legislature. *See* B040-45. Vigorous enforcement of the Electors Clause prevents non-legislative actors from engaging in last minute and significant departures from the legislative scheme for the Presidential election which may yield a partisan advantage and prevent knowing who would have won an election conducted in the "Manner...the Legislature...direct[ed]." U.S. Const. art. II, § 1, cl. 2.

Other than disagreeing with it, Defendants do not critique the President's analysis of "Manner," explaining its original meaning and the use of the same term in a broad way in numerous cases decided under the analogous Elections Clause. *Compare* Appellant's Br. at 22-30 to Gov't Defs. Br. at 16-19. Defendants merely restate the district court's analysis. As noted above, Defendants also concede as they must that Article II was read differently and consistent with the President's view of "manner" in *Bush v. Gore* and in *Carson v. Simon*.[4] Finally, the two cases

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[3] The DNC attempts to distinguish *Carson* on standing grounds. DNC Br. at 11, fn. 7. Standing is addressed below.

[4] *See also Moore v. Circosta*, -- F.Supp.3d – 2020 WL 6063332 (M.D.N.C. 2020) ("The Elections Clause certainly prevents entities other than the legislature from unilaterally tinkering with election logistics and procedures.").

cited by Defendants in support of the district court's holding are inapposite. Gov't Defs. Br. at 19 citing *Shipley v. Chicago Bd. of Election Commissioners*, 947 F.3d 1056, 1062 (7th Cir. 2020); *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986). *Shipley* was not an Electors Clause case and was dismissed because plaintiffs had only raised a claim for violation of state law under the Illinois post-election audit statute. *Shipley*, 947 F.3d at 1062. Likewise, *Bodine* was not an Electors Clause case, and was dismissed because voting machine issues "could have been adequately dealt with through the procedures set forth in Indiana law." *Bodine*, 788 F.2d at 1272.

Accordingly, this Court should find that the Electors Clause forbids overreach by non-legislative state actors in the conduct of a Presidential election, requiring them to act within the legislative scheme for administering elections.

Starting from this point, the principal remaining issues center upon (1) whether the boundary set by the Electors Clause was transgressed, *i.e.*, whether the WEC and other election officials "act[ed] within the legislative scheme for administering elections" within Wisconsin, (2) whether the President timely sought a remedy for any violation of the Electors Clause and (3) whether the scope of the remedy sought is appropriate and merited by the significance of the Article II violation(s) established.

However, Defendants also tend to conflate the issues of timing and remedy with the analysis of whether a constitutional violation occurred, *see*, *e.g.*, DNC Br. at 6-9, and to cast the President's mere request for relief under Article II as improper.

Defendants go so far as to characterize this suit as "an abuse of process;...intended to, erode public confidence in our electoral system [with]...corrosive effects [that] are like battery acid on the body politic." DNC Br. at 8. Therefore, the President briefly addresses here why the nature of the remedy sought is consistent with Article II. Timing issues will be addressed elsewhere.

B. Plaintiff's Proposed Remedy for Defendants' Violation of the Electors Clause is Appropriate and Constitutional

The President has stated a cognizable claim for relief under Article II of the Constitution as *Bush v. Gore* and *Carson v. Simon* confirm. The nature of the relief should not impede recognition of this claim. It is, of course, the case that, "[t]he scope of the remedy must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation." *Brown v. Plata*, 563 U.S. 493, 531 (2011) (unconstitutional prison conditions). However, "a narrow and otherwise proper remedy for a constitutional violation is [not] invalid simply because it will have collateral effects." *Id*. Defendants fail to propose a narrower remedy to address the Article II violations identified. It is insufficient to complain that the remedy proposed is too broad when a narrower one that will still address the constitutional wrong has not been identified.

In the seminal reapportionment case of *Baker v. Carr*, 369 U.S. 186, 197 (1962), the district court dismissed the plaintiff's claim, making "clear that its dismissal reflected a view not of doubt that violation of constitutional rights was alleged, but of a court's impotence to correct that violation." The Supreme Court reversed, finding that the "right asserted [what later came to known as the one person, one

vote principle] is within the reach of judicial protection under the Fourteenth Amendment." *Id.* at 237.

Similarly, in *Reynolds v. Sims*, 377 U.S. 533, 554 (1964), the appellants' position was that "a federal court lack[ed] the power to affirmatively reapportion seats in a state legislature." The Court responded to warnings about the "dangers" of entering political thickets by saying:

> [A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. As stated in *Gomillion v. Lightfoot, supra*:
>
> > 'When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.'

Reynolds, 377 U.S. at 566.

When *Baker v. Carr* and *Reynolds v. Sims* were decided, reapportionment cases were in their infancy. Therefore, the idea that a judicial remedy that would have the effect of altering the structure of the Tennessee state legislature or the Alabama state legislature seemed excessive and a three-judge court in the Middle District of Tennessee dismissed *Baker*. Since then, however, numerous federal courts have ordered state or local election structures changed to comply with the Constitution. *See*, *e.g.*, *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688(1989) (local government apportionment); *Connor v. Finch*, 431 U.S. 407 (1977) (Mississippi Legislature); *Chapman v. Meier*, 420 U.S. 1(1975) (North Dakota Legislature); *White v. Weiser*, 412 U.S. 783 (1973) (Texas Legislature); *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713(1964) (Colorado Legislature).

To date, cases under Article II have been infrequent, just as reapportionment cases were rare at the time of *Baker*, and there has not been a post-election case in which a federal court has been required to consider the remedy for an election conducted outside the bounds of Article II. However, as the history of reapportionment cases following *Baker* indicates, the fact that the remedy requested to address a constitutional violation is novel, does not make it unconstitutional.

Reapportionment cases are analogous to this case for a further reason. Upon a federal court declaration that the State's reapportionment of legislative seats violates the Constitution, the preferred remedy is to permit the state legislature to address malapportionment in the first instance by proposing a new redistricting plan. This is similar to the process proposed here of not asking the court to declare how electors will be appointed but to leave that decision to the state legislature after the election has been declared void.

The federal courts' role in this case is not unlike their role in other election cases of significant weight and impact. Although "none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere" than do federal courts, "[w]hen contending parties invoke the process of the courts...it becomes [their] unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Bush v. Gore*, 531 U.S. at 111.

Federal courts, though appropriately reluctant to do so, have long been willing to intervene in state electoral processes to ensure that constitutional standards are met. *Baker v. Carr*, *Reynolds v. Sims*, *supra*. There is ample historic endorsement for the principle that judicial intervention to maintain constitutional boundaries is healthy for democracy, not antithetical to it. A further counterweight to Defendants' claim that judicial review of election processes under Article II will somehow harm the electoral system is Justice Gorsuch's recent observation that:

> Our oath to uphold the Constitution is tested by hard times, not easy ones. And succumbing to the temptation to sidestep the usual constitutional rules is never costless. It does damage to faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures, for the more we [*i.e.*, unelected judges and, arguably, unelected state election administrators] assume their duties the less incentive they have to discharge them. Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes. No one doubts that conducting a national election amid a pandemic poses serious challenges. But none of that means individual judges [or unelected election administrators] may improvise with their own election rules in place of those the people's representatives have adopted.

Democratic Nat'l Comm. v. Wisconsin State Legislature, 2020 WL 6275871, at *2 (U.S. Oct. 26, 2020) (Gorsuch, J., concurring in denial of application to vacate stay). Judicial intervention is necessary when Constitutional lines have been transgressed in an election. Such intervention does not undermine constitutional democracy, it preserves it.

