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 *AMICI CURIAE* CHRISTINE TODD WHITMAN, JOHN DANFORTH, LOWELL WEICKER, *ET AL.*, IN SUPPORT OF APPELLEES

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December 18, 2020

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Christine Todd Whitman, John Danforth, Lowell Wicker, Constance Morella, Christopher Shays, Carter Phillips, Stuart Gerson, Donald Ayer, Edward Larson, John Bellinger III, Michael Stokes Paulsen, Alan Charles Raul, Robert Shanks, Paul Rosenzweig, Stanley Twardy, Keith Whittington, and Richard Bernstein

(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:

Katten & Temple, LLP

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

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

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Attorney's Signature: /s/ Nancy A. Temple Date: December 17, 2020

Attorney's Printed Name: Nancy A. Temple

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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N/A

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

N/A

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

N/A

Attorney's Signature: /s/ Richard D. Bernstein Date: December 17, 2020

Attorney's Printed Name: Richard D. Bernstein

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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INTEREST OF AMICI CURIAE

Amici include former Governor Christine Todd Whitman, former Senator John Danforth, former Governor and Senator Lowell Weicker, former Congressional representatives Constance Morella and Christopher Shays, Carter Phillips, former Acting Attorney General Stuart Gerson, conservative legal scholars, and others who have worked in Republican federal administrations. *See* Appendix A.[1] Reflecting their experience, *amici* have an interest in seeing the rule of law applied in contentious election cases. *Amici* speak only for themselves personally, and not for any entity or other person.

INTRODUCTION AND SUMMARY OF ARGUMENT

There are many reasons to affirm. This brief focuses on one. It is an alternative ground for affirmance that this Court need not reach. The Complaint ultimately sought "a very precise remedy," namely "to immediately remand this matter to the Wisconsin Legislature to review the nature and scope of the infringement declared and determine the appropriate remedy for the constitutional violation(s) established, including any impact on the allocation of Presidential electors for the state of Wisconsin." Complaint, Dkt. No. 1, ¶ 31; *see also* Appellant's Brief at 5 (requesting "injunctive relief ordering Governor Evers to issue a certificate of determination consistent with, and only consistent with, the appointment of electors by the Wisconsin legislature"); *id.* at 54-55 (same).

[1] No counsel for any party authored the brief in whole or in part, and no person other than amici made a monetary contribution to its preparation or submission

But, for at least two reasons, after election day, the Wisconsin legislature has no, and no court can grant it any, authority to appoint electors for the 2020 presidential election either expressly or in the guise of adjudicating a remedy.

First, Wisconsin provides by statutes, *e.g.,* Wis. Stat. § 8.25(1), for the popular election of presidential electors. The Wisconsin legislature could not appoint electors expressly or through the guise of adjudicating a remedy, unless and until a new statute first amends its existing statutes, or repeals and replaces them. But any such new statute "shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." *Smiley v. Holm*, 285 U.S. 355, 373 (1932).

Second, and independently, Article II, Section 1 of the Constitution (the "Electors Clause") confers plenary power on Congress over the time when a state must appoint electors. With one rare exception, 3 U.S.C. § 1 has implemented that power to prevent a state legislature from appointing electors after the election day determined by Congress – November 3, 2020. The rare and exclusive exception is set forth in 3 U.S.C. § 2 and applies only when a state's "election has failed to make a choice." The Complaint did not and could not allege such a failure. That failure does not and cannot occur simply because a losing candidate has raised challenges that, as here, were rejected in court. This Court should affirm to preserve the "trust of a Nation that here, We the People rule." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020).

ARGUMENT

I. THE WISCONSIN LEGISLATURE MAY NOT APPOINT ELECTORS WITHOUT FIRST AMENDING WISCONSIN'S PRESIDENTIAL ELECTION STATUTES, SUBJECT TO THE GOVERNOR'S VETO.

