SUPREME COURT OF WISCONSIN

Appeal No. 2020AP001930-OA

Wisconsin Voters Alliance, Ronald H. Heuer, William Joseph Laurent, Richard Kucksdorf, James Fitzgerald, Kelly Ruh, William Berglund, John Jaconi, Donna Utschig, Jeff Wellhouse, Kurt Johnson, Thomas Reczek, Linda Sinkula, Atilla Thorbjorssen, Jeff Kleiman, Navin Jarugumilli, Jonathan Hunt, Suzanne Vlach, Jacob Blazkovec, Donald Utschig, Carol Aldinger, Jay Plaumann, Deborah Gorman, Robert R. Liebeck, Valerie M. Bruns Liebeck, Edward Hudak, Ron Cork, Charles Risch, Karl Lehrke, Arnet Holty, and Joseph McGrath,

*Petitioners*,

v.

Wisconsin Elections Commission, Ann S. Jacobs, in her official capacity as Member, Mark L. Thomsen, in his official capacity as Member, Marge Bostelman, in her official capacity as Member, Julie M. Glancey, in her official capacity as Member, Dean Knudson, in his official capacity as Member, Robert F. Spindell, Jr., in his official capacity as Member, in their official capacities as Members, and Tony Evers, in his official capacity as Governor,

*Respondents*.

# GOVERNOR TONY EVERS' OPPOSITION TO EMERGENCY PETITION FOR ORIGINAL ACTION


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## COUNTERSTATEMENT OF THE ISSUE

Should this Court depart from settled practice and initiate an original proceeding to adjudicate a sweeping set of under-developed, unproven allegations in support of belated challenges to longstanding practices under, and interpretations of, Wisconsin election law, all as part of an unprecedented, unsound, and unconstitutional effort to nullify the nearly 3.3 million votes Wisconsinites cast in the November 3, 2020 election?

## INTRODUCTION

Nearly 3.3 million Wisconsin voters cast ballots in the November 2020 election. Petitioners ask this Court to nullify every one of those votes and open the way for the Wisconsin Legislature unlawfully to appoint presidential electors of its own choosing. The extreme nature of such a request cannot be overstated. The Petition amounts to a brazen attack on democracy itself.

Offering up a mishmash of legal distortions, factual misrepresentations and a facially absurd supposed "expert" analysis by a partisan actor, Petitioners ask this Court to ignore all of those deficiencies and take away from the voters of this State the power to choose the electors for the next President. In so doing, Petitioners fail to note that their attacks on the presidential election, if somehow accepted, would also require overturning all the *other* election results from November 3, throwing the governance of the State into complete chaos. Yet in support of this unprecedented request, Petitioners muster nothing more than recycled and rejected theories without basis in fact or law. The Petition would be farcical if the consequences were not so serious.

The words of last week's decision from the Middle District of Pennsylvania ring equally true here:

> Plaintiffs ask this Court to disenfranchise almost seven million voters. This Court has been unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election.… One might expect

> that when seeking such a startling outcome, a plaintiff would come formidably armed with compelling legal arguments and factual proof of rampant corruption, such that this Court would have no option but to regrettably grant the proposed injunctive relief despite the impact it would have on such a large group of citizens.
>
> That has not happened. Instead, this Court has been presented with strained legal arguments without merit and speculative accusations…. In the United States of America, this cannot justify the disenfranchisement of a single voter.

*Trump v. Boockvar*, No. 4:20-cv-02078-MWB, Doc. 202, Mem. Op., at *2 (M.D. Pa. Nov. 21, 2020) (App. 102), *aff'd*, No. 20-3371, slip op. at *2 (3d Cir. Nov. 27, 2020) ("Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.") (App. 139).

This Court should deny the Petition for multiple independent reasons:

*First*, Petitioners lack standing to bring this suit, having failed to follow the legislatively prescribed procedures

for the claims they seek to adjudicate. Such claims can be brought by individual voters only through those prescribed mechanisms. Moreover, the recount statute—Wis. Stat. § 9.01—is the exclusive manner to attempt to overturn the results of an election, and Petitioners are not proper parties to the presidential recount, which is ongoing.

*Second*, the equitable doctrine of laches bars Petitioners' claims. Petitioners seek to challenge longstanding practices under, and interpretations of, Wisconsin election law. By waiting until after the votes had been cast and counted, Petitioners acted inequitably and deliberately caused prejudice that they could have easily avoided.

*Third*, this case plainly does not meet the criteria for this Court to exercise its original jurisdiction. Petitioners' claims are fact-intensive, making this a case that cries out for adjudication in the first instance before a trial court.

*Fourth*, even a preliminary review of Petitioners' claims makes clear that they utterly lack merit and are not worthy of this Court's further attention.

*Fifth and finally*, even if Petitioners' claims were properly presented, fully proven, and had legal merit—none of which is the case here—the remedy they seek is outrageous, unprecedented, and unlawful.

Each of these arguments individually is fatal to Petitioners' case. Taken together, they overwhelmingly demonstrate that this Court should deny the Petition.

## ARGUMENT

### I. THE PETITION IS NOT PROPERLY BEFORE THIS COURT.

In their zeal to get before this Court, Petitioners have cut corners and taken shortcuts. Petitioners sidestep Wisconsin's election statutes, which prescribe the exclusive

process by which voters can allege violations of election law. The lack of standing and failure to follow procedure are fatal to their Petition.

Petitioners should have filed complaints with the Wisconsin Elections Commission ("WEC"), or a district attorney. Such complaints are the exclusive means for individual voters to allege violations of election law. Having failed to file the requisite complaints, Petitioners cannot now avail themselves of a judicial forum.

More fundamentally, Petitioners lack standing for another, independent reason. The only avenue to redress the kind of allegations Petitioners make is the recount statute. But Petitioners lack standing under that statute because they are not candidates. Regardless, judicial review under the recount statute is not yet ripe.

### A. Petitioners Lack Standing to Bring this Claim Because They Failed to Follow Mandatory Procedures Prescribed by the Legislature.

The Legislature has prescribed how allegations of election-related misconduct must be filed, reviewed, and adjudicated. A voter who believes an "election official" (as defined in Wis. Stat. § 5.02(2f)) administered or conducted an election in violation of state law is required to first file "a written sworn complaint" with the WEC "promptly … after the complainant knew or should have known that a violation of law or abuse of discretion occurred or was proposed to occur." Wis. Stat. § 5.06(1), (3). Until such a complaint has been disposed of by the WEC, no voter "may commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official." Wis. Stat. § 5.06(2). A party aggrieved by the WEC's disposition may appeal to the circuit court. Wis. Stat. § 5.06(8).

Even if not every single one of the violations of Wisconsin law alleged by Petitioners were committed by an "election official," Petitioners still needed to file a complaint with the WEC. Wis. Stat. § 5.05(2m)(c)2.a. Such a complaint triggers the WEC's authority to investigate and prosecute alleged civil violations of state election laws. Wis. Stat. § 5.05(2m)(a). The Legislature gave the WEC "power to initiate civil actions" that redress the wrongs identified in such complaints, and it decreed that the WEC's civil enforcement power is "the exclusive remedy for alleged civil violations of" Wisconsin's election code. Wis. Stat. § 5.05(2m)(k).

Sections 5.05 and 5.06 make clear that voters cannot seek recourse in the courts in the first instance. But that does not mean Petitioners' only option is to complain to the WEC about the WEC's own actions. State law also authorizes a voter to file a verified petition with a district attorney,

"requesting that an action be commenced for injunctive relief, a writ of mandamus or prohibition or other such legal or equitable relief as may be appropriate to compel compliance with the law." Wis. Stat. § 5.08. If the district attorney does not act, the voter may file the same petition with the Attorney General. *Id.*

Petitioners' decision not to avail themselves of any one of these procedural options mandated by Wisconsin law dooms the Petition. When statutes provide a method for administrative review, that method is exclusive and must be pursued as a condition precedent to a court exercising jurisdiction over the matter. *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 224, 487 N.W.2d 639 (Ct. App. 1992). In *Kuechmann*, plaintiffs brought an original action for declaratory and injunctive relief, rather than waiting for and seeking review of a decision by the State Elections Board (a predecessor agency to the WEC) under Wis. Stat. § 5.06. *Id.*

at 222. The plaintiffs' failure to comply with Wis. Stat. § 5.06 "deprived the circuit court of jurisdiction." *Id*. at 224 ("When the legislature prescribes the method to review alleged deficiencies in election procedure, the legislature must deem that procedure to provide an adequate review.").