Defendants have missed the import of the Court's statement in *Bush v. Gore* that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses

a statewide election as the means to implement its power to appoint members of the electoral college." *Bush v. Gore*, 531 U.S. at 104. This is why Defendants' contentions that voiding the election violates constitutional due process or "unlawfully disenfranchise[s]" voters are incorrect. *See* Gov't Defs. Br. at 37-40; DNC Br. at 14-15. A voter's right in a Presidential election is "the right to vote *as the legislature has prescribed*." *Bush v. Gore*, 531 U.S. at 104. There is no free standing, untethered right to vote in a manner inconsistent with Article II or other provisions of the Constitution. There were voters who might have had their votes counted had the recount continued in *Bush v. Gore*. However, ending a recount which violated Equal Protection did not abridge their rights any more than voiding an election abridges the rights of voters who had a right to vote for President solely in the manner prescribed by the legislature. "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Bush v. Gore*, 531 U.S. at 115, quoting *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). Therefore, it cannot be unconstitutional and does not abridge the constitutional right of any voter to void a Presidential election that does not comply with Article II.

Lost in Defendants' rhetoric is fair appreciation for how close the final vote was in Wisconsin and recognition that election results can be set aside by courts when the fundamental fairness of the election, or the public's perception of the fairness of the election, has been undermined, even when it is not possible to know to a mathematical certainty that the misconduct changed the outcome of the election.

See, *e.g.*, *Pabey v. Pastrick*, 816 N.E.2d 1138, 1151 (Ind. 2004) (ordering a new election under election contest statute where "a deliberate series of actions occurred making it impossible to determine the candidate who received the highest number of legal votes cast in the election"); *In re Ctr. Twp. Democratic Party Supervisor Primary Election*, 4 Pa. D. & C.4th 555, 562 (Com. Pl. 1989) ("when it is not possible to separate the lawful ballots from the unlawful or fraudulent ballots, then the entire vote must be rejected and thrown out"); *McNally v. Tollander*, 302 N.W.2d 440, 447–48 (Wis. 1981) ("where deprivations of the right to vote are…so egregious in character as to seriously undermine the appearance of fairness, we hold such an election must be set aside, even where the outcome of the election might not be changed"). While true that fraud may be the reason most frequently relied upon to set aside an election, or to throw out all absentee ballots cast in an election, a mathematical certainty of a changed election result need not be shown from such fraud to throw out either the election or all absentee ballots in the election. *See*, *e.g.*, *Bolden v. Potter*, 452 So. 2d 564, 567 (Fla. 1984) ("fraud and corruption may permeate the entire absentee balloting process, regardless of whether the number of ballots conclusively shown to be invalid would change the outcome of the election...it is unnecessary to demonstrate with mathematical certainty that the number of fraudulently cast ballots actually affected the outcome of the election"). Moreover, fraud is by no means the exclusive basis for voiding an election. For instance, an election can be set aside for violations of constitutional or Voting Rights Act guarantees against purposeful racial discrimination. *See*, *e.g.*, *N.A.A.C.P. v.*

Hampton Cty. Election Comm'n, 470 U.S. 166, 182–83 (1985) ("If appellees fail to seek this approval, or if approval is not forthcoming, the results of the March 1983 election should be set aside."); *Hadnott v. Amos*, 394 U.S. 358, 366 (1969) (ordering new election); *Bell v. Southwell*, 376 F.2d 659, 664 (5th Cir. 1967) (new election ordered based on racial discrimination even though it was not alleged the discrimination affected the winner of the election). Therefore, voiding the election is not dependent upon identifying some minimum number of ballots in any category as Defendants erroneously contend. *See* Gov't Defs. Br. at 24 (indefinitely confined voters), 30-31 (ballots in drop boxes), 33-34 (witness certificate alterations).

This Court has observed that, "[a]lthough federal courts have the power to invalidate elections held under constitutionally infirm conditions...the courts need not exercise this power in the case of all elections held pursuant to unconstitutional statutes." *Gjersten v. Board of Election Com'rs for City of Chicago*, 791 F.2d 472, 478 (7th Cir. 1986). "A federal court reaching into the state political process to invalidate an election necessarily implicates important concerns of federalism and state sovereignty. It should not resort to this intrusive remedy until it has carefully weighed all equitable considerations." *Id*. However, as explained above and in the President's opening brief, questions of federalism and separation of powers weigh *in favor of* vigorous enforcement of Article II. Moreover, there are not weighty state sovereignty concerns because in the context of the Elections Clauses, "the Constitution primarily treats states as election administrators rather than sovereign entities," *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008), and a

federal court "has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution[.]" *Judge v. Quinn*, 387 F.App'x 629, 630 (7th Cir. 2010).

This case presents the question of whether usurpation of the state legislature's Article II authority can, like other constitutional violations, constitute a basis for finding that an election was without legal basis and void, *i.e.*, that it cannot be determined who would have won the election had the Legislature's rules been followed. The President is not alleging that every instance in which the Legislature's rules for administering a Presidential election are not followed will constitute a remediable Article II violation. Rather, when the deviations from the legislative scheme are significant enough to overcome the margin between the two leading candidates in the election a federal court should determine that Article II requires the choice regarding Presidential electors revert to the Legislature.

Thus, the President is not requesting a "retroactive declaration of a winner by fiat" as the Defendants erroneously contend. Gov't Defs. Br. at 39. Nor is the President contending that this Court authorize the Wisconsin Legislature "to simply replace the popular choice with its own slate of electors" merely because "popular election results are disputed." *Id*. at 41. In fact, the President would agree with the Government Defendants that in *most* instances "the goal of...subsequent election dispute[s] in the courts is simply to determine whom the people have chosen, not to retroactively override their choice by turning it over to the state legislature." However, the President submits that if Article II was not followed because non-

legislative actors failed to abide by the legislative scheme for choosing electors, then a federal court enforcing Article II of the Constitution must determine whether it is possible from the election results to determine whom the people would have chosen *had the legislative scheme been followed*. If, as in this case, it is not possible to determine whom the people would have chosen because the margin between the candidates with the two highest vote totals is significantly less than the number of votes cast in a manner that the court has found was contrary to the legislative scheme then the unconstitutional nature of the election should be declared and the remedy of voiding the election invoked.[5]

C. The President's claims are justiciable

The Defendants argue the President's claims are not justiciable under the doctrines of standing, mootness, and Eleventh Amendment sovereign immunity. However, the district court correctly disposed of these defenses below and determined that the President's claims were justiciable. A011–A016.

1. As a candidate, President Trump has standing.

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. … The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). Standing asks "whether the plaintiff has 'alleged such a personal stake in the outcome of the

[5] The record demonstrates drop boxes were used throughout the state, and in two counties alone, some 91,000 to 116,000 ballots were collected via unlawful drop boxes. B028-29.

controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975).

"Standing has essentially three components. A plaintiff must show that he has suffered an 'injury in fact,' that the challenged action caused the injury, and that the injury can likely be redressed by the cause of action." *Krislov v. Rednour*, 226 F.3d 851, 857 (7th Cir. 2000).

i. President Trump suffered an injury in fact

"First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted) (emphasis added).

An injury is particularized when it affects a plaintiff "in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548. Particularization relates to an injury affecting the plaintiff's individual rights and not the rights of other people. *Id.* "Concrete" means it is a real, not abstract injury. *Id.* However, the injury does not need to be tangible-for example, free exercise and free speech are recognizable rights. *Id.*

This Court has held that standing exists not only when deprived of a benefit but also when deprived of a *chance to obtain* a benefit. *Casillas v. Madison Ave. Associates, Inc.*, 926 F.3d 329, 334 (7th Cir. 2019) (*quoting Robertson v. Allied Sols., LLC*, 902 F.3d 690, 697 (7th Cir. 2018)).

Despite these touchstones, "[w]e need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982).

Defendants urge that cases that auger for the President are outliers, but the reality is that as discussed in Part B above, there are few cases on point. Defendants rely on *Allen v. Wright*, 468 U.S. 737 (1984), and *Lance v. Coffman*, 549 U.S. 437 (2007), which are both classic citizen or taxpayer standing cases,[6] with no relationship to the issue at hand where a candidate sues alleging infringement of his right to compete in a constitutional election. Defendants are left with *Bognet v. Sec'y Commw. of Pa.*, 980 F.3d 336 (3d Cir. 2020). However, the President submits the Third Circuit is in error.