In *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court unanimously held that, under the Elections Clause, which grants state legislatures power over the "manner" of congressional elections, when a state's constitution includes a governor's right to veto statutes passed by the state legislature, any new law governing congressional elections "shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." *Id.* at 373. All nine Justices of the Supreme Court reaffirmed *Smiley* in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 806-08 (2015); *see id.* at 840-41 (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ.) (dissenting).

Smiley applies to state presidential election statutes. To start, the Elections and Electors Clauses have "considerable similarity." *Id.* at 839. Second, since 1788, state legislatures have enacted the manner of presidential election *by statute*. G. Brosofsky, M. Dorf, & L. Tribe, *State Legislators Cannot Act Alone in Assigning Electors*, at 5-7 (Sept. 25, 2020) (detailing with citations this practice).[2] In particular, in 1788 South Carolina first provided *by statute* for the legislative selection of presidential electors. *Id.* at 7 (citing 1788 South Carolina statute).

[2] Available at http://www.dorfonlaw.org/2020/09/state-legislatures-cannot-act-alone-in.html.

Only after the statute was enacted did the South Carolina legislature appoint electors. *Id.*

Wisconsin, by statute, provides for the popular election of presidential electors. Wis. State. § 8.25(1). Wisconsin, by statute, also provides for presidential election disputes to be resolved by Wisconsin's courts. Wis. Stat. §§ 9.01(1)-(10). "This section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process." *Id.* at § 9.01(11). Finally, 3 U.S.C. § 6 requires the governor to certify the winning electors based on the "final ascertainment, under and in pursuance of the *laws* of such State providing for such ascertainment." *Id.* (emphasis added). Wisconsin Statute § 7.70(5)(b) provides: "For presidential electors, the [Wisconsin elections] commission shall prepare a certificate showing the *determination of the results of the canvass* and the names of the persons elected and *the governor shall sign*, affix the great seal of the state, *and transmit the certificate* . . . ." (Emphases added.)

A new statute would have to amend these Wisconsin statutes, or repeal and replace them, in order for the Wisconsin legislature to change the manner of appointing electors either by providing for legislative selection expressly or through the guise of a legislatively-adjudicated remedy. Wisconsin's Governor would have veto power over any such proposed new statute. Wis. Const. Art. V, § 10(a).[3]

[3] Such a new statute also would violate the Wisconsin Constitution. *See* Wis. Const., Art.

II. INDEPENDENTLY, THE ELECTORS CLAUSE AND 3 U.S.C. §§ 1-2 PROHIBIT THE WISCONSIN LEGISLATURE FROM BELATEDLY APPOINTING ELECTORS AND ANY COURT FROM AUTHORIZING A LEGISLATIVE REMEDY.

A. 3 U.S.C. §§ 1-2 Prohibit The Wisconsin Legislature From Belatedly Appointing Electors For 2020.

3 U.S.C. § 1 requires that electors "shall be appointed, in each state, *on*" November 3, 2020. (Emphasis added.) To use the words of 3 U.S.C. § 1, what Wisconsin executive and judicial officials, by statute, have done after the nationwide election day has been to determine which electors were "appointed . . . on" election day—that is, determine which candidate won Wisconsin's popular election by votes cast by election day.

3 U.S.C. § 2 creates a single, narrow exception that allows electors to "be appointed on a subsequent day [after the nationwide election day] in such manner as the legislature of such state may direct," but only "[w]henever any State has held an election for purpose of choosing electors, and has failed to make a choice on" the nationwide election day.

The Complaint did not mention 3 U.S.C. § 2, much less allege that its narrow exception applies here. Nor could it have. An election "has [not] failed to make a choice" merely because determining the winner is disputed. The decisions of the District Court and the majority of the Wisconsin Supreme Court establish that there was no "failed" election here.

VII, § 2 ("The judicial power of this state shall be vested in a unified *court* system . . . ."). (Emphasis added.)