These principles preclude the Petition here. Petitioners allege that election officials throughout the state, including those at the WEC, administered or conducted the general election held on November 3, 2020, in violation of Wisconsin law. But Petitioners never filed a complaint with the WEC, Wis. Stat. §§ 5.05(2m)(c)2.a., 5.06(1), much less "promptly so as not to prejudice the rights of any other party," Wis. Stat. § 5.06(3). To the contrary, they have known about many of the allegations raised here for months, if not longer, and they seek relief only now, weeks after the election, in the form of disenfranchising nearly 3.3 million voters. Their failure to follow the procedural path prescribed by the Legislature

precludes this action and compels denial of their request for original jurisdiction. Wis. Stat. §§ 5.05(2m)(k), 5.06(2).

### B. The Recount Provides the Exclusive Remedy for Petitioners' Allegations—and Judicial Review of the Recount Is Not Yet Ripe.

Even if Petitioners had followed the mandatory procedure of raising their complaints with the WEC (or a district attorney), they still could not use that procedure to alter the results of the election. Claims challenging the results of an election based on alleged irregularities and defects in the voting process are exclusively determined through the recount statute. Wis. Stat. § 9.01(11). State law provides that the results of an election may be challenged via recount. *See* Wis. Stat. § 9.01. Just such a recount, requested by President Trump and Vice President Pence, is ongoing. Petitioners, however, lack standing to request a recount or to appeal the results. Voters, as opposed to candidates, may seek a recount

only of a referendum result. Wis. Stat. § 9.01(1)(a)1.[1] Following completion of the recount and the final canvass of results based upon the recount, any candidate "aggrieved by the recount may appeal to circuit court," and may subsequently appeal the circuit court's order to the court of appeals. Wis. Stat. § 9.01(6)(a), (9). Voters such as the Petitioners here have no standing under the recount statute.

The recount statute "constitutes the exclusive judicial remedy" for the gravamen of Petitioners' claim: "alleged irregularity, defect or mistake committed during the voting or canvassing process." Wis. Stat. § 9.01(11). This matter is cognizable only as part of the recount process itself.[2] Under

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[1] Not every candidate can request a recount. To qualify, a candidate must be an "aggrieved party." Where more than 4,000 votes are cast for the office, that means a candidate who trails the leading candidate by no more than 1 percent of the votes cast for that office. Wis. Stat. § 9.01(1)(a)1., 5.

[2] Petitioners may have independently reached this conclusion. In the cover letter transmitting their initial pleadings to this Court, the Re: line identifies the matter as *Donald Trump, et al. v. Wisconsin Elections*

the statute governing that process, the Petition (in addition to lacking standing) is also premature and unripe. It must be dismissed.

The evolution of Wis. Stat. § 9.01 across time underlines this point. Where it is now exclusive, it was once expressly inclusive. Until 1983, the recount statute provided that "[n]othing in this section shall be construed to abrogate any right or remedy that any candidate may now have affecting the trying of title to office." Wis. Stat. § 9.01(8) (1981-82). In 1983 Wisconsin Act 183, however, the Legislature repealed that provision and replaced it with the following exclusivity language: "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

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*Commission, et al.* But President Trump is not a party identified in the caption, perhaps because Petitioners' counsel recognized that he cannot bring suit outside of the recount process.

mistake committed during the voting or canvassing process." Wis. Stat. § 9.01(11).

The plain language of the statute is unambiguous. Courts "'assume that the legislature's intent is expressed in the statutory language'" and, therefore, begin statutory interpretation "with the language of the statute." *In re Elijah W.L.*, 2010 WI 55, ¶27, 325 Wis. 2d 584, 785 N.W.2d 369 (quoting *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶¶44-45, 271 Wis. 2d 633, 681 N.W.2d 110). "If the words chosen for the statute exhibit a plain, clear statutory meaning, without ambiguity, the statute is applied according to the plain meaning of the statutory terms." *Lang v. Lions Club of Cudahy Wis. Inc.*, 2020 WI 25, ¶21, 390 Wis. 2d 627, 939 N.W.2d 582 (internal quotation marks and citations omitted). "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *State v. Ozuna*, 2017 WI 64, ¶14, 376 Wis. 2d 1, 898

N.W.2d 20 (quoting *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967) (internal quotation marks omitted)). "[A]lthough a court may consider whether a particular interpretation of a statute would produce an absurd or unreasonable result, a court may not balance the policy concerns associated with the 'consequences of alternative interpretations.'" *Anderson v. Aul*, 2015 WI 19, ¶107, 361 Wis. 2d 63, 862 N.W.2d 304 (Zeigler, J., concurring).

That the exclusivity language is unambiguous and precludes the pursuit of other judicial remedies to test the right to an elective office has been confirmed by Wisconsin courts. In *State ex. rel. Shroble v. Prusener*, a candidate for office failed to timely request a recount, and ultimately challenged the results of the election by, in part, pursuing an action in *quo warranto* under Wis. Stat. § 784.04, which itself dates back to the very early years of the state. 185 Wis. 2d 102, 106-07, 517 N.W.2d 169 (1994).

This Court unanimously held that the cases Shroble relied upon in support of his argument that he could pursue an action in *quo warranto* were no longer valid authority because they were decided prior to enactment of 1983 Wisconsin Act 183 and were therefore reliant on the prior version of the statute explicitly stating that "[n]othing in this section shall be construed to abrogate any right or remedy that any candidate may now have affecting the trying of title to office." *Id*. at 111 (citing Wis. Stat. § 9.01(8) (1981-82)). This Court held that, as amended, "the recount statute plainly and unambiguously provides the exclusive remedy for challenging the results of an election based on mistakes in the canvassing process," because the "statute on its face is capable of no other interpretation." *Id*. at 107, 110. Although not necessary to its conclusion, this Court explained that interpretation was also supported by evidence of legislative intent. *Id*. at 111-12.

The Court of Appeals subsequently upheld this conclusion regarding exclusivity: "[i]n Wisconsin, relief for the losing candidate is confined to the recount statute," which "is the exclusive remedy for *any claimed election fraud or irregularity*." *Carlson v. Oconto Cty. Bd. of Canvassers*, 2001 WI App 20, ¶7, 623 N.W.2d 195 (emphasis added).[3]

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[3] When both of these cases were decided, state law permitted any candidate to request a recount. The Legislature has since narrowed the availability of a recount. Pursuant to 2017 Wisconsin Act 120, only a candidate who qualifies as an "aggrieved party" may request a recount. The result—precluding a candidate who does not qualify as "aggrieved" from challenging the results of an election—fits within the Legislature's "'constitutional power to say how, when and where' elections shall be conducted." *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶24, 357 Wis. 2d 360, 851 N.W.2d 302 (quoting *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949)). Moreover, where a legislative act has been construed by courts, the Legislature is presumed to know that, absent statutory amendment, the judicial construction will remain unchanged. *Reiter v. Dyken*, 95 Wis. 2d 461, 470-71, 290 N.W.2d 510 (1980) (internal citations omitted). Likewise, the Legislature is presumed to know the law when it writes statutes. *See Mack v. Joint Sch. Dist. No. 3, Vill. of Hales Corners, Cities of Greenfield & Franklin, Milwaukee Cty*., 92 Wis. 2d 476, 489, 285 N.W.2d 604 (1979). Therefore, it is presumed that, in enacting this limitation, the Legislature recognized it was narrowing opportunities to challenge election results. In fact, that appears to be the very purpose of the limitation.

Thus, the plain text of the law, statutory history, legislative intent, and judicial interpretations uniformly show that the recount process is the exclusive remedy for seeking judicial review of alleged voting or canvassing irregularities, defects, or mistakes. It follows that, even if Petitioners had standing to bring this claim—which they do not—the claim would be premature. An appeal to the circuit court may follow the recount. Wis. Stat. § 9.01(6). But because the recount is still pending at the county level, there is nothing to appeal, and Petitioners would not be the ones to appeal in any event.