In contrast to *Bognet* is *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), involving a COVID-inspired change to state election deadlines for absentee ballots adopted by the Minnesota Secretary of State. The *Carson* court reversed the Secretary's change based on the Electors Clause, holding the Secretary had invaded the province of the Legislature and that presidential "Electors have Article III

[6] *Allen* involved parents suing the Internal Revenue Service for failing to adopt procedures to deny tax-exempt status to discriminatory school districts, and *Coffman* involved citizens suing after a post census-redistricting dispute.

standing as candidates." *Carson*, 978 F.3d at 1058. If a Presidential Elector has standing under Article III, *a fortiori*, the candidate himself has standing.

Similar, although in *dicta*, is *Wood v. Raffensperger*, 2020 WL 7094866 (11th Cir. Dec. 5, 2020). The *Wood* plaintiff sued as a citizen and donor alleging violations of the Election Clause, Electors Clause, Equal Protection Clause, and irregularities in the recount violating his rights under the Due Process Clause. The Eleventh Circuit denied Wood standing, holding he had alleged merely a generalized grievance. However, the Court stated that "a political candidate harmed by the recount would satisfy [the injury in fact] requirement [to bring a constitutional claim] because he could assert a personal, distinct injury."[7] *Id.*; *see also Donald J. Trump for President, Inc. v. Bullock*, 2020 WL 5810556, at *8 (D. Mont. Sept. 30, 2020) (holding a candidate has standing).

As a candidate in the presidential election, President Trump has an interest in its conduct and outcome unique from "an undifferentiated, generalized grievance" that voters might have. It is akin to the loss of a job opportunity, which "is unquestionably a distinct and palpable injury." *Howard v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1099, 1101 (3d Cir. 1981).

The President was denied the Constitutional right to have electors appointed in a lawful manner in an election in which he was a candidate–in this case the "lawful

[7] The DNC inexplicably cites to *Wood* for the proposition that President Trump lacks standing (DNC Br. at 11-12), when *Wood* unquestionably stands to the contrary.

manner" is that manner directed by the legislature (i.e. according to the State of Wisconsin's duly enacted election statutes). *See* U.S. Const. art II, §1, cl. 2.

The President does not claim he has exclusive standing. Of course the Wisconsin legislature and the electors (*see Carson*), would each have standing as well. But standing does not require exclusivity. Rather, it ensures the individuals with a stake in the outcome are before the Court. To continue the sports analogy, the legislature has a stake in ensuring the rulebook it wrote is unchanged by unelected bureaucrats, and President Trump, and every candidate, has an interest in ensuring the election he participates in is governed by the rulebook as written.

ii. Defendants' actions caused the injury

Second, the actions complained of plainly caused the injury. The actions described of in the complaint contravened State Election Law which, for purposes of a Presidential election is, under Article II treated as federal law; thus, the election was not held in the manner directed by the state legislature.[8] See also Appellant's Brief at 25–30.

iii. The injury is redressable

The remaining element is whether the injury can be redressed by this action. *Wernsing v. Thompson*, 423 F.3d 732, 742–43 (7th Cir. 2005) ("Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.") he answer is yes.

[8] Defendants do not challenge causation. Arguing only the absence of an interest and injury, ability to obtain redress, and availability of remedies sought. (DNC Br. at 10-15.)

As discussed in Part B, the remedy here results in voiding an invalid election and the opportunity for a constitutionally valid selection of Electors.

2. President Trump's claims are not moot, or alternatively, are capable of repetition yet will evade review.

Defendants asserts this action is moot because the election has been certified, the Governor has signed the Certificate of Ascertainment and the recount appeal has been completed. (DNC Br. at 16). However, the mootness rule does not apply because President Trump is entitled to relief, and even if he was not, this action should continue because the harm is likely to recur and evade review.

i. Remedy still available

The WEC previously argued that final resolution of controversies may last until January 6 because, under the Constitution, none of the votes cast for president are even *opened* before that date. The winner of Wisconsin's ten electoral votes can be certified "after the electors have convened and cast their electoral votes," and before January 6. (ECF 109-1 at 8.)[9]

As WEC explained, 3 USC § 6 provides that a state governor may issue a certificate of ascertainment based on the canvassing and then a subsequent certificate of "determination" upon the conclusion of all election challenges. *Id.* The certificate of "determination" notifies Congress of the outcome when Congress

[9] *See also Bush v. Gore*, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting) (noting that the date that has "ultimate significance" under federal law is "the sixth day of January," the date set by 3 U.S.C. § 15 on which "the validity of electoral votes" is determined); Laurence H. Tribe*, Comment: eroG .v hsuB and Its Disguises: Freeing Bush v. Gore From Its Hall of Mirrors*, 115 Harv. L. Rev. 170, 265-66 (2001) (noting that the only real deadline for a State's electoral votes to be finalized is "before Congress starts to count the votes on January 6").

convenes on January 6 to count the electoral votes. Consequently, this matter is not moot, and could not be at least until January 6. WEC should be held to its prior position.

Amici Curiae Whitman *et al.* contend that WEC and President Trump are wrong about the importance of January 6, but Whitman is incorrect.

Whitman *et al.* admits, as they must, that 3 U.S.C. § 2 allows the legislature to select electors after election day if a state "has failed to make a choice on" election-day. (Whitman Br. at 5.) Whitman relies on *Foster v. Love*, 522 U.S. 67 (1997), in which the Supreme Court considered Louisiana's practice of selecting Congressional representatives prior to election-day. *Id*. Relying largely on a single footnote in *Foster*, Whitman erroneously concludes *Foster* stands for the proposition that 3 U.S.C. § 2 is triggered *only* where election-day voting results in a run-off.

Foster, however, was not applying 3 U.S.C. § 2 but rather 2 U.S.C. § 8 regarding congressional elections. The Supreme Court simply held that conducting a congressional selection before election-day is not valid. *Foster*, 522 U.S. at 72. Moreover, the cited footnote merely noted the only explanation in the legislative history for *2 U.S.C. § 8 relating to congressional elections* was to address elections in states that require a majority of votes but no candidate receives that majority on election day. *Id*. at 71 n. 3. The *Foster* Court did not address 3 U.S.C. § 2 relating to appointment of *Presidential electors*, much less conclude that it is implicated only in run-off situations. Nor does the statute's plain wording lead to that conclusion.

Whitman further claims that the Wisconsin Supreme Court's December 14, 2020, decision in the recount case disposed of President Trump's claims here. Whitman's claims are unfounded for the reasons set forth in the discussion addressing res judicata and collateral estoppel. *See* Part D.

Whitman next argues that the state legislature could not appoint electors without approval of the Governor. In *Smiley v. Holm*, 285 U.S. 355 (1932), Whitman's chief case, the Supreme Court held a state legislature is acting within its lawmaking function when operating under Article I, Section 4, which provides authority to determine "The Times, Places and Manner of holding Elections…" Clearly under Article I, Section 4, the state legislature *would be* determining the means for the public to vote. But relying on *Smiley* starts with a false premise because here the state legislature is operating under Article II, not Article I, and the legislature is not obligated in the first instance to develop the processes for an election. Instead the state legislature "shall appoint, in such Manner as the Legislature thereof may direct…" the Electors. U.S. Const. art. II, § 1, cl. 2. Appointing presidential electors does not *require* the state legislature to exercise its lawmaking powers, and *Smiley* does not apply.

Further, the Wisconsin legislature is empowered to act on its own in a number of situations outside the governor's veto power. See Wis. Const. art. IV, § 7 (each house determines whether to qualify the member and the legislature may compel the attendance of members); *State ex rel. Groppi v. Leslie*, 171 N.W.2d 192, 194 (Wis. 1969) (the legislature may hold citizens in contempt and order imprisonment).

The state constitution further provides that local government resolutions and ordinances are effective only after approval of the local chief executive, a limitation not placed upon the legislature. Wis. Const. art. IV, § 23a. All told, Whitman's assertion that the state legislature may not act unilaterally is not supported by the Wisconsin Constitution or statutes.

