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

BRIEF OF GOVERNMENT DEFENDANTS-APPELLEES

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Governor Tony Evers

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City Attorney

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Kathryn Z. Block
Patrick J. McClain
Elleny B. Christopoulos
Tyrone M. St. Junior
Julie P. Wilson
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Attorneys for Defendants
George L. Christenson and Julietta Henry

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-3414

Short Caption: Donald Trump v. Wisconsin Elections Commission, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Governor Tony Evers

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Stafford Rosenbaum LLP; Susan Godfrey LLP; Campaign Legal Center

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: _____ Date: 12/15/20

Attorney's Printed Name: Jeffrey A. Mandell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Stafford Rosenbaum LLP, P.O. Box 1784, Madison, WI 53701-1784

Phone Number: 608-256-0226 Fax Number: 608-259-2600

E-Mail Address: jmandell@staffordlaw.com

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature:  Date: 12/15/20

Attorney's Printed Name: Rachel E. Snyder

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Stafford Rosenbaum LLP, P.O. Box 1784, Madison, WI 53701-1784

Phone Number: 608-256-0226 Fax Number: 608-259-2600

E-Mail Address: rsnyder@staffordlaw.com

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Attorney's Signature: _____ Date: 12/15/20

Attorney's Printed Name: Richard A. Manthe

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Stafford Rosenbaum LLP, P.O. Box 1784, Madison, WI 53701-1784

Phone Number: 608-256-0226 Fax Number: 608-259-2600

E-Mail Address: rmanthe@staffordlaw.com

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n/a

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n/a

Attorney's Signature: Justin A. Nelson Date: 12/15/2020

Attorney's Printed Name: Justin A. Nelson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-3414

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n/a

Attorney's Signature: S/ Stephen E. Morrissey Date: 12/17/2020

Attorney's Printed Name: Stephen E. Morrissey

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Attorney's Signature: S. Shackelford, Jr. Date: December 16, 2020

Attorney's Printed Name: Stephen Shackelford, Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-3414

Short Caption: Donald J. Trump v. Wisconsin Elections Commission,et al.

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n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Davida Brook Date: 12/15/2020

Attorney's Printed Name: Davida Brook

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Phone Number: (310) 789-3100 Fax Number: (310) 789-3150

E-Mail Address: dbrook@susmangodfrey.com

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Appellate Court No: 20-3414

Short Caption: Donald Trump v. Wisconsin Elections Commission, et al.

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Attorney's Signature: /s/ Paul M. Smith Date: 12/15/2020

Attorney's Printed Name: Paul M. Smith

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 1101 14th St. NW, Ste. 400

Washington, DC 20005

Phone Number: 202-736-2200 Fax Number: 202-736-2222

E-Mail Address: psmith@campaignlegal.org

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Short Caption: Donald J. Trump vs. Wisconsin Elections Commission, et al.

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Mayor Satya Rhode-Conway, Maribeth Witzel-Behl and Scott McDonell

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Michael P. May Date: 12/15/2020

Attorney's Printed Name: Michael P. May

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 1 S. Pinckney Street, Suite 410

Madison, WI 53703

Phone Number: 608-257-9521 Fax Number: 608-283-1709

E-Mail Address: mmay@boardmanclark.com

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Mayor Cory Mason, Tara Coolidge, Mayor John Antaramian, Matt Krauter, Mayor Eric Genrich and Kris Teske

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N/A

Attorney's Signature: /s/ Dixon R. Gahnz Date: December 15, 2020

Attorney's Printed Name: Dixon R. Gahnz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Lawton & Cates, S.C., 345 West Washington Avenue, Suite 201, Madison, WI 53703

Phone Number: 608-282-6200 Fax Number: 608-282-6252

E-Mail Address: dgahnz@lawtoncates.com

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Daniel P. Bach Date: December 15, 2020

Attorney's Printed Name: Daniel P.Bach

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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N/A

Attorney's Signature: /s/ Terrence M. Polich Date: December 15, 2020

Attorney's Printed Name: Terrence M. Polich

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Daniel S. Lenz Date: December 15, 2020

Attorney's Printed Name: Daniel S. Lenz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Appellate Court No: 20-3414

Short Caption: DONALD J. TRUMP v. WISCONSIN ELECTIONS COMMISSION, et al.,

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Not Applicable.

Attorney's Signature: /s/ Andrew A. Jones Date: 12/15/20

Attorney's Printed Name: Andrew A. Jones

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Not Applicable.

Attorney's Signature: /s/ John W. McCauley Date: 12/15/20

Attorney's Printed Name: John W. McCauley

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement in the brief submitted on behalf of President Trump is incomplete and inaccurate. Federal courts lack jurisdiction over President Trump's claims because the President lacks Article III standing, his claims are moot, and his claims are barred by the Eleventh Amendment. Each of these objections to the federal courts' exercise of jurisdiction—standing, mootness, and the Eleventh Amendment—is discussed in detail in the brief of the Democratic National Committee, which the state and municipal defendants ("Government Defendants") adopt by reference.

A. District Court jurisdiction

President Trump brought this action on December 2, 2020, over four weeks after the November 3rd election. President Trump asked the court below to exercise federal jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 with respect to his claims under 28 U.S.C. §§ 2201-02 and 42 U.S.C. § 1983 for alleged federal constitutional violations in connection with the Presidential election. The President contends, specifically, that the Government Defendants violated Art. I, § 4, cl. 2, Art. II, § 1, cl. 4, and the First and Fourteenth Amendments of the U.S. Constitution. According to President Trump, the Government Defendants engaged in "*ultra vires* modifications to the Legislature's explicit directions for the manner of conducting absentee voting in Wisconsin for the presidential election," which the President claims were 'significant departure[s] from the legislative scheme for appointing Presidential electors.'" (Trump Br. at 1 (quoting *Bush v. Gore,* 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring))

The District Court lacked jurisdiction over these claims because of the standing, mootness, and Eleventh Amendment issues discussed in the DNC brief. In addition, the supposedly "federal" claims are merely disguised state law claims—President Trump seeks relief against state and local officials who supposedly violated state statutory law, even though these allegations have been

rejected by the Wisconsin Supreme Court. President Trump's claims of errors by state officials in carrying out state law are all wrong, and in any event would not constitute a "*significant* departure from the legislative scheme for appointing Presidential electors" necessary to invite federal judicial intervention. These points are developed below.

B. Appellate jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 over President Trump's appeal from the District Court's final Decision and Order (A001) and Judgment (A024), which were entered on December 12, 2020.[1] A notice of appeal was filed on behalf of the President that same day, so the appeal was timely filed pursuant to Fed. R. App. P. 4(a)(1)(A).

COUNTERSTATEMENT OF THE ISSUES

1. Whether the recent decision of the Wisconsin Supreme Court adverse to President Trump precludes this appeal.

2. Whether the doctrine of laches bars adjudication of President Trump's arguments.

3. Whether the district court correctly held that President Trump failed to state a plausible claim for violation of the Electors Clause of the United States Constitution.

4. Whether the unprecedented order that President Trump seeks, nullifying nearly 3.3 million votes, is unavailable because it would violate those voters' constitutional rights.

STATEMENT OF THE CASE

President Trump asks this Court to disenfranchise the nearly 3.3 million Wisconsinites who cast ballots in the November 3rd election. Those voters elected Wisconsin's presidential electors in accord with a legislative mandate—in place since statehood—that Wisconsin appoints its

[1] Consistent with President Trump's usage, citations to A___ are to the appendix materials attached to his brief (ECF No. 41). Citations to B___ are to his separately bound appendix (ECF No. 42). Citations to JD___ are to the Joint Defense Appendix being filed on behalf of all defendants and intervening defendants.

electors by popular vote. Nonetheless, in this appeal President Trump seeks appointment of a new slate of electors by judicial fiat, asking for a "declaratory injunction" encouraging the Wisconsin Legislature to disregard the election results and directing Governor Tony Evers to send to Congress the votes cast by those electors favored by the Legislature rather than the voters. This request would be outrageous and undemocratic under almost any circumstances, but it is even more egregious because it is rooted not in any allegation of fraud, but instead in President Trump's newfound disagreement with election rules and procedures that were all in place, and that he could have challenged, long before Wisconsin voters acted in reliance upon them.

I. Factual Background.

In the November election, a record turnout of nearly 3.3 million Wisconsinites—approximately 72.66 percent of the voting-age population—navigated the perils of a pandemic to cast their votes. (B027 ¶7) By a margin of more than 20,000 votes, Joe Biden defeated President Trump. (B028 ¶10; B033 ¶35)[2] President Trump requested a recount of the canvasses, but just in Dane and Milwaukee counties. (B028 ¶9) After those recounts concluded, Joe Biden still won the State of Wisconsin. (B033 ¶35)

After the election, the Wisconsin Elections Commission ("WEC") prepared a Certificate of Ascertainment and Governor Evers signed it, affixed the state seal, and transmitted it to the U.S.

[2] This margin is not particularly narrow by Wisconsin standards. It is not much narrower than the margin by which President Trump won Wisconsin in 2016. The following statewide Wisconsin elections within recent memory have been decided by narrower margins: 2019 Wisconsin Supreme Court, 2018 Attorney General, 2011 Wisconsin Supreme Court, 2004 President, and 2000 President.