## II. THE EQUITABLE DOCTRINE OF LACHES BARS RELIEF HERE.

Laches is an affirmative, equitable defense that bars relief when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim. *Wis. Small Businesses United, Inc. v. Brennan*, 2020

WI 69, ¶11, 393 Wis. 2d 308, 946 N.W.2d 101 (citations omitted). "A party who delays in making a claim may lose his or her right to assert that claim based on the equitable doctrine of laches." *Dickau v. Dickau*, 2012 WI App 111, ¶9, 344 Wis. 2d 308, 824 N.W.2d 142 (citing *Zizzo v. Lakeside Steel & Mfg. Co.*, 2008 WI App 69, ¶7, 312 Wis. 2d 463, 752 N.W.2d 889). "Laches is founded on the notion that equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587, *cert. denied sub nom. Wis. ex rel. Wren v. Richardson*, 207 L. Ed. 2d 161 (U.S. June 1, 2020) (internal quotation marks and citations omitted).

In Wisconsin, laches has three elements: (1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay. *Wis.*

*Small Businesses United*, 2020 WI 69, ¶12. As an equitable doctrine, "laches can and regularly does apply before a statute of limitation has expired." *Id*., ¶16. Laches is especially relevant in election-related matters, where the failure to resolve disputes as to the mechanics of the election well in advance could imperil the fundamental right to vote and extreme diligence and promptness are thus required. *See, e.g.*, *Clark v. Reddick*, 791 N.W.2d 292, 294-96 (Minn. 2010) (declining on basis of laches to hear a challenge to a ballot when petitioner delayed filing petition until 15 days before absentee ballots were to be made available to voters); *Knox v. Milw. Cty. Bd. of Election Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984) (laches warranted denial of preliminary injunction to restrain Wisconsin county elections where complaint filed seven weeks before election). *See also Democratic Nat'l Committee v. Wis. State Legislature*, No. 20A66, 2020 WL 627871, at *4 (U.S. Oct. 26, 2020)

(Kavanaugh, J., concurring in denial of application to vacate stay) ("The principle [of judicial restraint] also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process.").

Indeed, within the past several days, a federal court in Georgia rejected similar challenges to the presidential election results in that state on laches grounds. *Wood v. Raffensperger*, No. 1:2020-cv-04651-SDG, 2020 WL 6817513 (N.D. Ga. Nov. 20, 2020). In doing so, the court stressed that laches principles are particularly salient in post-election cases because of the potential impact on the rights of voters and on public confidence in the electoral process:

> Underscoring the exceptional nature of his requested relief, Wood's claims go much further; rather than challenging election rules on the eve of an election, he wants the rules for the already concluded election declared unconstitutional and over one million absentee ballots called into question. Beyond merely causing confusion, Wood's requested relief would disenfranchise a substantial portion of the electorate and erode public confidence in the electoral process.

*Id.* at *8. The same is true here.

### A. Petitioners Have Unreasonably Delayed in Seeking to Adjudicate Their Claims.

Petitioners have not acted with the requisite diligence and promptness. Their laundry list of claims became ripe for litigation well before the November 3, 2020, election. And yet Petitioners sat on their hands until in several cases *many months* later, doing nothing as Respondents worked diligently to carry out the election in the exceptional context of the ongoing COVID-19 pandemic, and instead waiting to assert their claims until more than three million Wisconsinites' votes had already been cast and counted.

To begin, there can be no doubt that Petitioners were previously aware of their claims involving "Zuckerberg's non-profit paying millions of dollars to the Cities of Milwaukee, Madison, Racine, Kenosha and Green Bay to administer the November 3 Presidential Election." (Pet. ¶72;

*see generally id.* ¶¶49-72.) In fact, rather than pursuing these claims in state court earlier, Petitioner Wisconsin Voters Alliance and six of its members previously brought a nearly identical suit in federal court in the Eastern Division of Wisconsin challenging this same program, resulting in Judge Griesbach denying a motion for preliminary relief. *See Wis. Voters All. v. City of Racine*, No. 20-CV-1487-WCG, 2020 WL 6129510, at *2 (E.D. Wis. Oct. 14, 2020). The United States Court of Appeals for the Seventh Circuit then refused to intervene, as did Justice Kavanaugh in his capacity as Circuit Justice. *See* Order, *Wis. Voters All. v. City of Racine*, No. 20-CV-1487-WCG, *appealed as* No. 20-3002, (7th Cir. Oct. 23, 2020) (denying motion for injunctive relief pending appeal), ECF No. 38; *see also* Search Results, *Wis. Voters Alliance v. City of Racine, Wis.*, Supreme Court of the United States, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a75.html (last visited on Nov.

25, 2020) ("Application (20A75) denied by Justice Kavanaugh.").

Similar lawsuits were brought in seven other states, and all resulted in orders denying the requested relief. *See Ga. Voter All. v. Fulton Cty.*, No. 1:20-CV-4198-LMM, 2020 WL 6589655, at *5 (N.D. Ga. Oct. 28, 2020) (denying TRO); *S.C. Voter's All. v. Charleston Cty.*, No. 20-CV-03710 (D.S.C. Oct. 26, 2020), ECF No. 5 (denying TRO) (App. 159); *Pa. Voters All. v. Ctr. Cty.*, No. 4:20-CV-01761, 2020 WL 6158309, at *7 (M.D. Pa. Oct. 21, 2020) (dismissing complaint and denying TRO); *Tex. Voters All. v. Dallas Cty.*, No. 4:20-CV-00775, 2020 WL 6146248, at *21 (E.D. Tex. Oct. 20, 2020) (denying TRO); *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559, at *5 (N.D. Iowa Oct. 20, 2020) (denying TRO); *Election Integrity Fund v. City of Lansing & City Of Flint*, No. 1:20-CV-950, 2020 WL 6605987, at *3 (W.D. Mich. Oct. 19, 2020) (denying

preliminary injunction); *Minn. Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937, at *9 (D. Minn. Oct. 16, 2020) (denying TRO).

In every instance, the plaintiffs demonstrated their ability to bring this type of challenge prior to the November 3, 2020 election, and yet, even at that point in time, courts found them to have improperly delayed. For example, in *Texas Voters Alliance v. Dallas County*, the Court found:

> Plaintiffs filed at least six near-identical lawsuits around the country challenging CTCL grants. Plaintiffs did not sue the Counties at the same time, however. Despite the Counties publicly accepting the grants in September, Plaintiffs did not sue until Friday, October 9th—the last business day before early voting began in Texas. This delay was unreasonable. It was foreseeable that Counties would immediately spend these funds in early voting efforts. By the time Plaintiffs sued, Counties already spent or irrevocably committed most of the grant funds. Although Plaintiffs' delay was objectively brief, it potentially had a prejudicial effect on the Counties given the urgency of the ongoing election.

2020 WL 6146248, at *20 (E.D. Tex. Oct. 20, 2020) (internal citation omitted).

In sum, Petitioners plainly could have brought the bulk of their allegations prior to the November 3, 2020 election. Indeed, they did so before Judge Griesbach, as explained above. There is no justification for their belated effort to obtain another bite at the same apple.

Petitioners' other allegations fare no better:

(1) *Claims Involving Dane County*: Petitioners complain that a March 31, 2020 order of this Court did not require the Dane County Clerk to determine which electors had applied for certain indefinite status and to remove them from the list of indefinitely confined voters. (Pet. ¶73.) Plaintiffs offer no explanation for why they waited nearly eight months to correct this perceived shortcoming, especially as litigation in this Court continued on that matter and other interested parties intervened. *See Jefferson v. Dane Cty.*, No. 2020AP557-OA (oral argument held Sept. 29, 2020).

(2) *Allegations Involving WEC Directives*: Petitioners complain about directives from the WEC issued in October 2016[4] and May 2020. (Pet. ¶¶79-83, 87-89.) Again, they offer no explanation for why they waited more than six months in one instance and more than four years in the other to challenge these directives, yet now seek to disenfranchise tens of thousands of citizens who cast their votes in reliance on those directives.