Whitman is correct that Wis. Stat. § 8.25(1) provides for the popular election of presidential electors. That vote was held, but for the reasons discussed in Parts A & B, the election was void and President Trump is entitled to a remedy. No Wisconsin statute accounts for how to proceed next. But reverting to the Constitution, the authority is vested in the state legislature: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…" Art. II, § 1, cl. 2.

The state legislature may act, as there is no prohibition against doing so. Further, selection of electors after December 14 is permitted by 3 U.S.C. § 6, which requires notification to the Archivist upon a final determination, which must be before the Congress meets on January 6.

ii. This case is capable of repetition yet evading review

Furthermore, even if this action were moot, the "capable of repetition yet evading review" doctrine applies. The DNC incorrectly relies on *Stotts v. Cmty. Unit Sch. Dist. No. 1*, 230 F.3d 989 (7th Cir. 2000) for the proposition that "[w]hen a case is moot, it *must* be dismissed as non-justiciable." *Id.* at 991, quoted in DNC Br. at 15-16 (emphasis added here). Yet the DNC ignores that two paragraphs later, the *Stotts* court acknowledged an exception to the mootness rule – cases that are

capable of repetition yet evading review are not moot. The exception applies when "(1) the duration of the case must be too short to allow a determination on the merits and (2) the particular plaintiff must have a reasonable expectation of suffering from the same harm again." *Id.*

Stotts was not an election case. Instead, Jeffrey Stotts was suspended from a high school basketball team for violating a rule. *Id.* at 990. While the appeal was pending, Stotts graduated. *Id.* Accordingly, the exception did not apply to him because he had graduated and did not have a reasonable expectation of suffering from enforcement of the same rule again. *Id.* at 991.[10]

The DNC's reliance on *McDonald v. Cook Cty. Officers Electoral Bd.*, 758 Fed. Appx. 527 (7th Cir. 2019), is instructive, but not for the reason the DNC cites. Candidate McDonald sought injunctive relief to prohibit enforcement of a statute requiring a certain number of signatures in order to be placed on the ballot. *Id.* at 528. The DNC is correct that the appeal was dismissed as moot because the election had passed. *Id.* at 529-30. *However*, McDonald had appealed a request for injunctive relief and this Court held that while the motion for injunctive relief was moot, the "underlying suit is still live in the district court." *Id.* at 530. McDonald could continue to litigate her declaratory judgment claim and prayer for damages as "she will be able to obtain review of the signature requirement before the next election for Cook County Clerk in 2022." *Id.*

[10] The DNC relied on another inapposite school case where the exception did not apply, *Ostby v. Manhattan Sch. Dist. No. 114*, 851 F.3d 677, 682 (7th Cir. 2017), as well as a third inapposite case, *Eichwedel v. Curry*, 700 F.3d 275 (7th Cir. 2012), regarding a prisoner's good time credits, rendered moot after release from custody.

The result in *McDonald* is not surprising because the "capable of repetition yet evading review" exception is often applied to election cases given that "[n]ormally…elections are routinely too short in duration to be fully litigated, and there is a reasonable expectation that the same party would be subjected to the same action again." *Stewart v. Taylor*, 104 F.3d 965, 969–70, 1997 WL 16359 (7th Cir. 1997). As this Court observed in *Stewart*, "[b]allot issues are notorious examples of this [capable of repetition yet evading review] situation." *Id.* (*quoting Arkansas AFL–CIO v. F.C.C.,* 11 F.3d 1430, 1436 (8th Cir.1993)); *see also*, *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735–36 (2008) (facial challenge to "Millionaires' Amendment" of Bipartisan Campaign Reform Act); *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007) (recognizing the propriety of applying the doctrine in the context of election cases) (citing *Storer v. Brown,* 415 U.S. 724, 737, n. 8 (1974)); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 235 n.48 (1996) (challenge to registration fees required to attend political party's state convention as a delegate); *Norman v. Reed*, 502 U.S. 279, 288 (1992) (access to ballot challenge); *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.3 (1983) (presidential candidate's challenge to Ohio's early filing deadline for independent candidates); *Brown v. Chote*, 411 U.S. 452, 457 n.4 (1973) (applying "evading review" doctrine to candidate's challenge to validity of candidate filing fees); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973) (challenge to political party enrollment requirements as condition to voting in primaries); *Dunn v. Blumstein*, 405 U.S. 330, 331 (1972) (applying doctrine to voter's challenge to durational residence

requirements for voting); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (challenge to number of signatures required on nominating petitions for new political parties); *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 947 (7th Cir. 2019) (applying doctrine to candidate's challenge to signature requirements to appear on primary ballot where candidate expressed intention to run again); *Libertarian Party of Illinois v. Scholz*, 872 F.3d 518, 523 (7th Cir. 2017) (challenge to number of signatures required on nominating petitions); *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 149 (7th Cir. 2011) ("An established exception to mootness, often invoked in election-law cases, permits an otherwise moot claim to be heard if it is capable of repetition, yet evades review."); *Lee v. Keith*, 463 F.3d 763, 767 (7th Cir. 2006) (applying doctrine to nominating petition signature requirements even where candidate abandoned his bid because statutes would continue to restrict independent candidacies); *Tobin for Governor v. Illinois State Bd. of Elections*, 268 F.3d 517, 528–29 (7th Cir. 2001) ("provisions that will continue to operate past the election in question and that will burden future candidates in future elections" have "traditionally have fallen within the 'capable of repetition' exception").

This Court acknowledged in *Stewart v. Taylor* that Stewart, as the Republican nominee, "could be politically popular enough to be subject to this statute again" and if "forced to wait until the next ballot to contest the constitutionality of the Indiana statutes, he will face time constraints similar to those that prevented resolution of this case before the 1996 election." *Stewart*, 104 F.3d at 969–70.

Similarly, the Supreme Court held that a candidate/litigant's public statement expressing intent to run again was sufficient to rebuff the assertion an action was moot. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 736 (2008); *see also Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000) (candidate's articulation of interest in running for office again prevents mootness from barring suit). Likewise, here, President Trump has articulated the potentiality of running for office if he were not determined to have won the 2020 election.[11] *See Krislov*, 226 F.3d at 858 (candidate's articulation of interest in running for office again prevents mootness from barring suit). The exception to the mootness rule applies. This appeal should not be dismissed.

3. The Eleventh Amendment does not bar President Trump's claims.

The DNC raises 11th Amendment sovereign immunity. (DNC Br. at 18–21.) In general, "The Eleventh Amendment grants *states* immunity from private suits in federal court without their consent." *Nuñez v. Indiana Dep't of Child Servs.*, 817 F.3d 1042, 1044 (7th Cir. 2016) (emphasis added).[12] The DNC is a partisan political group that does not wield any power of the state and voluntarily injected itself in

[11] https://www.washingtonpost.com/politics/trump-2024-rematch/2020/11/21/58ce87ac-2a8d-11eb-8fa2-06e7cbb145c0_story.html.

[12] 11th Amendment immunity extends only to state officials, not municipal officers. *Richman v. Sheahan*, 270 F.3d 430, 439 (7th Cir. 2001) ("The Eleventh Amendment does not apply to suits against counties or other local government entities.") None of the municipal defendants raised this defense below.

this action as an intervening party. Its brief fails to explain how it can raise Eleventh Amendment immunity objections on behalf of the State of Wisconsin.[13]

There are three exceptions to Eleventh Amendment immunity: (1) suits against state officials seeking prospective equitable relief for violations of federal law, *Ex Parte Young*, 209 U.S. 123 (1908); (2) Congressional abrogation of the state's immunity; and (3) the state's waiver of immunity and consent to suit in federal court. *Id.*

While President Trump seeks prospective equitable relief as permitted under the *Ex Parte Young* exception, the DNC argues this case falls within the exception to the exception announced in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding 11th Amendment denies federal courts jurisdiction to grant prospective equitable relief against state actors for *state* law violations). The DNC asserts President Trump's federal constitutional claims are based solely on violations of *state* law rather than *federal* law, and thus they argue, 11th Amendment immunity precludes federal courts from hearing those claims under *Pennhurst*.