Administrator of General Services.[3] On December 14, 2020, Wisconsin's presidential electors cast their votes for Joe Biden and Kamala Harris.[4]

In an election held amidst a global pandemic, state and local election officials worked tirelessly to ensure voters could safely and securely cast their ballots. Relevant here, WEC issued guidance regarding witness address procedures for absentee ballots on October 18, 2016, indefinitely confined voter guidance on March 29, 2020, and absentee drop box guidance on August 19, 2020. (B027 ¶4) The City of Madison publicly announced "Democracy in the Park" events on September 26 and October 3, 2020, where voters could return their absentee ballots to paid poll workers.[5] Voters throughout Wisconsin relied upon these election procedures when casting their ballots for the November election.

Despite having pre-election notice regarding each of these election procedures—and in one case guidance that was in effect during the 2016 presidential election that he won—President Trump waited until one month *after* the November election to bring suit attempting to disenfranchise nearly 3.3 million voters. This means he delayed at least 105 days before challenging Wisconsin's use of drop boxes; at least 248 days before challenging Wisconsin's indefinitely confined voter guidance; and more than 1,500 days before challenging Wisconsin's witness-address procedures. This delay is certainly not because he lacked the ability to bring a lawsuit. To the contrary, on at least eight other occasions President Trump brought actions in other States regarding election matters *prior* to the November general election. (B027 ¶6)

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[3] *See* https://www.archives.gov/files/electoral-college/2020/ascertainment-wisconsin.pdf (last visited Dec. 18, 2020).

[4] *See* https://www.archives.gov/files/electoral-college/2020/vote-wisconsin.pdf (last visited Dec. 18, 2020).

[5] City of Madison, *Democracy in the Park Event Planned for September 26 & October 3* (Aug. 31, 2020), available at https://www.cityofmadison.com/news/democracy-in-the-park-event-planned-for-september-26-october-3 (last visited Dec. 18, 2020).

The same week he commenced this action, President Trump brought a case asserting similar claims in Wisconsin state court. The Supreme Court of Wisconsin ruled on December 14, 2020 that an identical request to strike all ballots in two counties submitted by indefinitely confined voters, rather than a challenge to specific voters, was without merit. *Trump v. Biden*, 2020 WI 91, ¶8, --- Wis. 2d ---, --- N.W.2d ---. The court also ruled the equitable doctrine of laches barred President Trump's remaining claims, including challenges to Democracy in the Park and witness address correction, because it was "unreasonable in the extreme" to wait until after he lost the November election to challenge WEC guidance issued months or years prior to the election. *Id.*, ¶13.

II. Procedural History.

On December 2, 2020, nearly one month after the November 3rd election, President Trump commenced this action. (JD013) President Trump variously alleges that guidance issued by WEC relating to indefinitely confined voters, witness address requirements on absentee ballot envelopes, and absentee ballot drop boxes was inconsistent with Wisconsin law. He generally alleges that the guidance violated the Elections and Electors Clauses, and his Due Process, Equal Protection, and First Amendment rights. (JD017 ¶23, JD057 ¶199, JD083 ¶302) Among other things, the prayer for relief requests that the court "remand" the case to the Wisconsin Legislature, and enjoin any actions inconsistent with the district court's judgment. (JD084 ¶¶4-5)

President Trump's brief responding to multiple motions to dismiss modified the requested relief, asking the court to require "Governor Evers to issue a certificate of determination consistent with, and only consistent with, the appointment of electors by the Wisconsin legislature." (ECF No. 109 at 22) Finally, only 24 hours later—at the merits hearing—President Trump again changed his requested relief, asking the court to declare Wisconsin's entire election void. (JD156: 9-13)

Prior to the merits hearing, the parties stipulated to the Court's consideration of a record consisting of certain exhibits, affidavits, and stipulated facts that, President Trump argued, were "sufficient to establish a *prima facie* case for his claim." (B026 ¶3) Apart from the stipulated record, President Trump offered no witnesses or other evidence to support his contentions and never tried to show that the outcome of the election would have been different absent the practices he challenged. (JD098-250)

On December 12, the district court issued a decision rejecting President Trump's claims on the merits and entered judgment in accordance with Fed. R. Civ. P. 52. (A023) At the outset of the decision, the court found that President Trump had expressly disclaimed his First Amendment and Due Process claims. (A001 n.1) The court further found that President Trump's "complaint offers no clue of a coherent Equal Protection theory and plaintiff offered neither evidence nor argument to support such a claim at trial. It is therefore abandoned." (*Id.*) Accordingly, the court analyzed only President Trump's Electors Clause claim. (A001) The district court determined that Wisconsin's selection of electors was done by popular vote, and therefore in the "manner" chosen by the Legislature. (A018-20) It further concluded that even if the term "manner" encompassed the details of Wisconsin's election procedures, those procedures were consistent with state statutes and not a "significant departure" from Wisconsin's legislative election framework. (A020-22) President Trump immediately appealed.

STANDARD OF REVIEW

Where, as here, the district court accepted the parties' stipulated facts, that generally "will obviate the need for appellate review of factual findings." *TMF Tool Co. v. Siebengartner*, 899 F.2d 584, 588 (7th Cir. 1990). This Court will, however, review findings derived from stipulated facts for clear error," *United States v. Firishchak*, 468 F.3d 1015, 1023 (7th Cir. 2006) (citing *TMF Tool Co.*, 899 F.2d at 588), which means they may be overturned only if they are "clearly wrong."

Cooper v. Harris, 137 S. Ct. 1455, 1468 (2017); Fed. R. Civ. P. 52(a)(6). Appellate review of the district court's legal conclusions after a bench trial is *de novo*. *Acheron Med. Supply, LLC v. Cook Med. Inc.*, 958 F.3d 637, 642 (7th Cir. 2020).

SUMMARY OF ARGUMENT

President Trump's appeal fails on several independent grounds. *First*, although he fails to acknowledge it in his opening brief, President Trump brings before this Court arguments based on interpretations of Wisconsin law that, as of December 14, 2020, have been addressed, and rejected, by the Wisconsin Supreme Court. Consequently, his claims in this Court are now precluded by the doctrines of res judicata and collateral estoppel.

Second, whether precluded or not, President Trump is too late in bringing these claims. He did not challenge the Wisconsin election rules, practices, and administrative guidance underlying this appeal before Election Day. Instead, he sat on his hands, waiting to see the results of the election. He brought suit only after losing, when the resulting prejudice from disenfranchising nearly 3.3 million Wisconsin voters would be maximized. His case is thus barred by laches.

Third, even if not barred by laches, President Trump's claims fail on the merits, as the district court correctly concluded—notably, after providing President Trump with a full trial where he had the opportunity to introduce whatever evidence he had in support of his allegations but instead stipulated to an evidentiary record that the district court found insufficient to substantiate the theories he advanced.

Fourth, the relief President Trump requests—an order nullifying the votes of nearly 3.3 million Wisconsinites who participated in the November 3rd election—cannot be granted, because it would violate the constitutional rights of those voters, who participated in reliance on the established rules for elections in Wisconsin.

None of these defects can be cured.[6] As in other post-election cases brought by President Trump in courts around the country, his claims here are legally baseless, factually meritless, and procedurally improper. Yet President Trump seeks extreme, unprecedented, and unconstitutional relief. This Court should reject this attempt to use the courts as a weapon to overturn the will of the voters. As the Third Circuit stated in rejecting a similar case brought by President Trump: "Voters, not lawyers, choose the President. Ballots, not briefs, decide elections." *Donald J. Trump for President, Inc. v. Sec'y, Commw. of Pa.*, No. 20-3371, 2020 WL 7012522, at *9 (3d Cir. Nov. 27, 2020).

ARGUMENT

I. The Wisconsin Supreme Court's Trump v. Biden Decision Precludes Further Consideration Here.

As a threshold matter, the Wisconsin Supreme Court's December 14th ruling in *Trump v. Biden*, 2020 WI 91, precludes President Trump's claims in this case under the doctrine of res judicata.

"Ordinarily a state court judgment commands the same res judicata effect in federal court that it would have had in the state court that entered it." *Lee v. City of Peoria*, 685 F.2d 196, 198 (7th Cir. 1982). Since the prior adjudication occurred in Wisconsin, this Court applies Wisconsin res judicata principles. *Rockford Mut. Ins. Co. v. Amerisure Ins. Co.*, 925 F.2d 193, 195 (7th Cir. 1991). In Wisconsin, res judicata (also known as claim preclusion) applies when: "(1) identity between the parties or their privies in the prior and present suits; (2) prior litigation result[ing] in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action

[6] Mindful of this Court's admonition against repetitive briefing, the Government Defendants who submit this brief do not also separately argue the justiciability issues addressed in the brief submitted by Defendant-Intervenor Democratic National Committee. The Government Defendants join in full the arguments in the DNC's brief and submit that each issue addressed in that brief is an independent ground for resolving this appeal adverse to President Trump.

in the two suits." *DSG Evergreen Family Ltd. P'ship v. Town of Perry*, 2020 WI 23, ¶18, 390 Wis. 2d 533, 939 N.W.2d 564. "The rule applies even if the claim was not actually litigated, so long as the party *could have* raised it." *Id.*, ¶18 (emphasis in original). All three elements are satisfied here.

A. *Trump v. Biden* was a decision on the merits.

President Trump attempted to get two bites at the apple by filing identical claims in state and federal court. Within a matter of 72 hours, he lost in state circuit court, he lost in federal district court, and then the Wisconsin Supreme Court affirmed the state circuit court decision.