This plain and narrow meaning of "failed to make a choice" is confirmed by the statutory history of 3 U.S.C. §§ 1-2. Congress first enacted these provisions in 1845. 5 Stat. 721 (1845). The prior statute, enacted in 1792, allowed states to appoint electors on any of the "thirty-four days preceding the first Wednesday in December." 1 Stat. 239 (1792). The 1845 statute required, for the first time, that all states appoint electors on the same nationwide election day: "the Tuesday next after the first Monday in the month of November." 5 Stat. 721 (1845). The early proposed versions of the 1845 statute did not contain an exception for a "failed" election. See CONG. GLOBE, 28th Cong., 2d Sess. 14 (Dec. 9, 1844).

Representative Hale of New Hampshire suggested to the bill's manager, Representative Duncan of Ohio, that a provision should be added for the "contingency" faced by New Hampshire, where state law required that the electors could be elected only by "a majority of all the votes cast." *Id.* In his state, Hale explained, because the candidate with the most votes might obtain only a plurality, "it might so happen that no choice might be made on election day." *Id.* The next time the bill was debated, Representative Duncan offered, and the House adopted, an amendment containing what has become 3 U.S.C. § 2. CONG. GLOBE, 28th Cong., 2d Sess. 21 (Dec. 11, 1844).

In 1872, Congress enacted similar provisions for elections of a Representative – a nationwide election day and an exception if "upon" that day "there shall be a failure to elect." 17 Stat. 28-29 (Feb. 2, 1872), now codified as 2 U.S.C. §§ 7, 8(a). The Supreme Court has stated: "The only explanation of this

provision [2 U.S.C. § 8(a)] in the legislative history is Senator Alan G. Thurman's statement that 'there can be no failure to elect except in those States in which a majority of all the votes is necessary to elect a member.'" *Foster v. Love*, 522 U.S. 67, 71 n.3 (1997) (citation omitted).

There was never a suggestion with respect to the 1845 or 1872 statutes that when an election engendered vigorous – and here rejected – litigation, such an election could be considered an election that "has failed to make a choice" or "fail[ed] to elect." That would have consigned the Nation to continue the routine appointments of electors and election of Representatives by states on different days that the 1845 and 1872 statutes were designed to prevent.[4]

B. Additionally, The Federal Constitution, As Implemented By 3 U.S.C. §§ 1-2, Also Prohibits A Court From Authorizing The Wisconsin Legislature To Change Retroactively A Part Of The Manner Of Appointment From A Judicial Remedy In A Presidential Election Dispute To A Legislative Remedy.

The majority of the Wisconsin Supreme Court, which Appellant's Brief entirely ignores, denied relief on all of the Appellant's challenges – some based on laches:

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[4] Appellant and his allies previously have miscited a dictum in *McPherson v. Blacker,* 146 U.S. 1 (1892), that a legislature "may resume the power [to choose electors] at any time . . . ." *Id.* at 35 (quotations and citation omitted). This dictum is actually an inapposite part of a long quote from an 1874 Senate report supporting a "failed" proposal. *Id.*at 34. The dictum says nothing about whether any such resumption may be not only prospective but also retroactively enable a legislature to appoint electors after the people's votes have been cast, counted, and adjudicated. The dictum could not have addressed the holding of *Smiley* 40 years later that a legislative change to a state's law for federal elections is subject to a governor's veto. *Supra,* Part I. And, *McPherson* itself cited with approval the 1845 federal statute, now 3 U.S.C. § 1, requiring each state to appoint electors "on the Tuesday next after the first Monday in the month of November in the year in which they were to be appointed." 146 U.S. at 40.

> The Campaign's delay in raising these issues was unreasonable in the extreme, and the resulting prejudice to the election officials, other candidates, voters of the affected counties, and to voters statewide, is obvious and immense. Laches is more than appropriate here; the Campaign is not entitled to the relief it seeks.