The DNC's arguments, however, fail to recognize the intersection of state and federal law uniquely presented in cases arising under Article II's Electors Clause. The President's claims are grounded in Article II's delegation of *federal*

[13] As 11th Amendment immunity would have been more appropriately raised by state actors, it appears the Government Defendants and DNC have circumvented this Court's word count limitations (Cir. R. 32(c)) by relegating 11th Amendment issues to the DNC. This is one among several reasons Appellant is requesting leave to file an oversize reply brief.

constitutional authority for conducting presidential elections exclusively to the State Legislature. This means that

> in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, ***the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution***.

Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam) (emphasis added). In *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), the U.S. Supreme Court effectively halted the ongoing manual recount the Florida Supreme Court had ordered state and local officials to conduct. In his concurring opinion, joined by Justices Scalia and Thomas, Chief Justice Rehnquist stated, "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). Because "Article II, § 1, cl. 2, provides that '[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,' electors for President and Vice President[,] ***the text of the election law itself***, and not just its interpretation by the courts of the States, ***takes on independent significance***." *Bush*, 531 U.S. at 112–13 (Rehnquist, C.J., concurring) (original emphasis omitted and emphasis added).

Following *Bush v. Gore*, several other courts have likewise held the 11th Amendment does not bar federal suits pertaining to violations of state election law under Article II's Electors Clause. *Donald J. Trump for President, Inc. v. Bullock*, 2020 WL 5810556, at *5 (D. Mont. Sept. 30, 2020) ("Plaintiffs contend that

Governor Bullock, not the 'Legislature,' has altered the time, place, and manner of Montana's federal elections in contravention of the United States Constitution. … ***This is quintessentially a federal question*** [and] no Eleventh Amendment barrier blocks adjudication.") (emphasis added); *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 2020 WL 6589362, at *1–2 (M.D.N.C. Oct. 2, 2020), amended on reconsideration, 2020 WL 6591367 (M.D.N.C. Oct. 5, 2020) ("[T]his court intends to address whether the North Carolina State Board of Elections, by and through its most recent Memo 2020-19, has, through Executive action, unconstitutionally modified the North Carolina legislative scheme for appointing Presidential electors. ***That is a constitutional question, not a question of state law***.") (emphasis added).

Except for two recent district court opinions (more on those below), none of the cases cited by the DNC involved questions of fidelity to the Legislature's manner of conducting presidential elections under the Electors Clause. (*See* DNC Br. pp. 18–21) (citing *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999) (dairy regulations); *Colon v. Schneider*, 899 F.2d 660, 672 (7th Cir. 1990) (state prison regulations); *Massey v. Coon*, 1989 WL 884 at *2 (9th Cir. Jan. 3, 1989) (objections to pro tem judges); *Balsam v. Sec'y of State*, 607 F.App'x 177, 183–84 (3d Cir. 2015) (pendent state law claims); *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (provision of fire rescue services); *Ohio Republican Party v. Brunner*, 543 F.3d 357, 360–61 (6th Cir. 2008) (Voting Rights Act claims); *Rose v. Bd. of Election*

Comm'rs for City of Chi., 815 F.3d 372, 375 (7th Cir. 2016) (claims by candidate for city alderman).

The DNC also cites two recent district court opinions holding that the 11th Amendment bars federal courts from considering whether state election officials violated the Electors Clause when they deviated from their state legislature's election procedures. (DNC Br. at 21 (citing *Feehan v. Wisconsin Elections Comm'n*, 2020 WL 7250219 (E.D. Wis. Dec. 9, 2020) and *Bower v. Ducey*, 2020 WL 7238261 (D. Ariz. Dec. 9, 2020)).) However, neither case addresses the U.S. Supreme Court's statement in *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000)—from which no Justice dissented—that when it comes to state laws governing the manner of selecting Presidential electors, "the legislature is not acting solely under the authority given it by the people of the State." *Id.* at 76. Nor did either case attempt to wrestle with Justice Rehnquist's concurring opinion in *Bush v. Gore*, 531 U.S. 98, that a "significant departure from [that] legislative scheme for appointing Presidential electors presents a federal constitutional question." *Id.* at 113.

Finally, the DNC's brief merely mumbles without elaboration that President Trump is not seeking prospective injunctive relief. (DNC Br. at 20–21.) But as discussed in Parts D and C.2, the requested remedies are not moot but seek to enjoin the Government Defendants' ongoing violations of the Electors Clause.

The fact that the President's requested relief *also* includes an element of retrospective declaratory relief does not negate the application of *Ex Parte Young*. In *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635 (2002),

Verizon challenged the validity of an order by the Public Service Commission of Maryland requiring telecommunication carriers to pay certain reciprocal compensation. *Id.* at 637. Verizon filed suit requesting a declaration that the Commission's order violated federal law as well as an injunction against the individual Commissioners from enforcing the order. *Id.* at 640. The Court rejected the Commission's contention that the 11th Amendment barred the suit, saying:

> As for Verizon's prayer for declaratory relief: That, to be sure, seeks a declaration of the ***past***, as well as the ***future***, ineffectiveness of the Commission's action, so that the past financial liability of private parties may be affected. But no past liability of the State, or of any of its commissioners, is at issue. It does not impose *upon the State* "a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."

Id. at 645–46 (italics in original, bold emphasis added) (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)).

Here, too, while President Trump seeks a declaration concerning past events (i.e., unauthorized and unconstitutional absentee voting procedures), he also seeks a declaration of the future ineffectiveness of the results of Defendants' unconstitutional actions. And the declaratory relief he seeks imposes no loss on the Wisconsin state treasury.

Finally, the 11th Amendment does not apply here for an additional reason. The state parties here are not being sued as representatives of the state as sovereign, but as the administrator of a Presidential election, and as agents of the federal power. *See Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) ("When it comes to time, place, and manner regulations for federal elections, the Constitution

primarily treats states as election administrators rather than sovereign entities.") Thus, the district court correctly accepted jurisdiction to hear the merits of this case.

D. The President's claims are not barred by res judicata

As the Government Defendants concede, *res judicata* only applies if "the party *could have* raised" the claim in the prior proceeding. Gov't Defs. Br. at 9 (quoting *DSG Evergreen Family Ltd. P'ship v. Town of Perry*, 939 N.W.2d 564, 572 (Wis. 2020) (emphasis original)). *Res judicata* does not apply here because the President could not have raised his federal constitutional claims in the recount and subsequent appeal, as is made clear by the Final Order and attached Findings of Fact and Conclusions of Law in *Trump v. Biden*, Case No. 20-CV-2514 (J. Simanek, Milwaukee Circuit Court, Dec. 11, 2020), submitted as supplemental authority to the district court by the Governmental Defendants. ECF 132-1, 132-2.

Judge Simanek ruled that "[p]ost-election challenges under Wis. Stat. § 9.01 [the recount statute] are limited in scope. This court may not wade into alleged statewide procedural irregularities underlying the election process itself." ECF 132-2, p. 24, ¶ 13 (p. 23 of Findings). A recount under the Wisconsin recount statute is a narrowly scoped administrative proceeding. *See*, *e.g.*, *State ex rel. McIntyre v. Bd. of Election Comm'rs of City of Milwaukee*, 273 Wis. 395, 401–02, 78 N.W.2d 752, 756 (1956) ("a recount is [not] the equivalent of an action in a court of record…[but is] a proceeding before an administrative body"). The provision permitting appeal from the board of canvassers is only on the basis the petitioner was "aggrieved by the recount" itself. Wis. Stat. § 9.01(6). Judge Simanek was therefore correct in ruling

that the Trump campaign could not in the recount raise "statewide procedural irregularities underlying the election process itself." This is why President Trump brought this federal court action two days after the recount concluded to address his federal claims based on statewide procedural irregularities that could not be raised in the recount.[14]

Judge Simanek's ruling, which was affirmed on appeal by the Wisconsin Supreme Court,[15] was premised upon the decision of the Wisconsin Supreme Court in *Clapp v. Joint School Dist. No. 1*, 124 N.W.2d 678, 681-82 (Wis. 1963), where the court said a recount "remedy covers only those matters which are of such a character that the board of canvassers can correct." *Id*. at 478. "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. It has long been held *the duties of the board of canvassers are primarily ministerial in nature and not judicial*." *Id.* (emphasis added). The court went on to confirm that, "the scope of [the] appeal [to the circuit court] 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.*

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[14] The recount, of course, was limited to two counties, for which President Trump paid $3 million. It would have cost approximately $8 million to recount the entire state. B028 ¶ 9. This also addresses part of the reason why a recount was conducted in two counties. It was not "part of a racist legal strategy" as the NAACP contends without evidence. NAACP Br. at 4. *See also Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 74 (2000) (noting the Democratic candidate Vice President Gore "requested recounts in [only] four counties: Volusia, Palm Beach, Broward, and Miami-Dade.")