In upholding the state circuit court ruling, the Wisconsin Supreme Court held that President Trump's claim to invalidate all ballots in two counties submitted by voters identifying as indefinitely confined was without merit. *Trump*, 2020 WI 91, ¶9. The court observed that President Trump had not provided any evidence to invalidate a single vote, and that a broad exclusion of ballots submitted by indefinitely confined voters had "no basis in reason or law; it is wholly without merit." *Id.* Consequently, that is a decision on the merits regarding the votes of indefinitely confined voters.[7]

The Wisconsin Supreme Court also held that the equitable doctrine of laches disposed of President Trump's attempt to throw out Democracy in the Park ballots and ballots where clerks filled in witness addresses. The court noted the importance of a party bringing known claims *before* an election: "Extreme diligence and promptness are required in election-related matters, particularly where actionable election practices are discovered prior to the election." *Id.*, ¶11 (quoting 29 C.J.S. Elections § 459 (2020)). Notably, the court found "[t]he Campaign's delay in

[7] President Trump does not even mention the majority ruling that expressly rejected his indefinitely-confined-voter argument. He cites only to dissenting opinions in *Trump*, which are not law.

raising these issues was unreasonable in the extreme, and the resulting prejudice to the election officials, other candidates … and to voters statewide, is obvious and immense." *Id.*, ¶12.

A dismissal based on laches is a decision on the merits. In *Cannon v. Loyola University of Chicago*, this Court expressly held that disposition of constitutional claims based on "laches is equally a judgment on the merits. … Thus, all three requirements for application of res judicata have been met. The present suit is barred and was properly dismissed by the district court." 784 F.2d 777, 781-82 (7th Cir. 1986). Wisconsin has similarly held laches is a decision on the merits. *See Barbian v. Lindner Bros. Trucking Co.*, 106 Wis. 2d 291, 301, 316 N.W.2d 371, 377 (1982). Therefore, the Wisconsin Supreme Court's *Trump* ruling is a decision on the merits. Since "a state court judgment commands the same res judicata effect in federal court," the *Trump* decision applies equally here. *Lee*, 685 F.2d at 198.

B. There is an identity of claims between *Trump v. Biden* and this case.

The *Trump* decision also satisfies the second element of res judicata because the state and federal claims share an identity. Wisconsin applies the "transactional" test to determine whether claims in parallel cases share an identity.[8] *Teske v. Wilson Mut. Ins. Co.*, 2019 WI 62, ¶31, 387 Wis. 2d 213, 928 N.W.2d 555. "The transactional approach 'reflects the expectation that parties who are given the capacity to present their entire controversies shall in fact do so.'" *Id.* (quoting *Kruckenberg v. Harvey*, 279 Wis. 2d 520, ¶27, 694 N.W.2d 879). Under the analysis "'all claims arising out of one transaction or factual situation are treated as being part of a single cause of action and they are required to be litigated together.'" *A.B.C.G. Enterprises, Inc. v. First Bank Se., N.A.*, 184 Wis. 2d 465, 481, 515 N.W.2d 904, 910 (1994) (quoting *Parks v. City of Madison*, 171 Wis.2d

[8] The Seventh Circuit applies an identical test, so the analysis is essentially the same under both Wisconsin and federal law. *See Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986).

730, 735, 492 N.W.2d 365 (Ct.App.1992)). Courts must "consider whether the facts are related in time, space, origin, or motivation" to determine if it is the same "transaction." *Menard, Inc. v. Liteway Lighting Prod.*, 2005 WI 98, ¶ 30, 282 Wis. 2d 582, 698 N.W.2d 738.

President Trump's federal claims are identical to those brought in *Trump*. Both cases challenged indefinitely-confined-voter guidance, witness address information on absentee ballot envelopes, and Democracy in the Park ballots. The claims in both cases stem from guidance issued by WEC, and are on the *same* subject matter.

The overlapping nature of President Trump's arguments in federal and state court are self-evident. Here, President Trump makes arguments related to interpreting Wis. Stat. § 6.855. (Trump Br. at 35) President Trump made similar arguments about that *exact* statute in state court. *See Trump*, 2020 WI 91, ¶55 (Hagedorn, J., concurring); *see also Trump v. Biden*, Brief of Plaintiffs-Petitioners/Appellants at 32-35 (hereinafter "*Trump v. Biden* Br.").[9] In this case President Trump argues that WEC guidance, an increase in indefinitely confined voters, and Facebook posts by County Clerks regarding indefinitely confined voter status should lead to invalidation of votes. (Trump Br. at 46-49) He made the same argument regarding Facebook posts in his state court proceeding, and he similarly argued the increase in indefinitely confined voters revealed election law violations. *Trump*, 2020 WI 91, ¶9; *Trump v. Biden* Br. at 28-32. In this proceeding, President Trump claims WEC guidance regarding witness address information on absentee ballot certifications was invalid. (Trump Br. at 42-46) He made that *exact* argument before Wisconsin's Supreme Court. *Trump*, 2020 WI 91, ¶47 (Hagedorn, J., concurring); *Trump v. Biden* Br. at 24-27.

[9] A copy of President Trump's brief in the state court proceeding is available at https://acefiling.wicourts.gov/document/uploaded/2020AP002038/315221 (last visited Dec. 16, 2020).

President Trump will undoubtedly argue that he is challenging drop boxes in this case, unlike in the other case, or that the two cases raised different challenges to Democracy in the Park. Those arguments are inconsequential, because "transaction" is what matters, not the legal theories advanced in parallel cases, as Wisconsin has made clear. In this instance, the "transaction" was WEC guidance that municipalities relied upon in administering the election. President Trump cannot seek to invalidate the same ballots in both cases but use different legal theories in each case. These claims and legal theories all relate, and they undeniably should have been brought in one action, as expressly required by Wisconsin law.

President Trump's citations to dissenting opinions in *Trump* to support his federal arguments only underscores that President Trump's federal and state court arguments share an identity with the arguments he makes here. (Trump Br. at 4, 16, 34) President Trump cannot deny that his claims arise from the same "transaction" because his brief demonstrates the opposite.

President Trump tried to game the system by filing identical claims in state and federal courts. President Trump could have raised his arguments in one lawsuit, but he chose not to, presumably in hopes that piecemeal litigation would increase his chances of success. That kind of gamesmanship is the reason res judicata exists, and why it must be applied here. The state court ruled against him, and that ruling now precludes his claims in federal court.

C. Both cases involve the same parties.

President Trump initiated both the state and federal court proceedings. In both cases he sued WEC, as well as Dane and Milwaukee Counties. The presence of additional defendants in this case does not disrupt the application of res judicata, which "bars subsequent suits against those who were not party to a prior suit if their interests are closely related to those who were." *Tartt v. Nw. Cmty. Hosp.*, 453 F.3d 817, 822-23 (7th Cir. 2006). As evidenced by this unified brief and the unified presentations at the merits hearing below, all of the defendants that President Trump sued

in this case—those named in the state court action and those who were not—have closely related interests in these two suits litigating the same issues about the same election. Consequently, this element of res judicata is easily satisfied.

* * *

President Trump's parallel lawsuits satisfy all three elements of res judicata. Therefore, the Court should apply the doctrine and find that the Wisconsin Supreme Court's *Trump v. Biden* decision precludes further litigation here.

Similarly, the doctrine of collateral estoppel precludes this action. Courts apply state law to determine whether issue preclusion applies. *First Weber Grp., Inc. v. Horsfall*, 738 F.3d 767, 772 (7th Cir. 2013). Wisconsin courts first determine whether the issue was litigated in and essential to "a valid judgment." *In re Estate of Rille*, 2007 WI 36, ¶37, 300 Wis. 2d 1, 728 N.W.2d 693. Then, whether applying the doctrine "comports with principles of fundamental fairness." *Id.*, ¶38. Five factors are relevant: (1) the opportunity for appellate review of the prior judgment; (2) whether the legal questions are distinct; (3) significant differences between the cases; (4) the burden of persuasion; and (5) public policy. *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54.

As explained above, the issues were litigated and appealed in state court. The issues here are identical, stemming from the same theories, involving the same plaintiff bringing the same legal questions and bearing the same burden. Collateral estoppel, therefore, bars President Trump from re-litigating these issues in federal court.

II. Even If There Is No Preclusive Effect, the Doctrine of Laches Applies Here.

Even if res judicata does not preclude this appeal, Trump's claims are barred by laches, as numerous state and federal courts have now held. "Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant." *Fulani v.*

Hogsett, 917 F.2d 1028, 1031 (7th Cir. 1990). This Court repeatedly has emphasized that election law claims "must be brought 'expeditiously' ... to afford the district court 'sufficient time *in advance* of an election to rule without disruption of the electoral cycle.'" *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1061 (7th Cir. 2016) (emphasis added; citations omitted); *see Fulani*, 917 F.2d at 1031 (denying relief where candidate and political party had "slept on their rights" and the delay risked "interfer[ing] with the rights of other Indiana citizens, in particular the absentee voters"); *Gjersten v. Bd. of Election Comm'rs for City of Chicago*, 791 F.2d 472, 479 (7th Cir. 1986) (holding that plaintiffs challenging election practice must "establish that they pursued their rights in a timely fashion" and "filed a timely pre-election request for relief;" only then will the court consider whether the practice "had a significant impact on the particular election" and then "balance the rights of the candidates and voters against the state's significant interest in getting on with the process of governing once an electoral cycle is complete").[10]

Federal courts regularly dismiss claims brought after elections based on laches, "lest the granting of post-election relief encourage sandbagging on the part of wily plaintiffs." *Soules v. Kauaians for Nukolii Campaign Comm.,* 849 F.2d 1176, 1180 (9th Cir. 1988). This practice recognizes "the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Id.*; *see also, e.g.*, *Wood v. Raffensberger*, No. 1:2020-cv-04651-SDG, 2020 WL 6817513, at *13 (N.D. Ga. Nov. 20, 2020), *aff'd*, 2020 WL 7094866, at *6 (11th Cir.