(3) *Allegations Involving Milwaukee Election Commission Instructions*: Petitioners complain about instructions that by their own admission were made "[p]rior to the November 3, 2020, presidential election." (Pet. ¶91.) While Petitioners' language may lead one to believe that these instructions came out on the eve of the election, the YouTube link they cite in their Petition makes clear that the

[4] The WEC called attention to this guidance for the November 3 general election in a memorandum issued on October 19, 2020.

video was posted on April 1, 2020—nearly eight months before Petitioners brought suit. *Id*. Once again, they offer no basis for delaying until weeks after the election to raise their complaint.

(4) Allegations involving residency requirements and laws against "double voting": These allegations are so under-developed that it is difficult to ascertain what Petitioners are complaining about. (Pet. ¶¶105-07.) To the extent that the residency allegations are related to litigation over which election officials bear responsibility for removing voters from the rolls when they move, here, too, this is ongoing litigation in which Petitioners could have, but did not, seek to participate in the past year. *See State of Wis. ex rel. Zignego v. Wis. Elections Comm'n*, Nos. 2019AP2397 & 2020AP112 (oral argument held Sept. 29, 2020). Petitioners' complaint that election officials failed to utilize "information

to prevent double voting" lacks sufficient detail to be understood or responded to. (Pet. ¶¶108-10.)

In sum, Petitioners dragged their feet, even as they knew the state was dutifully working to administer the election in accordance with the procedures and guidance Petitioners now belatedly seek to undo.

Petitioners' delay in bringing this matter before this court is unexplained, inexplicable, and inexcusable. Their delay is unreasonable in light of the extreme diligence and promptness of action required in matters related to ballot printing. *See, e.g.*, *Clark*, 791 N.W.2d at 294-96; *Knox*, 581 F. Supp. at 402; *cf. Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam). Even worse, having waited to see whether their preferred candidate won or lost, Petitioners now seek to turn their own dilatory conduct to their advantage. They argue that the fact that the state's choices cannot be undone justifies the

outrageous and unprecedented result of nullifying Wisconsin's entire election, thus depriving millions of Wisconsin voters of their fundamental and constitutionally protected right to vote. But the absence of opportunity to undo the perceived wrongs is entirely a result of Petitioners' own decisions. They should not be allowed to profit from a purported emergency of their own making.

### B. Respondents Did Not Know Petitioners Would Raise This Claim.

Respondents did not know before Petitioners belatedly commenced this action that Petitioners would seek this relief. Indeed, given that one of these Petitioners (the first named on the caption to the suit) had already raised, and lost, on the bulk of these issues, Respondents assumed these disputes had been put to bed.

While many people speculated that litigants such as Petitioners might bring frivolous suits, the possibility of a

claim is not the same as knowledge of an impending suit. *See Wis. Small Businesses United*, 2020 WI 69, ¶18. Neither the WEC nor the Governor had any warning of the extraordinary request now presented to this Court. In that respect, this case differs from *Watkins v. Milwaukee County Civil Service Commission*, 88 Wis. 2d 411, 423, 276 N.W.2d 775 (1979), where laches did not apply because "[t]he petitioner informed the Commission at the time he rescinded his resignation that litigation would be commenced if a hearing were not granted." Here, the absence of notice that litigation was imminent satisfies the second element of laches.

### C. Petitioners' Unreasonable Delay Is Prejudicial.

Permitting this Petition to go forward despite Petitioners' inexcusable delay would cause unprecedented prejudice not just to Respondents, but to all of the nearly 3.3 million Wisconsinites who voted in the election.

Wisconsin officials administered this election, and Wisconsin voters participated in this election, in reliance on the propriety of the pre-election policies and court decisions only now challenged by Petitioners. Had Petitioners raised and diligently pursued challenges to these policies and court decisions before the election, as they should have, then any required changes to election procedures could have been implemented in response to any court rulings before the election—before, that is, the voters of Wisconsin participated in the election in reliance on these very policies and court decisions.

Now, however, Petitioners seek to benefit from the fact that they delayed these challenges until after the election took place, by arguing that the only remedy available at this late date is to declare the "results" of the election "null," in the process invalidating the votes of every one of Wisconsin's nearly 3.3 million voters. Make no mistake: the unavoidable

"logic" of Petitioners' arguments would require this Court to nullify *all* of the votes for *all* of the offices contested in the November general election, not just the presidential race; the result would be massive chaos, with no members of the Wisconsin Assembly, no quorum in the Wisconsin Senate, and a plethora of local offices—including but not limited to county clerks, district attorneys, and more—left vacant when the individuals who voters selected have their election victories wiped off the board.

The right to vote is the foundational right of our democracy. Petitioners chose to lie in the weeds for months nursing unasserted grievances with WEC, county, and municipal policies, and even a decision of this Court, only to spring out *after* the election and invoke those grievances in an effort to nullify the exercise of the right to vote by every single Wisconsinite who cast a ballot. That scheme is exceptionally prejudicial to Respondents, to all Wisconsin

voters, and to the foundations of democratic governance. Nothing could be more damaging to the exercise of a critical constitutional right than retroactively nullifying that right entirely.

Courts routinely decline to change the rules of elections in the days and weeks leading up to an election, because of the significant prejudice caused by last-minute changes, which can result in voter confusion and depressed turnout. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). A court decision to *retroactively* change the rules *after* the election, and to invalidate millions of votes in the process, is even more unacceptable.

Federal appellate courts have repeatedly held that voters should not have their votes nullified for having followed guidance, policies, and court decisions in effect when they cast their ballot. *See, e.g.*, *Griffin v. Burns*, 570 F.2d 1065, 1074-75 (1st Cir. 1978); *Ne. Ohio Coal. for the*

*Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012). These courts have relied both on fundamental notions of fairness, and on federal constitutional due process protections. And this very election cycle, the U.S. Supreme Court followed suit in *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020). In that case, the Supreme Court stayed a district court's order, in effect reinstating a briefly enjoined state-law witness requirement for absentee ballots. *See id.* But, in doing so, the Supreme Court expressly stated that any votes cast while the district court's order had been in effect "may not be rejected for failing to comply with the witness requirement." *Id.* The Court recognized the need to validate voters' reliance on the rules in place at the time they voted.

Nullifying every vote cast in the November general election based on Petitioners' inexcusably belated challenges to policies and court decisions in place well before the election would violate due process just as surely as the

decisions struck down in *Grif* and *Husted*, and would run afoul of the U.S. Supreme Court's decision in *Andino*. Violating both the voting and due process rights of millions of Wisconsinites would be hugely, unfairly, and indisputably prejudicial.[5]

## III. THE PURPORTED FACTUAL ISSUES PRESENTED BY PETITIONERS ARE INAPPROPRIATE FOR RESOLUTION IN AN ORIGINAL ACTION.

"The circuit court is much better equipped for the trial and disposition of questions of fact than is this court and such cases should be first presented to that court." *In re Exercise of Original Jurisdiction*, 201 Wis. 123, 128, 229 N.W. 643 (1930) (per curiam); *see also State ex rel. Atty. Gen. v. John*

[5] At a time when consistent leadership is most needed, overturning the election results for every single office on the ballot for the November 3 general election would also significantly prejudice the Governor, who is trying to guide the state through the COVID-19 pandemic as well as a number of other challenges, and the WEC, which would be expected to, at a minimum, assist municipalities in managing an unprecedented number of vacancies in elective offices statewide, including several County Clerks, as Wisconsin prepares for nonpartisan primaries in February and nonpartisan spring elections in April.

*F. Jelke Co.*, 230 Wis. 497, 503, 284 N.W. 494 (1939) (quoting *Pet. of Heil*, 230 Wis. 428, 448, 284 N.W. 42 (1939)) ("'Because it is the principal function of the circuit court to try cases and of this court to review cases which have been tried, due regard should be had to these fundamental considerations. Inasmuch as under the principles established the circuit court has jurisdiction to proceed, the excluding jurisdiction of this court will not be exercised in doubtful cases.'" (citations omitted)). As this Court has previously noted in declining to exercise original jurisdiction, it is "obviously not a trial court." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶20, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam).