[15] *Trump v. Biden*, --N.W.2d--, 2020 WL 7331907 (Wis. Dec. 14, 2020).

Accordingly, President Trump lacked a full and fair opportunity to litigate his federal constitutional claims in the recount proceedings because he was not entitled to bring them there. Rather, on appeal from the determinations of the boards of canvassers he could only challenge ministerial decisions not to invalidate ballots. While he could and did contend that the WEC's guidance on witness certifications and the indefinitely confined issue were inconsistent *with state law* and should have resulted in ministerial determinations not to count a certain number of ballots in Milwaukee and Dane Counties, he could not and did not contend that the WEC's guidance documents were *unconstitutional as a matter of federal law pursuant to Article II. Nor did he or could he argue about statewide irregularities* relating to drop boxes, witness certificates or the indefinitely confined issue because, as Judge Simanek points out, such issues are off the table in a recount limited to only two counties.

Therefore, this case is not a collateral attack on the Wisconsin Supreme Court's decision in *Trump v. Biden* as that decision was merely an appeal of Judge Simanek's decision to uphold the ministerial recount determinations with respect to specific ballots in Dane and Milwaukee Counties. The appeals in *Trump v. Biden* were not full judicial proceedings but were ministerial in nature and limited to review of the decisions of the boards of canvassers in the two counties whether to count certain ballots. Due to the limited and ministerial nature of recount proceedings there was no opportunity under Wisconsin law to raise federal constitutional issues, and they were not raised in that appeal. Likewise, no

statewide challenges could be made in the recount appeal before the Wisconsin Superior Court or Supreme Court.

In this case the President seeks, not the invalidation of particular ballots, but a determination that the entire statewide election is void based on violations of Article II and the Equal Protection Clause. These claims could not have been brought in the recount. Therefore, neither *res judicata*, nor claim or issue preclusion, apply. As the U.S. Supreme Court has observed, "claim preclusion generally does not apply where '[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts.'" *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985) (citation omitted). *See Poyner v. Murray,* 508 U.S. 931, 933 (1993) (Souter, J., on denial of petition for certiorari) (A "full and fair opportunity to litigate the case below is a prerequisite to the principles of res judicata."); *Ktsanes v. Underwood*, 552 F.2d 740, 743 (7th Cir.), on reh'g, 560 F.2d 790 (7th Cir. 1977) (plaintiff "was asking for ministerial action [in prior proceeding before state supreme court], not judicial determination. The denial of his petition was made by the court acting in an administrative capacity.... That denial did not present a case or controversy cognizable by an Article III court, and, thus, was not appealable to the Supreme Court of the United States."). As in *Ktsanes*, President Trump could not have appealed the state recount ruling to the U.S. Supreme Court on federal constitutional grounds because those grounds were off limits in the underlying recount as Judge Simanek ruled. *See Smith v. Nolan*, 648 F.Supp. 972, 974 (N.D.Ill.

1986) ("administrative res judicata...does not apply to all decisions rendered by an agency…. [party] must have had a full and fair opportunity to litigate his case during an administrative hearing;" holding that even a constitutional claim raised before a police merit board was not barred where the board did not reach a decision on the claim).

As the D.C. Circuit has said, "[p]reclusion is designed to limit a plaintiff to one bite at the apple, not to prevent even that single bite." *Hurd v. D.C., Gov't*, 864 F.3d 671, 679 (D.C. Cir. 2017). Neither *res judicata* nor claim preclusion apply here.

E. Defendants are Unable to Establish Compliance with the Legislative Scheme

1. Drop Boxes

It is as if Defendants did not even read the President's opening brief regarding drop boxes. Defendants fail to address any of the arguments made by the President regarding the lack of security standards or chain of custody requirements for drop boxes, *see* Appellant's Br. at 15-20, 37-40, the numerous multi-use slots permitting ballots to be mixed with library books or utility bills and to be accessed and handled by "potentially thousands of individuals not employed in a clerk's office," Appellant's Br. at 39, nor do they even try to explain why if drop boxes were supported by the legislature they are not referenced in the Election Code.

Government Defendants state, "if the Wisconsin Legislature had wanted to require absentee ballots to be returned to the clerk's *office*, it would have said so expressly[.]" Gov't Defs. Br. at 29. Yet, in the very next paragraph the Government Defendants reference Wis. Stat. § 6.88(1) which explains the procedures "[w]hen an

absentee ballot arrives at the *office* of the municipal clerk," making clear that the Legislature contemplated absentee ballots arriving at the clerk's office and neither absentee ballot drop boxes, nor "human drop boxes" roaming City parks in Madison, Wisconsin.

The Government Defendants fail to apply the principle that, "[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Failure to apply the whole-text canon of construction allows Defendants to say in effect, "Aha, this Code section does not prohibit drop boxes, neither does this one." And that's exactly what WEC did in response to a question about shared drop boxes: "There is nothing that prohibits it." B078. Yet this is insufficient when dealing with a statutory regime mandating "that the privilege of voting by absentee ballot must be *carefully regulated* to prevent the potential for fraud or abuse." Wis. Stat. § 6.84(1) (emphasis added). With regard to voting by absentee ballot, if the legislature has not expressly authorized a practice, it is regarded as prohibited and a reading of the Election Code as a whole confirms this conclusion. WEC's scattershot, one-off, outcome driven interpretative method is plainly insufficient to establish that absentee ballot drop boxes (including use of multi-use slots, library book returns and human drop boxes) were an aspect of "the legislative scheme" for absentee ballots.

2. Equal Protection

As explained in the President's opening brief, his Equal Protection claim overlaps his Article II claims and is based on the "lack of uniform standards

regarding the handling, security and openness of the process to the public in connection with the new use of un-manned, absentee ballot drop boxes." Appellant's Br. at 50. The Government Defendants complain that the Article II and Equal Protection claims are based on "related facts." Gov't Def.'s Br. at 34. However, this is not unusual or surprising. The Equal Protection claim identified in *Bush v. Gore* overlapped and was based upon the same facts the concurrence tied to an Article II violation. Similarly, in *Moore*, 2020 WL 6063332, * 30 (M.D.N.C. 2020), the district court identified an equal protection violation, the elimination of North Carolina's absentee ballot witness requirement via state court consent decree, that constituted a direct "conflict[]...with the statutes enacted by the North Carolina legislature." *Moore*, * 26.

The *Moore* court noted that, "[t]he requirement that a state 'grant[] the right to vote on equal terms,' *Bush*, 531 U.S. at 104...includes protecting the public 'from the diluting effect of illegal ballots.'" *Moore*, * 17, quoting *Gray v. Sanders*, 372 U.S. 368, 380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963). Therefore, "[a] state cannot uphold its obligation to ensure equal treatment of all voters...if another body, including [the State Board of Elections] is permitted to contravene the duly enacted laws of the General Assembly and to permit ballots to be counted that do not satisfy the fixed rules or procedures the state legislature has deemed necessary to prevent illegal voting." *Moore*, * 17. In other words, as Appellant has said, when legislative rules to protect against voting fraud are abandoned and replaced with a standardless, non-uniform, un-regulated vote collection method Equal Protection is violated due to the

State's failure to adequately protect each citizen's vote against dilution through counting fraudulent or unlawful votes.