Trump v. Biden, No. 2020AP2038, 2020 WL 7331907, at *9 (Wis. Sup. Ct. Dec. 14, 2020).[5]

Although Appellant cites the concurring opinion in *Bush v. Gore,* 531 U.S. 98 (2000), *see* Appellant's Brief at 21-24, Appellant's proposed remedy ignores and contradicts a central point of that opinion. The concurring opinion stated that it would violate the Electors Clause for a court, *after* election day, to change retroactively the manner of appointment by "chang[ing] the statutorily provided apportionment of responsibility" for which "bodies [are] expressly empowered by the legislature" to "oversee election disputes." *Id.* at 113-14 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.). Wisconsin Statutes §§ 9.01(1)-(11) empower the state's judiciary, and *only* the state's judiciary, to decide merits and remedial issues in an election dispute. Under the concurring opinion in *Bush v. Gore,* no court may change retroactively Wisconsin's statutory allocation of responsibility for resolving disputes concerning the 2020 presidential election.

[5] When the Pennsylvania Supreme Court rejected, based on laches, the claims of allies of the Appellant to overturn that state's election, *Kelly v. Commonwealth of Pennsylvania,* No. 68 MAP 2020, 2020 WL 7018314 (Pa. Sup. Ct. Nov. 28, 2020), the United States Supreme Court denied without dissent an application for an injunction pending certiorari. *Kelly v. Commonwealth of Pennsylvania,* No. 20A98, 2020 WL 7221757 (U.S. Sup. Ct. Dec. 8, 2020).

Two requirements of the Electors Clause, as implemented by 3 U.S.C. §§ 1-2, preclude Appellant's requested retroactive change in the manner of appointment after election day. The first applicable requirement of the Electors Clause is that a state "shall appoint, in such manner as the Legislature thereof may direct." This is an adverbial prepositional phrase with "in such manner as the Legislature thereof may direct" modifying "appoint." When "in" is used as a preposition, this denotes that the object of the proposition and the modified word are "*present*" at the same time. S. Johnson, *Dictionary of the English Language* (6th ed. 1785) (emphasis added). Dr. Johnson illustrated that "in" denotes a temporal concurrence with this example: "Danger before, and *in*, and after the act." *Id.* (emphasis in original). A danger that occurs only "after" the act is not danger "in" the act.

Thus, because the Electors Clause makes "such manner as the Legislature thereof may direct" the object of "in," then "such manner" can be only the manner in place simultaneously when the state's electors are "appoint[ed]" (the modified word) on November 3, 2020. This is confirmed by "our whole experience as a Nation." *Chiafalo*, 140 S. Ct. at 2326 (quotations and citation omitted).

The second pertinent requirement of the Electors Clause is that the state must comply with "the time of choosing the Electors" that Congress has determined. Implementing this power, 3 U.S.C. § 1 provides that "electors … shall be appointed, in each state, *on*" the nationwide election day. (Emphasis added.) In this statutory provision, "appointed . . . on" must mean *appointed, in*

such manner as the legislature may direct, on because the Constitution allows no other kind of appointment. A new manner of appointment that is created after November 3, 2020 no more exists "on" election day than does a manner of appointment that applied to a prior election but was repealed or amended *before* November 3, 2020.

Two canons of construction confirm that under 3 U.S.C. §§ 1-2, after election day, a court may not change retroactively any part of a state's apportionment of responsibility for deciding merits and remedial issues concerning presidential elections. First, because "[r]etroactivity is not favored in the law," a statutory provision "will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

Second, a court must adopt "a construction of a statute that is fairly possible," when the alternative construction would "raise a serious doubt as to [the statute's] constitutionality." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). Construing 3 U.S.C. §§ 1-2 to allow this Court after election day to change retroactively which Wisconsin body decides merits and remedial issues would raise serious constitutional doubts. To start, there is at least a serious question whether such retroactivity comports with the simultaneity required by the "appoint, in such manner" requirement in the Electors Clause. *Supra*, at 8-9. Moreover, there is at least a serious question whether the Due Process Clause

precludes a court from changing retroactively from a state statute's judicial remedy in an election dispute to a legislative remedy. *See Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 73 (2000) (the Supreme Court granted certiorari over, but did not decide, whether "by effectively changing the State's elector appointment *procedures* after election day, [a court] violated the Due Process Clause") (emphasis added).