Petitioners themselves identify this case as one that turns on whether they have adduced "sufficient evidence" that, under application of their scattershot legal theories, "the election should be declared void." (Pet. ¶8.) Assuming

*arguendo* that some quantum of evidence could justify such a drastic, unprecedented, and anti-democratic remedy, this case will turn on the extent, credibility, and persuasive value of Petitioners' evidence. A case of that character differs in kind from one presenting a pure question of law, and falls outside the scope of this Court's historical exercise of original jurisdiction. *See, e.g.*, *In re Exercise of Original Jurisdiction*, 201 Wis. 123, 128, 229 N.W. 643 (1930) (per curiam) ("This court will with the greatest reluctance grant leave for the exercise of its original jurisdiction … where questions of fact are involved."); *see also* S. Ct. Internal Operating Procedures § III(B)(3).

### A. Petitioners' Claims Are Fact-Bound and Would Require Both Discovery and an Adversarial Evidentiary Hearing.

The case Petitioners seek to bring is intensely factual, and thus—even wrongly assuming it survives on its misguided and undemocratic legal theories—it would require

discovery and contested evidentiary proceedings to determine the relevant facts.

Indeed, many of the factual assertions in the Petition are flatly incorrect. To give just a few examples: there is no Dane County Elections Commission, notwithstanding the assertion in Paragraph 18; Dane County elections administration is actually run by the Clerk. The City of Milwaukee is not the only municipality that uses a central-count facility for absentee ballots, as suggested in Paragraph 47; more than three dozen other municipalities also count under the procedures set out in Wis. Stat. § 7.52. Governor Tony Evers never ordered Wisconsin's April election be conducted exclusively by absentee ballot, as alleged in Paragraph 60; the Governor instead sought to extend the April election to ensure all registered voters had the opportunity to cast ballots—in person or absentee—safely in light of the

COVID-19 pandemic. And on and on; this is far from an exhaustive list of the factual misstatements in the Petition.

Additionally, much of the purported evidence that Petitioners cite is itself inadmissible. Newspaper articles offered for the truth of the matter asserted (*see, e.g.*, Pet'rs Exhs. 5, 8, cited in Pet. ¶¶49, 61, respectively) are inadmissible hearsay. *See* Wis. Stat. § 908.02. Declarations that are not signed and notarized (*see* Pet'rs Exh. 14, cited in Pet. ¶70) are not admissible under Wisconsin law. *Nelson v. State*, 35 Wis. 2d 797, 812, 151 N.W.2d 694 (1967) (quoting *Sullivan v. Collins*, 107 Wis. 291, 298-99, 83 N.W. 310 (1900)) (an unsworn statement "'is not evidence'" and it "'has no proper place in [a] trial.'"). And even properly sworn affidavits are not dispositive and their contents are subject to testing through cross-examination. That is especially so when the contents of multiple affidavits are identical boilerplate assertions (*compare* Pet'rs Exhs. 17A-I) and they are cited in

support of factual assertions that are actually contrary to the content of the affidavits (*see* Pet. ¶¶81-83).

The clearest illustration of this matter's unsuitability for original jurisdiction is found in Petitioners' reliance on expert testimony. In conjunction with their Petition (on Tuesday, November 24), they provided an expert report from Mr. Matthew Braynard. Just before the close of business the following day (November 25), Petitioners provided an additional expert report, from Dr. Qianying (Jennie) Zhang.

Under Wisconsin law, opinion testimony that "will assist the trier of fact" is admissible from a qualified expert "if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1). This adoption of the federal *Daubert* standard requires the circuit court to perform a gatekeeper function, evaluating the

proffered expert's methodology. *In re Commitment of Jones*, 2018 WI 44, ¶31, 381 Wis. 2d. 284, 911 N.W.2d 97; *State v. Giese*, 2014 WI App 92, ¶18, 356 Wis. 2d. 796, 854 N.W.2d 687.

As this Court has stated, the *Daubert* gatekeeping function involves a highly fact-specific inquiry that requires a court to make "five determinations before admitting expert testimony." *In re Commitment of Jones,* 2018 WI 44, ¶29. The purpose of this analysis is to determine whether any proffered expert evidence is of sufficient quality and reliability to go to the factfinder, whose role is to weigh the evidence to ascertain the truth. *Id*. ¶¶31-32. Whether to admit expert evidence is a discretionary decision subject to appellate review. *Id*. ¶27. Were this Court to exercise original jurisdiction, it would need to serve as both the gatekeeper, determining which proffered expert opinions were methodologically sound, and the factfinder, weighing

competing expert analyses to choose which one better fits the facts and illuminates the legal questions at issue.

This Court, however, has concluded that "[t]he Supreme Court is not a fact-finding tribunal," and for that reason "generally will not exercise its original jurisdiction in matters involving contested issues of fact." Wis. S. Ct., Internal Operating Procedures § III.B.3. *Accord, e.g., Green for Wis. v. State Elections Bd.*, 2006 WI 120, 297 Wis. 2d 300, 302, 723 N.W.2d 418. Indeed, only "with the greatest reluctance" will this Court "grant leave for the exercise of its original jurisdiction ... where questions of fact are involved." *In re Exercise of Original Jurisdiction*, 201 Wis. at 128.

### B. This Petition Relies Upon Expert Opinions, and It Cannot Be Adjudicated Without Evaluating the Admissibility of those Expert Opinions and Testing Them through the Adversarial Process.

Were the Court to exercise its original jurisdiction here, before the gatekeeping analysis could begin,

Respondents would need the opportunity to test the methods and data used by Petitioners' experts through discovery and to offer their own responsive expert reports. Petitioners would then likely want discovery of Respondents' experts. Then the *Daubert* question would have to be briefed and decided. All of these steps would have to precede consideration of the Petition's merits. Even at this preliminary stage, there is ample reason to doubt whether Petitioners' expert testimony is sufficiently reliable to be admissible.

**1. Matthew Braynard is not qualified to offer the expert opinions in his report.**

Petitioners describe Braynard's report as presenting a "statistical expert opinion" from a "governmental data expert." (Pet. ¶¶115-26; Mem. at 3.) Based on their characterization of Braynard's opinions, Petitioners claim that *every* vote should be declared "nullified."

But Braynard is not a qualified expert. He is a partisan political consultant who served as the Director of the "Data Division" for President Trump's 2016 campaign. (Pet'rs Exh. 1.) He has an undergraduate business degree and a masters of fine arts, and he has worked on various Republican campaigns. He is not a statistician, mathematician or data analyst; he does not have any apparent training or expertise in survey-based research; he does not purport to have any expertise in linking and analyzing complex databases; he does not have any peer-reviewed publications relating to election data or data analysis; and he apparently has never been qualified to serve as an expert witness in any matter in any court. (Braynard Rep. & Pet'rs Exh. 1.) According to a recent article in the *Washington Post* (and his own postings on Twitter), Braynard and a team of contractors he has retained using crowd-sourced funds, are currently engaged in an effort to "hunt for fraud" in the 2020 election. *See* Jon Swaine &

Lisa Raine, "The federal government's chief information security officer is helping an outside effort to hunt for alleged voter fraud," *Washington Post* (Nov. 15, 2020)[6]; *see also* http://twitter.com/MattBraynard.

**2. Braynard fails to explain and to demonstrate the credibility of his methods.**

Braynard does not provide even a cursory explanation of his methodology for ensuring that names in the various data sets he used were matched accurately, selecting samples of voters to ensure respondents are representative of the relevant population, conducting voter surveys in a manner that avoids biasing the results, or estimating the portion of all "indefinitely confined" voters who were purportedly ineligible to vote. Nor does he make any effort to show that his methodologies comport with generally accepted practices

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[6] Available at https://www.washingtonpost.com/politics/trump-voter-integrity-fund/2020/11/15/89986f1c-25fe-11eb-952e-0c475972cfc0_story.html.

among experts in the relevant fields of statistics, mathematics, and election data analysis. Braynard nonetheless opines that 45.23% of the 213,215 voters statewide who characterized themselves as "indefinitely confined" were not eligible for that status, and that 96,437 votes in the state were thus improperly cast. (Braynard Rep. at 10.)