3. Witness certificate alterations

Again, with respect to witness certificates altered by clerks, Defendants simply fail to address the President's arguments. There is no counter to Appellant's argument concerning shifting guidance from 2016 to 2020. *See* Appellant's Br. at 9-13, 42-46. Nor is there a response to the fact that clerks are instructed by Wis. Stat. § 6.88(1) to put accepted envelopes immediately into a carrier envelope and seal and endorse the carrier envelope (Appellant's Br. at 36-37) or to the analysis that the witness certificate is part of the evidentiary chain for the absentee ballot to be considered by the inspectors in deciding whether to open the ballot on election evening and therefore is obviously not to be altered by clerks. Appellant's Br. at 43-45.

On this topic as well, Government Defendants return to their "if it's not prohibited do it," approach to statutory construction, concluding that although the Code requires a witness address for a ballot to be voted "it says nothing about who may enter [witness] information" therefore "clerks were permitted to fill in that information." Gov't Defs. Br. at 32. This is a rule of convenience, not valid statutory interpretation, and is entirely antithetical to the inclusion of the witness address requirement in the list of mandatory Code provisions which if not followed must result in an absentee ballot not being counted. Wis. Stat. § 6.84(2).

4. Indefinitely confined applications

Defendants claim that WEC's instruction that "Statutes do not establish the option to require proof or documentation from indefinitely confined voters. Clerks...*may not request or require proof*" of an elector's claim to indefinitely confined status" (B055) is justified by a statute which purportedly "give[s] clerks *only* a *passive* duty to remove voters from that status 'upon receipt of reliable information' that they no longer qualify. Wis. Stat. § 6.86(2)(b)." Govt Defs. Br. at 26 (emphasis added). However, Wis. Stat. § 6.86(2)(b) provides:

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

This provision makes clear that a clerk's duty to remove individuals from the indefinitely confined list is *mandatory* upon the receipt of information that the voter no longer qualifies and removing an elector from the list can be undertaken unilaterally, subject to notice within five days after removal. There is no requirement that a clerk only receive such information "passively" as erroneously claimed by the Government Defendants. Obviously, information can qualify as having been "received" whether it is acquired actively through requesting information from the voter, or passively, or actively or passively through a third party. Thus, the WEC's restriction on clerks is not supported by the statute and does not bear scrutiny. The statute requires clerks to seek information about voters who seek indefinitely confined status and remove them from that status upon

receiving reliable information they do not qualify, no matter how that information is acquired, and WEC's guidance prevented clerks from doing their job.

F. The President's claims are not barred by laches

Defendants contend the President should have brought suit earlier to address their *ultra vires* actions sooner. This is wrong for multiple reasons.

1. The district court's decision not to apply laches was within its sound discretion

Although observing that Plaintiff's delay "likely implicates" the doctrine of laches, the district court chose not to reach the issue and made no findings on it. A021. "[A] decision on...laches rests within the sound discretion of the trial judge" and this Court "will not disturb [the trial court's] findings on appeal 'unless it is so clearly wrong as to amount to an abuse of discretion.'" *Lingenfelter v. Keystone Consol. Indus., Inc.*, 691 F.2d 339, 341 (7th Cir. 1982). Indeed, even "establishing delay and prejudice...'does not *mandate* recognition of a laches defense in every case,' but rather 'merely lay[s] the foundation for the trial court's exercise of discretion.'" *Formax, Inc. v. Alkar-Rapidpak-MP Equip., Inc.*, 2013 WL 12178064, at *5 (E.D. Wis. Aug. 29, 2013). "Because a district court's decision to apply the doctrine of laches is discretionary, [this Court] leave[s] it to the district court to determine, in the first instance, how it will exercise its discretion." *AutoZone, Inc. v. Strick*, 543 F.3d 923, 934 (7th Cir. 2008) (declining to apply laches where district court chose not to do so).

There is, of course, no presumption that laches should apply. The Supreme Court "has cautioned against invoking laches to bar legal relief." *Petrella v. Metro-*

Goldwyn-Mayer, Inc., 572 U.S. 663, 678 (2014). Therefore, the district court's decision not to invoke laches was not an abuse of discretion.

2. Laches should not shield WEC's misconduct from public view, nor prevent resolution of constitutional claims on the merits

"The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 2020 WL 6275871, at *2 (U.S. Oct. 26, 2020) (Gorsuch, J., concurring in denial of application to vacate stay). Yet, this message is not getting through in Wisconsin where the WEC has repeatedly failed to follow rules set by the Legislature with no pushback from a majority of the Wisconsin Supreme Court, much to the frustration of the three dissenting justices.[16]

[16] *See Hawkins v. Wisconsin Elections Commission*, 948 N.W.2d 877, 882-83 (Wis. 2020) (Roggensack, C.J., dissenting) ("The Commission ignored its legal obligations…and…suppressed the rights of voters to choose Green Party candidates for President and Vice President…. The court's silence not only affirms lawless conduct by the Commission, but…provides no directive for the required treatment of nomination papers in the future."); *Hawkins*, 948 N.W.2d at 898 (Bradley, J., dissenting) ("the court refuses to perform its duty to faithfully apply the law and allows the Wisconsin Elections Commission to flout it, thereby signaling to the WEC that it may disregard the law at whim, with no accountability to the people for its transgressions…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"); *Trump v. Biden*, --- N.W.2d ----, 2020 WL 7331907 *13, 21 (Wis. Dec. 14, 2020) (Ziegler, J., dissenting) ("Make no mistake, the majority opinion fails to even mention, let alone analyze, the pertinent Wisconsin statutes…. 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.").

Courts should not employ equitable discretion to apply laches where there is a strong public interest in resolution on the merits. "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). Failing to address election cases on the merits may undermine public confidence in the electoral process. *See Trump v. Biden*, --- N.W.2d ----, 2020 WL 7331907 *13, 21 (Wis. Dec. 14, 2020) (Ziegler, J., dissenting, joined by Roggensack, C.J. and Bradley, J.) ("addressing the merits will reassure the people of Wisconsin and our nation that our elections comport with the law").

As explained above and in the President's opening brief, this case highlights multiple ways through which the WEC's infidelity to the Wisconsin Election Code significantly impacted the Presidential election in Wisconsin. There are other examples. For instance, in September Wisconsin Supreme Court Justice Bradley issued a stern warning concerning WEC's "tactic[al]" maneuver that excluded the Green Party candidates for President and Vice President from the November ballot. *Hawkins v. Wisconsin Elections Comm'n*, 948 N.W.2d 877, 884-897 (Wis. 2020) (Bradley, J., dissenting). Justice Bradley warned:

> Ironically, the majority...adopts the mantra of the Wisconsin Elections Commission, caving to its fearmongering invocation of "chaos" should the court dare to right this wrong. *The majority ignores the pandemonium that would ensue following its refusal to right this wrong, should the United States Supreme Court order Wisconsin to repeat the November election—next time in accordance with the law*.

Id.

As this case demonstrates, if left unchecked, in future Presidential elections the WEC will continue to follow its mode of operation which has been to repeatedly ignore the direction of the state legislature in favor of WEC's own arbitrary choices regarding how it wishes to administer elections. Therefore, the public interest weighs in favor of deciding this case on the merits.

3. Requiring a pre-election lawsuit in the circumstances of this case is not reasonable

While laches is appropriate where there has been "unwarranted delay [that] produces prejudice to the defendant" or when a candidate has "slept on their rights," *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990), this is not the case here. Defendants have identified no personal prejudice – no change in position, no reliance – claimed to have resulted from the timing of this suit. Laches may also apply in an election case where delay is prejudicial to the State or voters, *Fulani*, 917 F.2d at 1031, but this is also not the case here.

A pre-election lawsuit raising the issues in this case was either not possible or would have been even more disruptive than a post-election suit and would only have increased the chaos and voter uncertainty which WEC's last minute changes created. Rather than avoiding needless litigation, requiring pre-election suits in light of WEC's ever-changing guidance would in the future "spawn[]…preventative lawsuits to address any possible infraction of our election laws." *Trump v. Biden*, 2020 WL 7331907 at *26 (Ziegler, J., Roggensack, C.J., and Grassl Bradley, J., dissenting). "[A] candidate [would then be responsible 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." *Id.* This borders on the impossible.