[10] There are numerous other election-law decisions by this Court denying relief because of laches. *See, e.g.*, *Bowes v. Indiana Sec'y of State*, 837 F.3d 813, 818 (7th Cir. 2016) ("plaintiffs in general must act quickly once they become aware of a constitutional violation, so as not to disrupt an upcoming election process"); *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) ("It would be inequitable to order preliminary relief in a suit filed so gratuitously late in the campaign season."); *Navarro v. Neal*, 904 F. Supp. 2d 812, 816 (N.D. Ill. 2012) ("By waiting so long to bring this action, plaintiffs 'created a situation in which any remedial order would throw the state's preparations for the election into turmoil.'") (citation omitted), *aff'd in relevant part*, 716 F.3d 425, 429 (7th Cir. 2013) (agreeing that laches barred injunctive relief eleven weeks before election but holding that laches did not bar "declaratory relief concerning future elections").

Dec. 5, 2020) (concluding that Plaintiff's claims following the 2020 election were barred by laches and that "interfer[ing] with the result of an election that has already been concluded would be unprecedented and harm the public in countless ways"); *King v. Whitmer*, No. 2:20-cv-13134-RSW, 2020 WL 7134198, at *7 (E.D. Mich. Dec. 7, 2020) ("While Plaintiffs delayed, the ballots were cast; the votes were counted; and the results were certified. The rationale for interposing the doctrine of laches is now at its peak"). Moreover, "the failure to require prompt pre-election action ... as a prerequisite to post-election relief may 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." *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973) (en banc) (quoting panel decision at 476 F.2d 203, 209 (5th Cir. 1973)). This is precisely what President Trump is attempting to do here, to the extreme prejudice of Wisconsin voters.

President Trump's claims were already egregiously delayed and barred by laches when he initiated this case on December 2, 2020. Indeed, he stipulated that the guidance underlying his Complaint was issued months and, in one case years, before he filed his lawsuit. (B027 ¶¶4-5)[11] Despite his best efforts to persuade this Court to the contrary, President Trump cannot now introduce new evidence that was, without doubt, readily available at the time he filed his complaint and make new arguments in order to negate his stipulations. (Trump Br. at 9-13) This Court has stated that it "cannot consider evidence" described "for the first time on appeal." *Henderson v. Wilkie*, 966 F.3d 530, 539 (7th Cir. 2020). "A reviewing court on direct appeal is limited to the record of trial and cannot consider any extrinsic evidence." *Delatorre v. United States*, 847 F.3d

[11] Although he decided the case on the merits, rather than on laches, the district court suggested that the claims are also barred by laches: "If these issues were as significant as plaintiff claims, he has only himself to blame for not raising them *before* the election. President Trump's delay likely implicates the equitable doctrine of laches." (A021 n.10)

837, 844 (7th Cir. 2017) (quoting *Galbraith v. United States*, 313 F.3d 1001, 1007 (7th Cir. 2002)). This is related to the "'well-established rule that arguments not raised to the district court are waived on appeal.'" *Henderson*, 966 F.3d at 539 (quoting *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012)). Given the significant developments in the short time since President Trump agreed to the stipulation he now seeks to negate—developments that include the Electoral College having met and cast its ballots, as well as the Wisconsin Supreme Court definitively rejecting the same legal arguments raised here—President Trump's delay is now even starker and the prejudice it creates more extreme.

Finally, the Wisconsin Supreme Court's ruling that President Trump's claims are, in part, barred by laches is highly persuasive, even if not preclusive. This is especially true given the broad range of other courts across the country who have rejected similar post-election challenges on the basis of laches. *See Kelly v. Commw.*, No. 68 MAP 2020, 2020 WL 7018314, at *1 (Pa. Nov. 28, 2020); *King*, 2020 WL 7134198, at *7; *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261, at *11 (D. Ariz. Dec. 9, 2020); *Wood*, 2020 WL 6817513, at *7. Like the Wisconsin Supreme Court and other federal courts, this Court should conclude that President Trump's claims are barred by laches.

III. The District Court Correctly Concluded that President Trump Cannot Prevail Here.

A. The President's Electors-Clause claim fails because Defendants conducted the 2020 election in the "manner" prescribed by the Wisconsin Legislature.

President Trump contends that WEC guidance concerning absentee voting in the 2020 election departed from the governing Wisconsin statutes so significantly as to violate the Electors Clause. (Trump Br. at 22-49) As the district court correctly held, President Trump's argument erroneously conflates the "manner" of appointing presidential electors referred to in the Electors Clause with the details of election administration. (A019) Defendants conducted the 2020 election

in precisely the "manner" prescribed by the Wisconsin legislature: by popular vote. Moreover, even if the Electors Clause were concerned with matters of election administration, the conduct of the 2020 election easily passes the test: it was administered by WEC, the body created by the Wisconsin legislature for that administrative purpose; and WEC's guidance did not in fact depart from the governing statutes, let alone in any way significant enough to violate the Electors Clause.

1. Defendants conducted Wisconsin's 2020 election by popular vote, as the Legislature has prescribed.

The Electors Clause provides that each State "shall appoint" its presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const., Art. II, § 1, cl. 2. The Constitution thus gives state legislatures "the broadest power" to determine the method of selecting electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). It does not mandate that the method be by popular vote. *Id.* Indeed, in the Nation's early decades, most States' legislatures chose the electors, with the majority party sending its delegates to the Electoral College. *Chiafolo v. Washington*, --- U.S. ---, 140 S. Ct. 2316, 2321 (2020). By 1832, however, all States but one had introduced popular presidential elections. *Id.* Today, all States select their presidential electors in a manner based on the popular vote. *Id.*

Wisconsin has determined that the State's presidential and vice-presidential electors shall be chosen "[b]y general ballot at the general election." Wis. Stat. § 8.25(1). (The "general election" is defined as "the election held in even-numbered years on the Tuesday after the first Monday in November to elect," among other officials, "presidential electors." Wis. Stat. § 5.02(5).) As the district court correctly observed, it is undisputed that the 2020 presidential election in Wisconsin was conducted "by general ballot at the general election." (A019) The straightforward conclusion, drawn by the district court, is that Defendants conducted this election in exactly the "manner" prescribed by the Wisconsin legislature, in compliance with the Electors Clause. (*Id.*)

President Trump insists that the word "manner" in the Electors Clause must include every detail of election administration set forth in state law. (Trump Br. at 25-30) But that stretches the meaning of the term too far. As Justice Thomas noted in *Chiafolo*, "[a]t the time of the founding, the term 'manner' referred to a '[f]orm' or 'method.'" 140 S. Ct. at 2330 (Thomas, J., concurring) (quoting 1 S. Johnson, *A Dictionary of the English Language* (6th ed. 1785)). "These definitions suggest that Article II requires state legislatures merely to set the approach for selecting Presidential electors." *Id.* "manner" refers only to "the method for selecting electors." *Id.*[12] To illustrate the word's meaning, Justice Thomas pointed out that at the Constitutional Convention, "the Framers debated whether Presidential electors should be selected by the state legislatures or by other electors chosen by the voters of each State." *Id.* From the State's inception, Wisconsin has settled that debate in favor of popular election. That is the "Manner" in which presidential elections must be conducted in Wisconsin. And it is exactly how Defendants conducted the 2020 election.

A contrary holding would, as the district court cautioned, give "any disappointed loser in a Presidential election, able to hire a team of clever lawyers," the opportunity to "flag claimed deviations from the election rules and cast doubt on the election results." (A020) As Chief Justice Rehnquist observed in *Bush v. Gore*, "[i]solated sections of the [state] election code may well admit of more than one interpretation." 531 U.S. at 114 (Rehnquist, C.J., concurring). If every such interpretive debate constituted an Electors Clause claim, this "would risk turning every Presidential election into a federal lawsuit." (A020) That is not and cannot be a proper reading of

[12] Contrary to President Trump's suggestions, nothing about *Chiafolo*'s context—the question of whether states may punish "faithless" electors—renders Justice Thomas's observations less germane here.

Article II. *See, e.g., Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020); *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986).

Ironically, while Defendants conducted the 2020 election in accordance with the Electors Clause, the remedy sought by President Trump would directly violate it. President Trump asked the district court—and now asks this Court—to overturn the result of a popular election, invalidate the votes of nearly 3.3 million Wisconsinites, and "remand" the matter to the Wisconsin legislature (presumably in hope that the Republican legislative majority would appoint Republican electors). That is the opposite of a vote "[b]y general ballot at the general election." Wis. Stat. § 8.25(1).

2. Defendants administered the 2020 election as directed by the Wisconsin Legislature.

Even if this Court were to conclude that a candidate's challenge to the administration of an election may state a potential Electors Clause claim, the President's claim here would still fail. The rule of decision that he asks the Court to employ is based on Chief Justice Rehnquist's concurrence in *Bush v. Gore*: that a "significant departure from the legislative scheme for appointing Presidential electors" violates the Elections Clause. (Trump Br. at 23 (citing 531 U.S. at 113)) A concurring opinion of a Supreme Court Justice, of course, is not binding on this Court. But even if this principle is treated as controlling, Defendants did not depart from the legislative scheme here. They operated expressly within it.