Braynard's opinion, and thus Petitioners' position, is based entirely on observations his twelve individual staff members made of social-media postings from a small subset of "indefinitely confined" absentee voters. (*Id.* at 10.) Based on those staff observations, Braynard opines (and thus Petitioners assert, subject to the requirements of Wis. Stat. § 802.05) that some subset of such voters were not qualified to avail themselves of Wis. Stat. § 6.86(2)(a)—because, for instance, a staff member observed that the voter posted online, during the period around the election, an image of themselves "riding a bike." (Braynard Rep. at 10.)

Based on this wholly subjective (and entirely speculative) assessment of whether voters were in fact "indefinitely confined," Braynard then opines that 45.23% of Wisconsin citizens who cast their votes as such "were not indefinitely confined on Election Day." (*Id.*) He somehow reached that conclusion even though *his own staff* identified only 38 of 429 (8.86% of the voters) in their sample as "not indefinitely confined" based upon his staff's review of social media. Petitioners absurdly assume that all absentee voters for whom their so-called expert's staff were unable to readily identify a social media post confirming their confinement status during the period around the election were not properly designated as "indefinitely confined." (Pet'rs Exh. 3). And, on top of that, Petitioners implicitly assume (without so stating) that such absentee voters would have been pro-Biden rather than pro-Trump in amounts disproportionate to the

election results. Such assumptions, unsupported by evidence, are no basis for overturning the results of an election.[7]

Petitioners fare no better with respect to other categories of voters whose votes they, through Braynard, seek to disqualify. For instance, Braynard points to 96,771 voters for whom he asserts the State recorded absentee ballot requests as "unreturned." (Braynard Rep. at 4-5.)[8] The Petition asserts that Braynard's analysis confirms that 26,497

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[7] To be sure, *all* absentee voters who designated themselves as "indefinitely confined" did so in reliance on the laws implemented by the State. Petitioners offer no basis for depriving any of these voters of their right to vote in the presidential election. Indeed, there is litigation pending in this Court on the proper interpretation of Wis. Stat. § 6.86(2)(a), *see Jefferson v. Dane Cty.*, No. 2020AP557-OA (argued Sept. 29, 2020), but no party sought, and this Court did not see fit to issue, an order casting doubt on the rights of those who have previously, or recently, self-certified as indefinitely confined.

[8] Braynard claims this 96,771 ballot figure was derived from a report he obtained from a firm called "L2 Political." (Braynard Rep. at 5-6.) Braynard does not provide the report itself, the date of the report, the underlying data from the State that supposedly served as the basis for the report, or any other information that would allow for validation of his double-hearsay account of what this data purportedly shows. Accordingly, there is no basis for relying on the 96,771 ballot figure that serves as the basis for his calculations.

of such votes—enough, potentially, to overturn the State's 20,608 margin—were either Republican votes that went uncounted or requested ballots that were cast in the name of a Republican by someone else. (Pet. ¶¶117-18.) But, contrary to the Petition, Braynard's report says *nothing about voters' party affiliations.* (Braynard Rep. at 4-5.) This is unsurprising because Wisconsinites do not designate a party affiliation in conjunction with their voter registration.

And while Braynard indicates that he "had [his] staff make phone calls to a sample of this universe" of unreturned absentee ballots and record answers from respondents who indicated whether they had requested and returned absentee ballots, he provides no explanation of how the sample was selected or what, if anything, he did to ensure it was representative. Nor does Braynard describe what, if any, methodologies were used to ensure the responses were unbiased and error-free by, for instance, using a reliable

process for accurately matching names from multiple data sets and thereby ensuring calls were made to the correct individuals (rather than others with similar or identical names) and guarding against the possibility that survey respondents were not truthful in their post-election descriptions of their pre-election conduct. In short, Braynard's report provides no basis for inferring anything at all, let alone for casting aside the results of the recent presidential election.

### 3. The belated report of Dr. Qianying (Jennie) Zhang does not cure the Braynard report's shortcomings.

Petitioners belatedly supplemented their Petition with an expert report by Dr. Qianying (Jennie) Zhang, an assistant professor of finance at Hillsdale College whose focus is "asset pricing and applied time-series econometrics." (Zhang Rep. at 3.) Zhang addresses only Braynard's conclusions based on his survey of a subset of the 96,771 voters identified

as having unreturned ballots, and specifically the statistical extrapolation from the 2,111 answers to the Braynard team's telephone survey. Like Braynard (but unlike the Petition), Zhang says nothing about these voters' party affiliations.

The critical point for present purposes is Zhang's statement that her "opinions are predicated on the assumption that the responders to these calls are a representative sample of the population in the State who requested an absentee ballot and responded accurately to the questions during the calls." (Zhang Rep. at 4.) As explained above, that assumption is not well-founded. Zhang's report thus does nothing to address that or the other fundamental shortcomings of Braynard's report—namely his lack of the professional or academic expertise needed to conduct a reliable survey and the complete absence of any methodology for ensuring his sample was representative and that the responses his team solicited were accurate.

### 4. The opinions of Petitioners' proffered experts cannot be considered without being tested through adversarial process.

The heart of Petitioners' expert reports—what is left when the methodologically unsubstantiated analysis is pared away—is merely a restatement of the Petition's objections to specific election rules and practices. Even if Petitioners' proffered expert reports did raise valid questions about some votes counted in Wisconsin (which they do not), such questions cannot be resolved without a full adversarial process that is incompatible with this Court's original jurisdiction. Evaluating such questions would require discovery, including depositions of Braynard and Zhang, opinions from and a deposition of one or more opposing experts, and a contested evidentiary hearing. Such processes are necessary to inform the *Daubert* gatekeeping analysis, and, even if they were not, "*Daubert*'s reliability inquiry 'is not intended to supplant the adversarial process.'" *Bayer ex*

*rel. Petrucelli v. Dobbins*, 2016 WI App 65, ¶30, 371 Wis. 2d 428, 885 N.W.2d 173 (quoting *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887, 894 (7th Cir. 2011)). Discovery, a *Daubert* hearing, and a full adversarial presentation of competing evidence will take time and require a degree of judicial supervision that is incongruent with this Court's procedures for original actions.

## IV. PETITIONERS' CLAIMS ARE NOT SUPPORTED BY LAW.

This Court should, furthermore, deny the Petition because its claims are glaringly deficient as a matter of law. Without attempting to catalogue all of the legal deficiencies that Respondents would raise if the Court were to proceed with this original action, Governor Evers offers several principal examples to make clear why the Court should not even consider exercising original jurisdiction.

Petitioners' claims that Respondents violated state law fall into four buckets:

- attempts to relitigate failed challenges to grants by the Center for Tech and Civic Life ("CTCL");
- contradicted allegations that voters improperly cast ballots as "indefinitely confined" absentee voters;
- stale challenges to years-old WEC guidance on absentee ballot envelope markings; and
- vague assertions that Wisconsin election officials "violated Wisconsin law" that cite to no actual "law" any Wisconsin officials may have violated.

None can withstand even cursory, initial scrutiny.

Petitioners also claim that Wisconsin's November 2020 election violated the Electors Clause of Article II of the U.S. Constitution and several clauses of the Fourteenth Amendment. Here, too, their allegations are underdeveloped and unavailing.

### A. Eight Jurisdictions, Including Wisconsin, Have Already Denied Petitioners' Challenges to the CTCL grants.

In their effort to retroactively nullify the votes of almost 3.3 million Wisconsin voters, Petitioners attack a nonpartisan grant program aimed at facilitating safe and efficient voting during the pandemic. Courts in eight states—including Wisconsin—already rejected these theories prior to the November 3 election. Indeed, the lead Petitioner here—Wisconsin Voters Alliance—has already litigated this same claim and lost. *See Wis. Voters All.*, 2020 WL 6129510, at *2 (denying TRO). As Judge Griesbach found in the order denying the Wisconsin Voters Alliance's request to enjoin Wisconsin cities from accepting CTCL grants, Wisconsin law does not prohibit cities from accepting nonpartisan private funds to facilitate voting access. Order, *Wis. Voters All.*, 2020 WL 6129510, at *2–3. Order, *Wis. Voters All.*, 2020 WL 6129510, at *2–3. Judge Griesbach also confirmed—as did

the seven other courts that heard similar cases around the country—that no federal law, including the Elections Clause, prohibits CTCL grants. *See* cases cited on pages 24-25, *supra*. As noted in Section II above, the Wisconsin Voters Alliance unsuccessfully sought emergency relief from Judge Griesbach's order, first in the Seventh Circuit and then the U.S. Supreme Court.