A significant problem for a pre-election challenge is that the WEC 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 Employees Intern'l Union v. Vos*, 946 N.W.2d 35, 67 (Wis. 2020). As the Wisconsin Supreme Court has held, the guidance documents "explain" statutes and rules or provide "guidance or advice" about how the executive branch is "likely to apply" a statute or rule. *Id.* They impose no obligations, set no standards, and bind no one. *Id.* As Appellant has demonstrated, WEC's guidance on witness certificates changed multiple times just this year. Therefore, a pre-election challenge before the impact of the guidance has become clear will be met with the retort that the guidance is not binding and any claim of injury is therefore speculative.

Nor was there any reasonable point at which President Trump could have challenged the drop box guidance before the election. The WEC's guidance did not require clerks to adopt drop boxes, and President Trump could not have been expected to know about the coordinated activities of the five mayors to secure funding for drop boxes months before the WEC ever issued guidance on the topic or to have anticipated the rapidity with which, under WEC's urging, drop boxes and multi-use slots would be adopted as polling locations throughout the state. Further, the WEC's drop box guidance was only issued on August 19 and absentee balloting began less than a month later on September 17.

Had President Trump challenged absentee ballot drop boxes on or after September 17, the response would certainly have been that absentee voting had already begun and removing drop boxes would be too disruptive. Moreover, Madison, the second largest city in the State did not set up its drop boxes until October 16 and Milwaukee replaced its drop boxes with "more secure" models on October 27. The President brought suit on this issue within a reasonable and appropriate time.

As the Supreme Court has made clear, "[c]ourt orders affecting elections...can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5. Therefore, requiring candidates to challenge late breaking changes to the administration of an election works against the public interest. Also, as Justice Stevens cautioned in *Purcell*, allowing an election to "proceed without enjoining" suspect rules "will provide the courts with a better record on which to judge their constitutionality." *Purcell*, 549 U.S. at 6 (Stevens, J., concurring). Invoking laches in this case would only incentivize disruptive pre-election suits in the future, contrary to the best interests of voters and democracy. *Purcell* has been regularly followed in this Circuit and identified as a reason why judicial relief *cannot* be granted in the lead up to an election. *See*, *e.g.*, *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (district court's September 21, 2020, order stayed on October 8, 2020); *Tully v. Okeson*, 977 F.3d 608, 612 (7th Cir. 2020) ("Given that

voting is already underway in Indiana, we have crossed *Purcell*'s warning threshold and are wary of turning the State in a new direction at this late stage.").

A recent case illustrating the fruitlessness of bringing a lawsuit after absentee ballots have already been issued is *Moore*, 2020 WL 6063332. In that case the Plaintiffs filed suit on September 26, 2020, challenging recent memoranda distributed by the North Carolina State Board of Elections (SBE) concerning absentee voting. *Moore*, *7. The SBE memoranda, among other things, sought to eliminate the requirement of North Carolina law that absentee ballots be witnessed. *Moore*, *26. The court held a preliminary injunction hearing on October 8, 2020 and the court issued its ruling on October 14, 2020. *Moore*, *7. The court found that, "[b]y eliminating the witness requirement SBE implemented a rule that conflicted directly with the statutes enacted by the North Carolina legislature." *Moore*, *26. The court also found that this rule violated Equal Protection. *Moore*, *30. Nevertheless, the court concluded that under the Supreme Court's holding in *Purcell*, and in order to abide by the Supreme Court's instruction that a district court should not disrupt an ongoing election, the district court could not issue relief. Therefore, the court denied the motion for preliminary injunction that had been filed in September. The court wrote:

> This court believes the unequal treatment of voters and the resulting Equal Protection violations as found herein should be enjoined. Nevertheless, under *Purcell* and recent Supreme Court orders relating to *Purcell*, this court is of the opinion that it is required to find that injunctive relief should be denied at this late date, even in the face of what appear to be clear violations.

Moore, *30.

Thus, as indicated in *Tully*, *Bostelmann* and *Moore*, a lawsuit brought after absentee voting has commenced in a state is discouraged under the Supreme Court's guidance in *Purcell*. Accordingly, as a matter of law, laches should under no circumstances be applied with respect to any WEC guidance or challenged conduct occurring after the start of voting on September 17, 2020.

Finally, application of laches to this case would place an intolerable burden on the exercise of a First Amendment right -- the right of a citizen to run for public office, by seeking to persuade other citizens to cast their votes for him or her -- by forcing candidates, in the midst of an election, to continuously monitor ever-shifting election procedures, and guess at which might or might not impact the result, and which post-election challenges might or might not be deemed barred under the doctrine of laches. The cloud of confusion, uncertainty, and ambiguity that this regime would cast over all candidates in all elections would impose a severe burden on the First Amendment right to engage in election advocacy, *e.g.*, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 735-40 (2011); *Randall v. Sorrell*, 548 U.S. 230, 261-63 (2006); *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 834-42 (7th Cir. 2014), and would also violate the void-for-vagueness due process doctrine. E.g., *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253-54 (2012); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 478-79 (7th Cir. 2012).

CONCLUSION

The 2020 election season in Wisconsin was chaotic and marked by division. The outcome of the election may not have healed the division, however, the outcome of this case can help to prevent chaos in future elections.

The WEC and other election officials crossed the constitutional line drawn some 231 years ago when Article II of the Constitution was penned. By restoring the vitality of Article II, in future elections state officials outside the legislature will have less incentive to cross the constitutional boundary whether due to zeal prompted by a health crisis or more malign motives.

The selection of our Nation's leaders is too important to risk future Presidential elections degenerating into internecine contests between various branches of state government with the rules constantly in play and administrators, local officials and others potentially seeking advantage through last minute changes to dates, definitions and the way ballots are collected and counted.

During this year's Presidential election key rules for administering the election set by the Wisconsin Legislature were changed by the WEC and other election administrators were led astray. Where there was a chance to restore balance Wisconsin courts proved unable to address that matter in timely fashion. This case provides the only opportunity to uphold the rule of law against administrative actions which strike at the heart of the constitutional order established for the administration of federal elections.

The relief sought by the President is significant. The district court called the request to void the presidential election in Wisconsin, "extraordinary." Yet, the

relief requested matches the seriousness of the unconstitutional actions on which it is based. It is a serious matter to usurp the exclusive authority of the state legislature to set the rules for a Presidential election. Election administrators must receive clear instruction that this may never happen again and they must be incentivized to seek legislative approval for changes in the future.

The remedy may be characterized by some as harsh. But the duty of the courts in a case such as this is to uphold the Constitution. The injury to the Republic is greater if unconstitutional actions go unchecked.

Therefore, the President respectfully requests that this Court uphold the rule of law and find that the Defendants-Appellees violated Article II of the United States Constitution, that the Presidential election in Wisconsin was unconstitutional and void, that the order of the district court dismissing this case is vacated, and that this case shall be remanded for entry of a judgment declaring the 2020 Presidential election in Wisconsin void as to the Office of President of the United States, and entering an injunction requiring the Wisconsin Governor to refrain from issuing a certificate to any Presidential electors selected as a consequence of the void election and to withdraw any certificate previously issued that is in conflict with this judgment, and requiring the WEC to record the 2020 Presidential election in the State of Wisconsin as void as to the Office of President and for the Wisconsin Governor, Secretary of State and WEC to take such other action as is necessary to effectuate this Court's decision and the judgment to be issued on remand by the district court and for all other just and proper relief.

CERTIFICATE OF COMPLIANCE

1. This brief contains 13,467 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) as verified through Microsoft Word's "Word Count" function, which is in excess of the 7,000-word limit specified for Reply Briefs under Cir. R. 32(c). Appellant is contemporaneously filing a *Motion for Leave to File Oversize Brief* for the reasons stated therein.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 12-point Century Schoolbook font.

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF No. system. Participants in this case who are registered CM/ECF No. users will be served by the CM/ECF No. system.

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