The district court described the essential features of Wisconsin's legislative scheme. (A003-06, 020-21) Chapters 5 to 12 of the Wisconsin Statutes set forth the rules for elections in the state. In 2015, the Legislature created the bipartisan WEC with "responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections." Wis. Stat. §§ 5.05(1), 15.61. The Legislature gave WEC a variety of powers. It made WEC's administrator the "chief election officer" of Wisconsin. *Id.* § 5.05(3g). It empowered WEC to conduct investigations, issue

subpoenas, and sue for injunctive relief. *Id.* § 5.05(b), (d). WEC also has the power to conduct voter education programs, receive reports of voter fraud, and investigate and prosecute violations of the election laws. *Id.* § 5.05(12), (13), (2m)(a). The legislature authorized WEC to issue formal and informal advisory opinions on elections matters, which may have "legal force and effect" if supported by appropriate authority. *Id.* § 5.05(6a)(1), (2).

Municipal and county clerks and boards of canvassers also have important roles in Wisconsin's legislative scheme for the administration of elections. *See id.* §§ 7.10 (county clerks), 7.15 (municipal clerks), 7.21 (election commissioners). Along with WEC, they count the votes, canvass the returns, and certify the results. *See id.* §§ 7.51-.70. The governor then completes and transmits the certificate of ascertainment. *See id.* § 7.70(5)(b); 3 U.S.C. § 6.

WEC issued guidance and, with several other Defendants, administered the 2020 election pursuant to these express legislative directives. Thus, Defendants operated in accord with Wisconsin's "legislative scheme," not contrary to it. *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring). President Trump objects that WEC and other Defendants are "non-legislative actors," meaning they are not members of the Wisconsin Legislature. (Trump Br. at 23) That is true, but their actions carrying out legislative schemes do not violate the Electors Clause.

Regardless, "[w]herever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). The Electors Clause's use of "legislature" is not strictly limited to members of the state's legislative body but also includes other officials. For example, in *Davis v. Hildebrant*,) the Supreme Court upheld an Ohio constitutional provision conferring legislative power on the people directly to approve or disapprove of laws enacted by the General Assembly through a referendum process. 241 U.S. 565, 566-70 (1916). The Court extended *Davis* a few years later in *Smiley v.*

Holm, where it held that nothing in the Elections Clause[13] "precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." 285 U.S. at 372-73. More recently, the Supreme Court expanded that principle even further, holding that the Elections Clause permits the use of a redistricting commission, rather than solely the state legislature, to draw congressional districts. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 801-09 (2015). Following *Davis* and *Smiley*, the Court explained that "our precedent teaches that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto," as well as an independent redistricting commission. *Id.* at 808-09.

Here, too, the Wisconsin Legislature has chosen to administer the manner of its elections in part by using a commission separate from the legislative body and by adopting a highly localized system of election administration. The statutes give WEC general authority and responsibility for the administration of elections in this state. Wis. Stat. § 5.05. Nothing in the Electors Clause prohibits Wisconsin from conducting its elections in that manner or turns its choice to do so into a federal constitutional issue.

B. There were no significant departures from the legislative scheme for conducting elections in Wisconsin.

A final fatal flaw with President Trump's Electors Clause claim is that the conduct of WEC and other Defendants with respect to the 2020 election was not a "significant departure" from the governing statutes. *Bush*, 531 U.S. at 113. Indeed, as shown in Section III.C below, Defendants

[13] The Elections Clause, Art. I, § 4, cl. 1, contains, for present purposes, substantially the same language as the Electors Clause. It provides in relevant part that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*" (emphasis added).

did not depart from those statutes at all. In any event, the President Trump's arguments at most present one interpretation of the technical requirements of Wisconsin's statutes regarding absentee voting. But the mere fact that "[i]solated sections of the [state] election code may well admit of more than one interpretation," 531 U.S. at 114 (Rehnquist, C.J., concurring), does not implicate the Electors Clause.

Again, although President Trump relies heavily on Chief Justice Rehnquist's concurrence in *Bush*, that opinion does not support the President's position. Florida, like Wisconsin, had "created a detailed, if not perfectly crafted, statutory scheme that provides for appointment of Presidential electors by direct election." *Id.* at 116. The Florida legislature "designated the Secretary [of State] as the 'chief election officer,' with the responsibility to '[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws,'" and authority to "issue binding interpretations of the Election Code," *id.* at 119 (citations omitted)—similar to the Wisconsin Legislature's delegation of responsibility for administering elections to WEC and its designation of WEC's administrator as the "chief election officer," Wis. Stat. § 5.05(1), (3g). And Florida, like Wisconsin, had statutory mechanisms for protesting election returns and contesting certified results. *Id.*

The problem in *Bush*, as articulated by Chief Justice Rehnquist, was that the Florida Supreme Court upset this legislative scheme by ordering a recount and extending the statutory deadline for certification of the election results established by the legislature. *Id.*. The effect of that extension would have been to lose the protection of the safe harbor provided by 3 U.S.C. § 5, in contravention of the state legislature's clearly expressed intent. *Id.* at 120-21. The same problem drove the Eighth Circuit's decision in *Carson v. Simon*, where the Secretary of State had agreed

in a consent decree not to enforce Minnesota's ballot-receipt deadline. 978 F.3d 1051, 1056 (8th Cir. 2020).

There was no suggestion in *Bush*, however, that other state officials acting within the legislative scheme for administering elections would somehow transgress the Electors Clause by fulfilling their appointed roles. On the contrary, Chief Justice Rehnquist's concurrence recognized that elections are "committed to the executive branch of government through duly designated officials all charged with specific duties," whose judgments are "entitled to be regarded by the courts as presumptively correct." 531 U.S. at 116 (quoting *Boardman v. Esteva*, 323 So. 2d 259, 268 n.5 (1975)). "[W]ith respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate." *Id.* at 114. Here, WEC and some other Defendants are expressly empowered by the Legislature to carry out its mandate regarding the conduct and administration of elections in Wisconsin. Even assuming arguendo the existence of a dispute as to whether those Defendants properly administered the election in accordance with Wisconsin election law (a position that, as is discussed below, lacks merit), such a dispute simply cannot constitute a departure from the legislative scheme for conducting elections in Wisconsin sufficient or substantial enough to violate the Electors Clause.

C. Even if there is a plausible claim, the state-law arguments all fail on the merits.

Even if President Trump could state an Electors Clause claim based on mere state law violations, it would fail because Wisconsin election officials complied with state election law. President Trump contests three categories of absentee ballots: those cast by absentee voters who claimed to be "indefinitely confined"; those delivered to municipal clerks using drop boxes; and those accompanied by witness certifications that lacked certain address information. All these

challenged ballots satisfied state law and, of equal importance, President Trump lacks any evidence that invalidating them would change the election results.

1. President Trump's indefinite confinement challenge fails.

a) Statutory background

Absentee voters in Wisconsin ordinarily must submit photo identification when they first apply to receive an absentee ballot. *See* Wis. Stat. § 6.86(1)(ac), (ar); *id.* § 6.87(1); *id.* § 6.87(4)(b)3. However, there is an exception for voters who are "indefinitely confined because of age, physical illness or infirmity or [are] disabled for an indefinite period." *Id.* § 6.86(2)(a). Such voters are not required to submit photo identification before receiving an absentee ballot. *Id.* § 6.87(4)(b)2. Instead, their witness may submit a signed statement verifying the voter's name and address. *Id.* § 6.87(4)(b)2.

b) WEC accurately advised voters about indefinite confinement, and no evidence exists of anyone improperly claiming the status.

President Trump seeks to invalidate ballots cast by an unspecified set of voters who identified as "indefinitely confined" under Wis. Stat. § 6.86(2)(a). In his view, both WEC and local officials gave incorrect guidance about when voters could claim the status.

But his argument fails because WEC gave accurate guidance on this issue, as the Wisconsin Supreme Court has twice recognized. On March 25, 2020, local officials posted on Facebook disputed advice that led to an original action before the Wisconsin Supreme Court, *Jefferson v. Dane County*, No. 2020AP557-OA (Wis.). Four days later, on March 29, 2020, WEC released the following guidance:

> 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.

> 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. ...
>
> During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates.

(Dkt. 12-2:1–2.)[14]

The Wisconsin Supreme Court first reviewed this guidance upon a request for preliminary relief in *Jefferson*. It concluded that WEC's March 29 advice "provide[d] the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." *Jefferson v. Dane County*, 2020 WI 90, ¶9 (citation omitted). President Trump responds that, because the court did not quote WEC's entire March 29 publication, nothing can be inferred from that order. (Trump Br. at 48) But it simply beggars belief that the court would have said that this guidance contained the "clarification ... that [was] required" if it contained inaccurate information.

President Trump also skims over the court's final decision, which further reinforced what WEC said:

> (1) [D]eclaring oneself indefinitely confined or disabled for an indefinite period is an individual determination that only an individual elector can make; (2) an elector is indefinitely confined for purposes of § 6.86(2)(a) for only the enumerated reasons therein; and (3) an elector is indefinitely confined due to his or her own age, physical illness, or infirmity, not the age, physical illness, or infirmity of another person.