Nothing in the Petition suggests that Judge Griesbach erred in concluding that Wisconsin law allows cities and counties to obtain revenue from sources other than taxes, bonding, fines, fees, or state grants. Laws that simply *allow* cities and counties to levy taxes do not, of course, prohibit other revenue sources. *See, e.g.*, Wis. Stat. §§ 59.51, 65.07; *id.* ch. 70. And no other statute cited by Petitioners precludes cities from receiving CTCL grants either. *See* Wis. Stat. §§ 5.05(10) (allowing the WEC to seek federal funds), 5.05(11) ("[T]he commission *may* provide financial

assistance to eligible counties and municipalities for election administration costs." (emphasis added)).

Similarly, Petitioners' naked assertions that the CTCL grants "disparately impact" rural voters have no basis in reality. As Petitioners already well know, CTCL funding did not go only "to Wisconsin's largest cities." (Pet. ¶¶64, 112.) To the contrary, as Judge Griesbach explicitly stated, "in addition to the five cities that are named as defendants, more than 100 other Wisconsin municipalities have been awarded grants from CTCL." *Wis. Voters All.*, 2020 WL 6129510, at *2. The CTCL website confirms that 216 Wisconsin municipalities and townships have been awarded CTCL grants. Center for Tech and Civic Life, "CTCL Program Awards Over 2,500 COVID-19 Response Grants" (Oct. 29, 2020).[9]

[9] Available at https://www.techandciviclife.org/grant-awards/.

The CTCL's goal of increasing voting access during the global pandemic does not conflict with any Wisconsin laws. *See, e.g.*, Wis. Const. art. III (recognizing right to vote as a fundamental right). For example, nothing in Wisconsin law prohibits clerks from accepting absentee ballots in "mobile" drop off locations, which Petitioner irrelevantly and falsely states are not "secured … to the sidewalk." (Pet. ¶69.) *See* Chris Rickert, "Madison installs 14 absentee ballot drop boxes," *Wisconsin State Journal* (Oct. 17, 2020).[10] Whether the drop boxes are "secured" to the sidewalk or not, the Wisconsin Statutes offer no impediment to clerks accepting absentee ballots in secure drop boxes. *See generally* Wisc. Stat. §§ 6.84-6.89.

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[10] Available at https://madison.com/wsj/news/local/govt-and-politics/madison-installs-14-absentee-ballot-drop-boxes/article_6dfe559d-e681-581b-9559-2e6c179bff3f.html.

### B. Petitioners' Own Evidence Confirms that Clerks Would Have Followed Wisconsin Law Had They Received Reliable Information that a Voter Was No Longer "Indefinitely Confined."

Petitioners also present no evidence whatsoever that any of the voters designated as "indefinitely confined" remained on the absentee voter list in contravention of Wisconsin law. (Pet. ¶¶75-83.) In fact, Petitioners offer not a single shred of proof that even one county clerk allowed absentee voters who were no longer "indefinitely confined" to vote absentee in the general election. Rather, Petitioners' evidence shows the *opposite*. Petitioners provide affidavits from nine municipal clerks, each of whom swears that if they had received reliable information that an elector was no longer "indefinitely confined," they would have followed Wisconsin law and removed that elector from the list to receive an absentee ballot. (*See* Pet. ¶81 & Exhs. 17A-I.) Petitioners thus fail to show that any of Wisconsin's 1,850

municipal clerks received any reliable information that a voter was no longer "indefinitely confined," much less that one failed to follow Wisconsin law. In fact, the clerks' affidavits make no mention of any WEC guidance at all.

### C. Allegations that Clerks Followed Longstanding WEC Guidance on Absentee-Ballot Envelopes Cannot Justify Retroactively Disenfranchising Almost 3.3 Million Voters.

Citing no evidence, Petitioners offer naked allegations that "numerous" unnamed "inspectors and witnesses" saw unnamed City of Milwaukee employees filling out voter addresses in red pens on ballot envelopes. (Pet. ¶101.) Petitioners conclude that those employees were following WEC guidance from October 2016 and/or instructions in a YouTube video posted by the Milwaukee Election Commission in April 2020. (Pet. ¶¶87-89, 91-92, 102-04.) Setting aside that these arguments are all barred by laches, *see* Section II, *supra*, nothing in the Wisconsin Statutes prohibits

election officials from filling in addresses on ballots received before Election Day with information known to them, nor does the statute require that absentee ballot envelopes be "immediately" placed in carrier envelopes. *See* Wis. Stat. § 6.87(6)(d) (stating only that "[i]f a certificate is missing the address of a witness, the ballot may not be counted."); *see generally* Wis. Stat. §§ 6.84-.89. Petitioners had years—and more than ten previous elections—to challenge the WEC guidance to the contrary.

### D. Petitioners' Naked Assertions that "Wisconsin Election Officials" Did Not Enforce "Wisconsin Law" Do Not Justify Overturning the Results of the Entire State's Presidential Election.

Citing no evidence and offering no specific allegations, Petitioners baldly assert that Wisconsin's election officials did not enforce residency requirements or double-voting prohibitions. (Pet. ¶¶105-10.)

As for alleged double voting, even if Petitioners' proffered expert analysis was verified and accurate (and as discussed in Section III, *supra*, it is far from it), 234 alleged "double votes" do not overcome the relevant margin in this election, nor can they justify invalidating nearly 3.3 million other "single" votes. Neither do 234 alleged "double votes" prove that Wisconsin officials "did not enforce" Wisconsin law.

With respect to the residency requirement, the Court of Appeals recently confirmed that the WEC "has no 'positive and plain' duty to deactivate voters pursuant to [Wisconsin Statute] § 6.50(3)." *State ex rel. Zignego v. Wis. Elections Comm'n*, 2020 WI App 17, ¶52, 391 Wis. 2d 441, 941 N.W.2d 284; *see also* Wis. Stat. § 6.50(3) (providing that, upon receipt of reliable information that a registered voter has changed addresses, "the municipal clerk or board of election commissioners shall notify the elector"). This Court heard

oral argument in an appeal from that decision in September, but the Court of Appeals decision is, until and unless this Court decides otherwise, the law.

In addition, there is no logical or factual connection between the claim that 26,673 electors voted where they "did not reside" and the conclusion that all of those 26,673 electors—including all military voters overseas, workers temporarily employed outside Wisconsin, and students attending school out-of-state who may have changed their mailing address for reasons that had no bearing on their residence status or right to vote in Wisconsin—voted illegally and therefore must have their ballots invalidated.[11] Indeed,

[11] This resembles spurious claims made by those challenging the presidential election results in Nevada. Parties there likewise speculatively alleged that thousands of voters in that state had voted illegally after moving from the state, but those allegations were quickly debunked. *See, e.g.*, PolitiFact, "Fact-checking Republican claim of illegal votes in Nevada" (Nov. 6, 2020), available at https://www.politifact.com/factchecks/2020/nov/06/nevada-republican-party/fact-checking-republican-claim-illegal-votes-nevad/. For instance, the list of addresses from which many of these Nevada voters allegedly

every voter who completed an absentee ballot—whether by mail or as part of in-person absentee voting—attested, under penalty of perjury, to their residence in Wisconsin. Wis. Stat. § 6.87(2).