CONCLUSION

The decision below should be affirmed.

December 18, 2020

Respectfully submitted,

/s/ Richard D. Bernstein

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APPENDIX A

LIST OF AMICI CURIAE

Christine Todd Whitman, Administrator, Environmental Protection Agency, 2001–2003; Governor, New Jersey, 1994–2001.

John Danforth, United States Senator from Missouri, 1976-1995; United States Ambassador to the United Nations, 2004-2005; Attorney General of Missouri, 1969-1976.

Lowell Weicker, Governor, Connecticut, 1991-1995; United States Senator from Connecticut, 1971-1989; Representative of the Fourth Congressional District of Connecticut in the United States House of Representatives, 1969-1971.

Constance Morella, Representative of the Eighth Congressional District of Maryland in the United States House of Representatives, 1987-2003; Permanent Representative from the United States to the Organisation for Economic Co-operation and Development, 2003-2007.

Christopher Shays, Representative of the Fourth Congressional District of Connecticut in the United States House of Representatives, 1987-2009.

Carter Phillips, Assistant to the Solicitor General, 1981-1984.

Stuart M. Gerson, Acting Attorney General, 1993; Assistant Attorney General for the Civil Division, 1989–1993; Assistant United States Attorney for the District of Columbia, 1972–1975.

Donald Ayer, Deputy Attorney General 1989-90; Principal Deputy Solicitor General 1986-88; United States Attorney, E.D. Cal 1982-86; Assistant U.S. Attorney, N.D. Cal 1977-79.

Edward J. Larson, Counsel, Office of Educational Research and Improvement, United States Department of Education, 1986-1987; Associate Minority Counsel, Committee on Education and Labor, United States House of Representatives, 1983-1986; formerly University of Georgia Law School Professor; currently Hugh & Hazel Darling Chair in Law at Pepperdine University.*

* The views expressed are solely those of the individual amici, and reference to current positions is solely for identification purposes.

John Bellinger III, Legal Adviser to the Department of State, 2005-2009; Senior Associate Counsel to the President and Legal Adviser to the National Security Council, 2001-2005.

Michael Stokes Paulsen, Attorney-Advisor, Office of Legal Counsel, U.S. Department of Justice, 1989-1991; Special Assistant United States Attorney, Eastern District of Virginia, 1986; Staff Attorney, Criminal Appellate Section, United States Department of Justice, 1986; currently University Chair & Professor of Law, The University of St. Thomas.*

Alan Charles Raul, Associate Counsel to the President, 1986-1988; General Counsel of the Office of Management and Budget, 1988-1989; General Counsel of the United States Department of Agriculture, 1989-1993; Vice Chairman of the Privacy and Civil Liberties Oversight Board, 2006-2008.

Paul Rosenzweig, Deputy Assistant Secretary for Policy, Department of Homeland Security, 2005-2009; Office of Independent Counsel, 1998-1999; United States Department of Justice, 1986-1991; currently Professorial Lecturer In Law, The George Washington University Law School.*

Robert Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, 1981-1984.

Stanley Twardy, U.S. Attorney for the District of Connecticut, 1985–1991.

Keith E. Whittington, William Nelson Cromwell Professor of Politics, Princeton University, 2006-present; currently Visiting Professor of Law, Georgetown University Law Center.*

Richard Bernstein, Appointed by the United States Supreme Court to argue in *Carmell v. Texas*, 529 U.S. 513, 515 (2000); *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).

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* The views expressed are solely those of the individual amici, and reference to current positions is solely for identification purposes.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,746 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 with 12-point Century font in the body and 11-point Century font in the footnotes.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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