Jefferson, 2020 WI 90, ¶22. That is consistent with WEC's advice that each voter must make the determination based in their own "circumstance[s]" and that, due to COVID-19, voters of a "certain age" or who are "at-risk" "may" qualify for the status. (B054)

President Trump's only real argument on the merits is that WEC's guidance about "age" and "at-risk populations" was somehow "not tied to confinement based on any of the four physical

[14] The local officials also issued clarifying pronouncements based on the WEC's March 29 guidance. (Dkt. 127, ¶26)

conditions" in Wis. Stat. § 6.86(2)(a). But that statute expressly lists both "age" and "infirmity." A common definition of "infirmity" is "of poor or deteriorated vitality"[15] That definition easily encompasses "at-risk populations" at heightened risk of serious complications or death caused by COVID-19. And WEC accurately stated that "[c]lerks ... may not request or require proof" (B055)—President Trump points to no provision that would have allowed election officials to demand such sensitive medical information from voters. Instead, the statutes give 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).

c) The evidence President Trump offers is insufficient to void a statewide election.

Even if WEC *had* offered incorrect advice—which it did not—President Trump offers no evidence of a single voter who improperly claimed to be indefinitely confined. This is despite being given the opportunity to have a full trial on the merits of his claims. That is exactly why the Wisconsin Supreme Court rejected Mr. Trump's parallel state-court challenge as "wholly without merit." *Trump*, 2020 WI 91, ¶8. There, too, President Trump "[did] not challenge the ballots of individual voters" and instead sought to invalidate "a class [of voters] without regard to whether any individual voter was in fact indefinitely confined." *Id.* Just as that evidence-free attempt failed in state court, it fails here too.

President Trump merely observes that the absolute number of indefinite confinement requests increased from 2016 to 2020. (Trump Br. at 49) Leaving aside how that says nothing about any particular voter, the increase is unsurprising. Since the absolute number of absentee

[15] "Infirmity," Merriam-Webster, https://www.merriam-webster.com/dictionary/infirmity (last visited Dec. 17, 2020); *see also* "Infirm," Meriam Webster, https://www.merriam-webster.com/dictionary/infirm (last visited Dec. 17, 2020).

voters in the general election also increased from 2016 to 2020 (*Compare* https://elections.wi.gov/node/4397 *with* https://elections.wi.gov/node/7227 (county spreadsheet, Column E, Row 74), a corresponding increase in the number seeking indefinite confinement status would be expected.

2. President Trump's absentee ballot drop box challenge fails.

a) Statutory background

To handle the expected increase in absentee voting during the November election, WEC advised election officials that they could set up secure drop boxes into which absentee voters could deposit their completed ballots. (B063) Wisconsin used hundreds of these drop boxes statewide to conduct the November election (B032 ¶28), a fact that Justice Gorsuch praised:

> Returning an absentee ballot in Wisconsin is also easy. ... Until election day, voters may, for example, hand-deliver their absentee ballots to the municipal clerk's office or other designated site, or they may place their absentee ballots in a secure absentee ballot drop box. Some absentee ballot drop boxes are located outdoors, either for drive-through or walk-up access, and some are indoors at a location like a municipal clerk's office. ... The Wisconsin Elections Commission has made federal grant money available to local municipalities to purchase additional absentee ballot drop boxes to accommodate expanded absentee voting.

Democratic Nat'l Comm. v. Wis. State Legislature, No. 20A66, 2020 WL 6275871 (U.S. Oct. 26, 2020) (Gorsuch J., concurring). State legislative leaders also "wholeheartedly support[ed] voters' use" of this "lawful" tool.[16]

Relatedly, the City of Madison also hosted a series of staffed drop boxes at city parks on two Saturdays before the November election, nicknamed "Democracy in the Park." *See Trump*, 2020 WI 90, ¶19. Sworn city election inspectors attended these events to register voters and provide secure ballot containers into which voters could deposit completed absentee ballots. *Id.*

[16] Letter from Misha Tseytlin to Maribeth Witzel-Behl, City Clerk, City of Madison (Sept. 25, 2020), https://www.wpr.org/sites/default/files/september_25_2020_letter_to_city_clerk_witzel-behl.pdf.

No absentee ballots were distributed, and officials could serve as witnesses only for absentee voters who brought unsealed, blank ballots. *Id.*

Returning absentee ballots at both drop boxes and Madison's "Democracy in the Park" events was controlled by Wis. Stat. § 6.87(4)(b)1., which requires ballots to be "mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots."

Separate from this provision about ballot return, Wis. Stat. § 6.855 regulates sites where absentee ballots may be requested, voted, and returned. Specifically, it applies to places where voters "may request and vote absentee ballots and to which voted absentee ballots shall be returned." Wis. Stat. § 6.855(1). If those activities occur outside the municipal clerk's office, the municipality's governing body must "designate" that site. *Id.*

b) Wisconsin's use of drop boxes complied with state law.

President Trump contends that Wisconsin's use of drop boxes violated both Wis. Stat. §§ 6.87(4)(b)1. and 6.855(1). Neither argument succeeds.

First, the use of drop boxes complied with Wis. Stat. § 6.87(4)(b)1., which permits absentee ballots to be returned by "deliver[y] in person, to the municipal clerk." Drop boxes accomplish exactly that. Absentee voters hand-deliver their absentee ballots to municipal clerks via the drop boxes. That is not a meaningfully different delivery method than depositing a ballot in a mailbox, *see* Wis. Stat. § 6.87(4)(b)1., or delivering it to a designated election official who places it in a secure location until Election Day. Likewise, as to the "Democracy in the Park" events, "voters who returned ballots to city election inspectors at the direction of the clerk returned their absentee ballots 'in person, to the municipal clerk' as required by § 6.87(4)(b)1." *Trump*, 2020 WI 90, ¶54 (Hagedorn, J., concurring).

President Trump seems to assume that Wis. Stat. § 6.87(4)(b)1. requires delivery to occur at the *office* of the municipal clerk, but the statute says nothing of the sort. That silence contrasts

with other statutes that expressly require certain actions to occur at the clerk's "office"—language that is conspicuously absent from Wis. Stat. § 6.87(4)(b)1. *See, e.g.*, Wis. Stat. §§ 6.86(1)(a)2. (absentee ballot applications made "at the office of the ... clerk"), 6.87(3)(a) (absentee ballots delivered "at the clerk's office"). Simply put, if the Wisconsin Legislature had wanted to require absentee ballots to be returned to the clerk's *office*, it would have said so expressly, as it did in those related statutes.

That same contrast explains why President Trump's citation to the ballot-storage procedures in Wis. Stat. § 6.88(1) undermines his position. Those procedures apply only "[w]hen an absentee ballot arrives *at the office of the municipal clerk*," Wis. Stat. § 6.88(1), which again underscores how the Wisconsin Legislature knew how to specify the clerk's "office" when that is what it meant. Moreover, drop boxes do not meaningfully differ from mail delivery (which President Trump concedes is acceptable), since the storage provisions in Wis. Stat. § 6.88(1) obviously do not apply until absentee ballots make it from either a drop box or a mail box to the clerk's office.

President Trump's citation to *Olson v. Lindberg*, 2 Wis. 2d 229, 85 N.W.2d 775 (Wis. 1957), does not help his position. That case addressed a now-defunct statute that "specifie[d] the requirements for the delivery of *absentee ballot blanks*" and held that "absentee ballots delivered *by the town clerk* to places other than his office may not be counted." *Id.* at 230, 236. This case, by contrast, does not address where clerks may deliver *blank* ballots to voters, but rather where *voters* may return *completed* ballots to clerks under Wis. Stat. § 6.87(4)(b)1. *Olson* did not address that issue.

Second, Wis. Stat. § 6.855(1) does not apply to drop boxes, contrary to President Trump's assertion. That provision applies only to alternate absentee ballot sites where voters "may request

and vote absentee ballots *and* to which voted absentee ballots shall be returned." *Id.* (emphasis added). In other words, "[a]n alternative absentee ballot site ... must be a location not only where voters may return absentee ballots, but also a location where voters 'may request and vote absentee ballots.'" *Trump*, 2020 WI 91, ¶56 (Hagedorn, J., concurring) (citation omitted).

Drop boxes lack one of the two required attributes of alternate absentee ballot sites under Wis. Stat. § 6.855(1). Although absentee voters may "return" a completed ballot to a drop box, they obviously cannot "request and vote" a ballot from one. Municipalities therefore did not have to follow section 6.855(1) before setting up their drop boxes. The same is true for "Democracy in the Park"; it is undisputed that voters could only return completed ballots at those events. (B032 ¶31)

c) President Trump offers inadequate evidence to void a statewide election on this basis.

As with President Trump's claim about indefinitely confined voters, despite being afforded a full trial on the merits, he offers no evidence to quantify how many absentee ballots were deposited in drop boxes statewide. Instead, he relies solely on evidence specific to the cities of Madison and Milwaukee. (Trump Br. at 40 (citing B028-29 ¶¶13-15)) But drop boxes were used both in counties President Trump won and in those he did not.[17] He offers no evidence that discarding *all* drop box votes would leave him with more votes than his opponent.