### E. Petitioners' Suggestion that the Constitution Requires Nullifying Wisconsin's November 2020 Election Fails.

Petitioners' bottom line is that the U.S. Constitution requires nullifying every one of the nearly 3.3 million votes cast by Wisconsinites in the November 2020 election. This argument is entirely without merit. Petitioners claim support

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illegally voted includes hundreds of addresses of overseas military post office boxes or locations in the United States where military personal are stationed, strongly indicating that these votes were validly cast by Nevada residents who were temporarily transferred outside of Nevada as part of their ongoing military service to this country. *See, e.g.*, Military.com, "GOP List of Alleged Voter Fraud in Nevada Contains Hundreds of Military Addresses" (Nov. 10, 2020), *available at* https://www.military.com/daily-news/2020/11/10/gop-list-of-alleged-voter-fraud-nevada-contains-hundreds-of-military-addresses.html. Moreover, federal law plainly permits even voters who permanently move from a state to still vote in the federal presidential election in the state from which they moved, if they moved within 30 days of the election. 52 U.S.C. § 10502(e).

from not only the Electors Clause, but also the Fourteenth Amendment. (*See* Mem. at 3-14.) Constitutional law does not support Petitioners' theories.

The Electors Clause grants state legislatures power to determine how their states will appoint presidential electors. U.S. Const. art. II, § 1, cl. 2. The Wisconsin Legislature made that determination at the time of statehood, adopting statutes directing that Wisconsin would pledge its presidential electors to the winner of the statewide popular vote. R.S. 1849 c. 6, ss. 79-81 and c. 7, ss. 3-6. Having made that determination and enshrined it in statute, the Legislature can alter it only by amending the law through bicameralism and presentment. *See* Wis. Const. art. IV, § 17(2), art. V, § 10; *see also Milwaukee Journal Sentinel v. Wis. Dep't of Admin.*, 2009 WI 79, ¶20, 319 Wis. 2d 439, 768 N.W.2d 700 (Legislature must "take additional actions to amend existing law or to create new law"). Here, the Legislature has made no effort to revisit

Wisconsin's established law that awards the State's presidential electors to the winner of the statewide popular vote.

As relevant here, the Equal Protection Clause of the Fourteenth Amendment requires states to treat voters equally. Petitioners err, however, when they suggest that any deviation in election administration across the state is unconstitutional. The U.S. Supreme Court in *Bush v. Gore* acknowledged that the question at issue was "not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. 98, 109 (2000) (per curiam). Local entities may surely do so. Post-*Bush* decisions recognize "that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state." *Boockvar*, 2020 WL 5997680, at *44 (collecting cases). Petitioners' arguments to the contrary prove too much,

suggesting (incorrectly) that Wisconsin's decentralized system of election administration is constitutionally suspect. It is not. And none of Petitioners' allegations here rise to the level of an equal protection violation.

Nor do Petitioners' vague assertions about "arbitrary enforcement" and "vote dilution" establish a violation of the Equal Protection, Due Process, or Privileges or Immunities Clauses. (*See* Mem. at 11-14.) These claims are too poorly explained to be fully rebutted at this stage. Even read in the most generous light, these theories require specific evidence of actual disparate treatment that harmed those seeking judicial relief. *See, e.g.*, *Boockvar*, 2020 WL 5997680, at *41-42; *Jones v. Samora*, 395 P.3d 1165, 1169, 1178 (Colo. Ct. App. 2016); *Samuel v. Virgin Islands Joint Bd. of Elections*, No. 2012 Civ. 0094, 2013 WL 106686, at * 6 (D.V.I. Jan. 6, 2013); *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006). Petitioners fail to plead, much less to offer evidentiary

support for, allegations sufficient to establish a constitutional violation.

In fact, the real threat of a constitutional violation arises here because of the relief Petitioners themselves seek. Petitioners accurately note that the individual right to vote is a fundamental right protected by the Fourteenth Amendment. (Mem. at 11-12.) But that right cuts strongly against their effort to disenfranchise almost 3.3 million voters. Of course, the right to vote is also enshrined in the Wisconsin Constitution, Wis. Const. art. III, and the Wisconsin Legislature has expressly directed the WEC (and courts) to construe and implement the State's election laws in a manner that will "give effect to the will of the voter." Wis. Stat. § 5.01(1).

## V. THE REMEDY PETITIONERS SEEK IS BOTH GROSSLY DISPROPORTIONATE AND ILLEGAL.

Finally, beyond the pleading, evidentiary, and analytical shortcomings fatal to Petitioners' pleadings, the request that the Court simply discard the November 3 presidential election—and along with it, all the other elections held that day in Wisconsin—is outrageous, undemocratic, and unconstitutional. The Wisconsin Legislature has the authority to direct the "Manner" of appointing presidential electors, and it made the choice to delegate appointment to the people. U.S. Const. art 2, § 1; Wis. Stat. §§ 7.75, 8.25. That is the end of the matter. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2321 (U.S. 2020). Before and on Election Day, nearly 3.3 million Wisconsinites—a record number—found a way to cast their votes during a pandemic. This Court should not consider voiding all of those votes after the fact.

The right response to any post-election claims of election improprieties is to follow the recount procedures provided by law and to produce as accurate a count as humanly possible. But that of course is not what Petitioners seek, because they know that those normal processes will not produce the outcome they favor politically. They would prefer to change the method of selecting electors after the fact, and they ask this Court to become a party to that proposed assault on basic American principles of democracy.

Acceptance of this invitation by the Court would not only violate state law calling for selection of electors by popular vote but also constitute a mass deprivation of Wisconsinites' constitutional right to vote. "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Bush*, 531 U.S. at 104. "Having once granted the right to vote on equal terms, the State may not, by later

arbitrary and separate treatment, value one person's vote over that of another." *Id.* But that is precisely what this Court would be doing if it agreed to disregard the outcome of the 2020 election and to empower the Legislature to support a candidate who did not get the most votes on November 3.

To do so would not only defy the Constitution but also violate other federal laws. Congress has the authority to set the date of appointing electors, *see* U.S. Const. art. II, § 1, cl. 3, and has mandated that electors be chosen on "on the Tuesday next after the first Monday in November," 3 U.S.C. § 1; *see Foster v. Love*, 522 U.S. 67, 70 (1997). The relief sought here would violate that mandate because the Legislature would be acting well after November 3. It would also contravene the congressional prohibition—firmly established in federal law for 150 years—against denying any registered voter the right to vote in an election based on an immaterial error or omission under state law. 52 U.S.C.

§ 10101(a)(2)(B). The standard imposed for ballot acceptance must be directly related to determining voter qualification. Any requirement that is not material to that specific function cannot be the basis for denying the right to vote. Disqualifying a ballot for any reason other than those related to determining qualification to vote is impermissible under federal law.

For all of these reasons, the Court should not start down this path. The Petition does not come close to justifying initiation of an original action—let alone an action aimed to abrogate an entire election.

## CONCLUSION

For the reasons stated above, this Court should deny the Emergency Petition for Original Action.

Dated: November 27, 2020.

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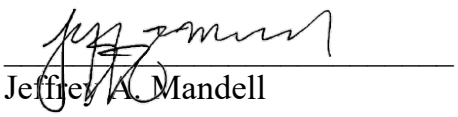
*Application for admission *pro hac vice* pending

## CERTIFICATION

I certify that the foregoing petition conforms to the rules contained in Wis. Stat. § (Rule) 809.62(4) and § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 11,199 words, exclusive of the caption, Table of Contents and Authorities, and the Certificates.

Dated: November 27, 2020.



Jeffrey A. Mandell

**CERTIFICATION OF FILING AND SERVICE**

I certify that on November 27, 2020, as provided in the Court's Order dated November 24, 2020, this brief and the accompanying appendix were filed by electronic mail and also hand delivered to the Clerk of the Supreme Court.

I certify that on November 27, 2020, I caused a copy of this brief and the accompanying appendix to be emailed to counsel of record for Petitioners and the other Respondents as previously agreed when they waived service of paper copies.

Dated: November 27, 2020.

Jeffrey A. Mandell

## CERTIFICATION OF APPENDIX

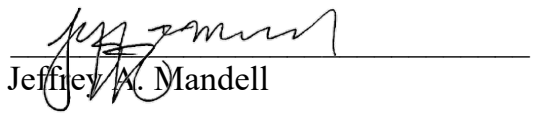
I hereby certify that filed with this brief, is an appendix that complies with Wis. Stat. (Rule) § 809.19(2)(a) and that contains, at a minimum, if applicable: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including

juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: November 27, 2020.



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