Similarly, President Trump suggests that, contrary to WEC advice, some drop boxes lacked adequate security safeguards (Trump Br. at 37), but he again offers no evidence of how many fell

[17] For instance, President Trump highlights a drop box in Hayward, located in Sawyer County, where President Trump received more votes than his opponent. (JD058 ¶201) *See* WEC, *WEC Canvass Reporting System County by County Report, 2020 General Election* (Nov. 30, 2020), https://elections.wi.gov/sites/elections.wi.gov/files/County%20by%20County%20Report%20%20President%20of%20the%20United%20States%20post%20recount.pdf.

into this category, let alone whether invalidating the ballots deposited in them would change the election result.

3. President Trump's challenge to ballot envelopes on which clerks entered certain witness address information fails.

a) Statutory background

When Wisconsin voters complete absentee ballots, an adult witness must be present to verify the voter's identity and other information. Wis. Stat. § 6.87(4)(b)1. To guarantee a witness's presence, absentee-ballot envelopes contain a sworn certification that the witness must sign attesting to the absentee voter's identity and residency. *Id.* § 6.87(2). Below that sworn witness certification, the witness must sign their name and write their "address." *Id.* If the witness certificate is "missing" an "address," the accompanying ballot "may not be counted." *Id.* § 6.87(6d). And 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. *Id.* § 6.87(9).

Before the 2016 presidential election, WEC advised local election officials to "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.[18]

b) Witness certificates that lacked a city, state, or zip code were not "missing" an address, and, even if they were, clerks could fill in that information.

President Trump seeks to invalidate absentee ballots accompanied by witness certifications that lacked even a single item of address-related information (such as a city, state, or ZIP code),

[18] *See* Mem. from Michael Haas to Wis. Mun. Clerks & Milwaukee City Elections Comm'n (Oct. 18, 2016), https://elections.wi.gov/sites/elections.wi.gov/files/memo/20/guidance_insufficient_witness_address_amended_10_1_38089.pdf (last visited Dec. 17, 2020).

whether or not a clerk filled in that information using reliable sources. But President Trump misunderstands what it means for an "address" to be "missing" under Wis. Stat. § 6.87(6d).

First, President Trump is wrong that a witness "address" is "missing"—thereby requiring the accompanying ballot to be invalidated—simply because it lacks a city, state, or ZIP code. Justice Hagedorn of the Wisconsin Supreme Court recently pointed out the flaw in this argument: "Although Wis. Stat. § 6.87(6d) requires an address, § 6.87(2) and (6d) are silent on precisely what makes an address sufficient. This is in stark contrast to other provisions of the election statutes that are more specific." *Trump*, 2020 WI 90, ¶49 (Hagedorn, J., concurring). He pointed to, for example, Wis. Stat. §§ 6.34(3)(b)2. and 6.18, both of which expressly require voters to provide specific information such as their municipality, rather than simply an "address." By declining to use such specific language in Wis. Stat. § 6.87(2) and (6d), the Wisconsin Legislature indicated that witnesses need not supply every conceivable piece of address-related information.

That flexible approach conforms to the functional purpose of providing a witness's address. Specific elements of an *absentee voter's* address verify their eligibility to vote in a particular ward, but a *witness* merely needs to be an "adult U.S. citizen." Wis. Stat. § 6.87(4)(b)1. So, unlike a voter, a witness's address is irrelevant to their eligibility. The witness's address simply enables election officials to locate them and secure their personal testimony about the accuracy of the voter information to which they attested. Witness addresses lacking such information therefore were not "missing" under Wis. Stat. § 6.87(6d).

And, even if witness certifications lacking a state or ZIP code were "missing" an address under Wis. Stat. § 6.87(6d), clerks were permitted to fill in that information. Here, President Trump reads into the provision a requirement missing from its text. It requires only that a witness's address not be "missing"; it says nothing about who may enter that information. The address is not

"missing" if an election official has filled it in. Contrary to President Trump's insinuation, doing so does not entail post hoc tinkering with a witness's sworn assertions. Per Wis. Stat. § 6.87(2), a witness swears only to information about the absentee voter, not to their own address. The unsworn nature of witness addresses again underscores their functional nature—they do not satisfy an eligibility requirement, but rather are tools to locate the witness if necessary.

President Trump nonetheless tries to infer such a prohibition from Wis. Stat. § 6.87(9), which says that clerks "may" return to the voter ballots with an "improperly completed certificate." He argues that, because the statute expressly allows clerks to return such ballots, it implicitly prohibits clerks from adding more address information themselves. But that provision does not say it is the sole method by which incomplete absentee certificates may be cured. The permissive return provision is not needed for certificates that lack a witness's ZIP code. A clerk is perfectly capable of filling in that (unsworn and easily obtained) address information, without sending it back to the voter. It is therefore more reasonable—and more consistent with the policy of enfranchising voters, *see* Wis. Stat. § 5.01(1)—to conclude that Wis. Stat. § 6.87(9) contains no implicit prohibition on clerks completing witness addresses.

c) President Trump offers inadequate evidence to void a statewide election on this basis.

Just like in the other two categories, President Trump identifies no evidence about how many absentee ballots were accompanied by envelopes with witness address information added by clerks, let alone the partisan breakdown of those ballots. Moreover, President Trump has not identified which witness certifications lacked only a city, state, or ZIP code versus those which lacked all address information whatsoever. That is why, in President Trump's parallel state court challenge, he failed to "establish[ ] that all ballots where clerks added witness address information were necessarily insufficient and invalid." *Trump*, 2020 WI 90, ¶51 (Hagedorn, J., concurring).

Where ballot envelopes already had adequate address information when clerks added more, there is no "authority that would allow such votes to be struck." *Id.*, ¶50. So, just as in *Trump*, President Trump lacks evidence "that any particular number of ballots were improper." *Id.*, ¶51.

d) President Trump has waived any equal protection claim, which would fail regardless.

President Trump also attempts to resuscitate a claim under the Equal Protection Clause. (Trump Br. at 51-52) President Trump "abandoned" any such claim below (A001 n.1), however, and his conclusory, unsupported arguments on appeal amount to waiver before this Court as well. Regardless, the President's purported equal protection claim fails on its merits.

As the district court observed, "the complaint offers no clue of a coherent Equal Protection theory and plaintiff offered neither evidence nor argument to support any such claim at trial. It is therefore abandoned." (*Id.*) All President Trump offers to rebut this conclusion is one sentence buried in the body of a 302-paragraph, 72-page complaint and his counsel's discussion of related facts in arguing his Electors Clause claim to the district court. (Trump Br. at 50.) But claims cannot be based on bare conclusions alone, and a party's failure to tie general allegations to a specific legal theory amounts to waiver. *See*, *e.g.*, *Tamburo v. Dworkin*, 601 F.3d 693, 699-700 (7th Cir. 2010) (claims alleged "in a wholly conclusory fashion" are "plainly improper" under federal pleading standards); *Puffer*, 675 F.3d at 718 (noting that "raising an issue in general terms is not sufficient to preserve specific arguments that were not previously presented" and further observing that "it is the parties' responsibility to allege facts and indicate their relevance under the correct legal standard") (internal quotations and citations omitted). Given these standards, the district court's conclusion that President Trump waived any equal protection claim was correct.

Even so, President Trump presents only a perfunctory argument in support of his equal protection claim on appeal. He devotes only one paragraph of a 55-page brief to this claim,

suggesting that, "[f[or reasons similar to the concern in *Bush v. Gore*," the use of ballot drop boxes in Wisconsin "is problematic under the Equal Protection Clause" because the "State has not shown that its procedures include the necessary safeguards." (Trump Br. at 51) As this Court has repeatedly held, such perfunctory, undeveloped arguments on appeal constitute waiver. *See*, *e.g.*, *Crespo v. Colvin*, 824 F.3d 667, 674 (7th Cir. 2016) ("'[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues).'") (quoting *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991)). Thus, even if he did abandon it below, President Trump forfeits the equal protection claim on appeal.

The claim fails as a matter of law in any event. The only authority President Trump cites, *Bush v. Gore*, does not support an equal protection claim in this context. There, the Court addressed a circumstance where the Florida Supreme Court ordered a statewide recount of the results of the 2000 presidential election in Florida with the aim of discerning the "intent of the voter." 531 U.S. at 105-06. The Court concluded that equal protection was implicated, however, because the state court's order lacked a "specific standard to ensure ... equal application" of that principle. *Id.* at 106. But the Court stressed that it was not deciding "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 109. Indeed, federal courts have routinely held that local election officials within a state may employ different election procedures without running afoul of equal protection principles. *See, e.g.*, *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018); *Ne. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 636 (6th Cir. 2016); *Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 181 (4th Cir. 1983). That is the very question at issue here—the exercise by state and local authorities of their lawful expertise in conducting an election. *Bush*

v. Gore expressly did not address that question, so it cannot support President Trump's attempt to state an equal protection claim.

The only other hint President Trump offers as to the substance of an equal protection claim is his unsupported suggestion that the use of ballot drop boxes may have harmed "candidates" by "diluting or debasing votes." (Trump Br. at 51-52) However, under controlling law, "vote dilution" is a constitutional injury that occurs only when certain electors' votes have greater weight, or count for more, than votes of other electors. *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986). Under this theory, a citizen's vote is diluted if legislative districts have significant population differences. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). Under President Trump's apparent theory, all voters are equally affected by any number of invalid votes; it follows that each individual vote still carries the same weight in determining the result of the election, so vote dilution does not occur. *See Bognet v. Sec'y Commw. of Pa.*, 980 F.3d 336, 356-60 (3rd Cir. 2020) (explaining that any purported vote dilution resulting from allegedly invalid votes would affect all voters (and all candidates) equally, not just the plaintiffs and their votes).

IV. The Remedy President Trump Seeks—Invalidating the Entire Statewide Presidential Election—Would Disenfranchise Millions of Voters, in Violation of Due Process.

Even if President Trump could state and support a valid federal claim, he seeks an unavailable and unconstitutional remedy. Beyond requesting a declaration that alleged violations of state election statutes violated the Electors Clause (JD016-019 ¶¶26-30), he also asks the Court "to immediately remand this matter to the Wisconsin Legislature to review the nature and scope of the infringement and to determine the appropriate remedy for the constitutional violation(s) established, including any impact upon the allocation of Presidential electors for the State of Wisconsin." (JD019 ¶31) At the hearing below, Plaintiff clarified that what he wants is for the

Court to declare the November 3 election a failure, discard its results, and thereby open the door for the Wisconsin Legislature to appoint presidential electors in some other fashion. (A002) That proposed remedy is procedurally unprecedented, substantively extraordinary, and flatly unconstitutional.

President Trump contends that such sweeping and radical relief is authorized by the role of state legislatures under the Electors Clause and by 3 U.S.C. § 2, a statute that allows a state, under certain circumstances, to appoint its electors through activity carried out on a date later than Election Day.[19] But both the Electors Clause and 3 U.S.C. § 2 must be construed consistent with the constitutional requirement of due process. To retroactively override Wisconsin's statutorily designated method for choosing presidential electors after the election has taken place, as President Trump seeks, would violate due process by disenfranchising the nearly 3.3 million Wisconsinites who voted in reliance upon that method.

A. The Electors Clause does not authorize a federal court to retroactively override a popular presidential election so that a state legislature may appoint electors in some other fashion.

The Electors Clause provides that each state shall appoint its presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const., art. II, § 1, cl. 2. In accord with that provision, ever since Wisconsin was admitted to the Union in 1848, our Legislature has directed by statute that Wisconsin's presidential electors shall be appointed by popular election. *See* 1848 Wis. Sess. Laws 192; Wis. Stat. § 8.25(1); *see also id.* §§ 5.10, 5.64(1)(em). The November 2020 election—which President Trump seeks to invalidate—was conducted via popular vote in furtherance of that legislative directive. That directive, having now been carried out, cannot be

[19] Although the Complaint did not cite 3 U.S.C. § 2, President Trump clarified at trial that he wants the Court to declare the November 3 election a failed election under that statute, thereby opening the door for the Wisconsin Legislature to appoint presidential electors in some other fashion. (A013 n.8)

retroactively undone and superseded by action of the Wisconsin Legislature. As the Pennsylvania Supreme Court held recently, "there is no basis in law by which the courts may ... ignore the results of an election and recommit the choice to the [state legislature] to substitute its preferred slate of electors for the one chosen by a majority of [the state's] voters." *Kelly*, 2020 WL 7018314, at *3; *see also Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 6821992, at *12 (M.D. Pa. Nov. 21, 2020) ("This is simply not how the Constitution works.").

Once a state legislature has directed that the electors shall be appointed by popular election, the people's "right to vote as the legislature has prescribed is fundamental." *Bush*, 531 U.S. at 104. 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 Electors Clause vests power in the state legislature that 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).

Accordingly, while the Electors Clause 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 Fourteenth Amendment's Due Process Clause. Thus, 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 a court from imposing the type of post-election changes President Trump seeks here. *See Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (retroactive invalidation of absentee ballots violated due process). And even a prospective change would require lawmaking, not a court order. *See Smiley*, 285 U.S. at 366-67 (state legislature's power to choose "manner" of

congressional elections under Elections Clause requires following ordinary lawmaking requirements).[20]

In general, a due process violation exists where there is "(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). Accordingly, 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 due process was implicated by a Rhode Island Supreme Court decision that unexpectedly changed state law after voters had relied on their absentee ballots being counted. 570 F.2d at 1078. Similarly, in *Husted*, the Sixth Circuit considered a claim that provisional ballots were disqualified because of ballot deficiencies caused by poll-worker error, and it concluded that to disenfranchise voters whose only error was relying on instructions from election officials would be fundamentally unfair, in violation of due process. 696 F.3d at 597.

President Trump contends that the relief he wants is permissible because the district court held that claims seeking to change the election's outcome will not be moot until Congress has counted the electoral votes on January 6, 2021. (Trump Br. at 54-55) Mootness, however, is distinct from whether a particular remedy would violate the Constitution. Here, it is hard to imagine a burden on the fundamental right to vote greater than the complete invalidation of a popular election that has already taken place, and the retroactive declaration of a winner by fiat. Contrary to

[20] The Elections Clause, U.S. Const. art. I, § 4, cl. 1, and the Electors Clause have "considerable similarity," *Ariz. State Legislature*, 576 U.S. at 839 (Roberts, C.J., dissenting). *See also Foster v. Love*, 522 U.S. 67, 69 (1997) (characterizing Electors Clause as Elections Clause's "counterpart for the Executive Branch"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995) (noting that state's "duty" under Elections Clause "parallels the duty" described by Electors Clause).

President Trump's contention, the Electors Clause does not authorize—and due process cannot countenance—such a remedy.

B. Wisconsin's November 3 presidential election has not "failed" to appoint the state's electors, within the meaning of 3 U.S.C. § 2.

President Trump tries to justify his unorthodox request for a "remand" to the Wisconsin Legislature by pointing to 3 U.S.C. § 2, which provides that, "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." Plaintiff argues that this is "a savings provision" placed in the Electoral Count Act to permit a state legislature to appoint electors if an election is unconstitutional and void. (Trump Br. at 53) That argument is both historically wrong and, if accepted, would raise serious doubts about the constitutionality of that statute.

First, Plaintiff is wrong as a matter of historical fact. The provision he cites – 3 U.S.C. § 2 – is not the kind of "savings provision" that he suggests. In fact, it is not part of the Electoral Count Act at all. That provision was enacted in 1845 as part of Congress's effort to establish a uniform national date for federal elections. Act of Jan. 23, 1845, 5 Stat. 721 (1845) (codified at 3 U.S.C. § 1). At that time, Congress recognized that some states might adopt presidential election procedures that would sometimes require runoff elections, which would make it impossible to complete the selection of electors on Election Day, or that natural disasters or extreme weather might interfere with an election on that date. *See* Cong. Globe, 28th Cong., 2d Sess. 10, 14 (remarks of Rep. Hale), 15 (statement of Rep. Chilton) (1844). Congress accordingly enacted the provision now codified at 3 U.S.C. § 2 to give states flexibility and ensure that a state would not forfeit its electors where such circumstances prevented completion of the appointment process on Election Day.

The Electoral Count Act, in contrast, was not enacted until 1887, when Congress tried establishing a statutory framework for it to receive and count electoral votes, in the aftermath of the disputed presidential election of 1876. *See* Electoral Count Act of 1887, 24 Stat. 373, 3 U.S.C. §§ 5-6, 15. The Electoral Count Act did not revise 3 U.S.C. § 2, and Congress's purposes in 1887 cannot be projected back onto a statute enacted 42 years earlier for entirely different reasons.[21]

If 3 U.S.C. § 2 is applied to the facts of this case, then it is clear that Wisconsin held and completed its popular vote on November 3, 2020, and therefore it "[made] a choice on the day prescribed by law." President Trump's challenge to the validity of certain absentee ballots does not mean Wisconsin "failed" to select its presidential electors on November 3.

Second, President Trump's reliance on 3 U.S.C § 2 is also wrong as a matter of law. Under his reading, that statute would allow a state legislature to step in even when a state conducts and completes a popular presidential election on Election Day, just because post-election litigation challenges the validity of certain votes. There would be grave doubts, however, about the constitutionality of a statute that would allow a state legislature, whenever popular election results are disputed, to simply replace the popular choice with its own slate of electors. Such an unreasonable outcome would disenfranchise those who already voted, thereby violating due process as discussed above. That interpretation of 3 U.S.C. § 2 cannot be correct. Such constitutional concerns are avoided, however, by the historically correct reading of the statute as applying only to true Election Day "failures" where some extraordinary circumstance or occurrence prevents the state from completing its electoral process on Election Day.

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[21] In 1948, Congress codified what is now Title 3 of the U.S. Code. See 62 Stat. 672 (1948). That legislation modernized the language of the statutes, and revised the final phrase of 3 U.S.C. § 2 from "as the State shall by law provide" to "as the legislature of such State may direct." There is no indication that any linguistic change in the 1948 legislation was intended to alter the substantive meaning of a state failing to make a choice of electors on Election Day.

* * *

Where the state legislature has given the people the right to vote for President, and where the people have exercised that fundamental right, the goal of any subsequent election dispute 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. President Trump's request for such extraordinary and unconstitutional relief must be denied.

V. The District Court Erred in Not Dismissing the Case Under Rule 12(b)(1) Because It is Not Justiciable.

As flagged in the Government Defendants' jurisdictional statement and in note 1 above, Defendant-Appellees join in full the justiciability arguments made by Intervenor Defendant-Appellee Democratic National Committee, any one of which is sufficient to defeat President Trump's appeal.

CONCLUSION

For the reasons above, this Court should affirm the dismissal with prejudice of President Trump's complaint.

Dated: December 18, 2020.

Respectfully submitted,

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I. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B), as modified by Circuit Rule 32(c), because this brief contains 13,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as verified through Microsoft Word's "Word Count" function.

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