STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1930-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 THORBJORSSON, 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, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Respondents.

PETITION FOR ORIGINAL ACTION IN THE SUPREME COURT

RESPONSE OF RESPONDENTS WISCONSIN ELECTIONS COMMISSION AND ITS MEMBERS

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INTRODUCTION

In the 2020 general election, millions of Wisconsinites cast their ballots for national, state, and local elected offices. Election officials painstakingly planned and executed that election and counted the ballots. The diligent efforts of Wisconsin's electors and election officials filled countless offices and passed (or rejected) myriad referenda from Superior to Beloit and everywhere in between. One office put to the people's choice was, of course, the next President of the United States.

Now, a handful of Wisconsin voters request something never before seen in our nation's history: For this Court to discard every vote cast statewide for one office only—the President of the United States—and turn that choice over to the state legislature. Millions of Wisconsin electors carried out perhaps their most important civic duty by voting in the 2020 general election—and during a deadly pandemic, no less. Petitioners would have this Court disenfranchise every single one of those voters.

What's more, Petitioners' unprecedented and undemocratic request rests on the flimsiest of legal and factual bases. They begin with a smorgasbord of meritless legal arguments about how the election was conducted, including an already-litigated dispute with certain cities about accepting grant funds and quarrels with advice from the Elections Commission on which local clerks and voters relied when casting and counting ballots. Even if Petitioners had identified some scattered legal errors—and they have not—the only factual basis they offer to show the extent of those issues is a so-called "expert report" riddled with obvious defects.

This Court cannot invalidate an entire statewide election based on these borderline frivolous claims.

ARGUMENT

Given the breathtaking nature of the relief that Petitioners request—overturning an entire statewide election and turning it over to the state legislature—it is necessary to begin by discussing why, leaving everything else aside, federal law bars it.

Turning then to the merits, Petitioners' case fares no better. They assert two federal constitutional claims that fail right out of the gate because Petitioners lack standing to assert them. Those claims also fail as matter of law and fact, in large part because the only factual support they offer is a facially implausible and unreliable "expert report."

Only Petitioners' state law allegations remain. Those largely could have been brought long ago and therefore are barred by laches. Similarly, Petitioners' "indefinite confinement" claim is barred by issue preclusion, since they already litigated it in a federal forum earlier this year. All that remains are allegations of ordinary election irregularities that must be brought by a candidate through the exclusive recount remedy under Wis. Stat. § 9.01, not a procedure-free original action like this one.

I. Petitioners' requested relief is precluded by Article II of the U.S. Constitution and would violate the due process rights of the more than 3.2 million voters whom it would disenfranchise.

To call the relief that Petitioners seek extraordinary would be a massive understatement. First, they request a declaratory judgment that would completely nullify the November 3, 2020, presidential election in Wisconsin and disenfranchise the more than 3.2 million people who voted in it. (Pet. 42.) Second, they ask this Court to enjoin the state officials statutorily charged with certifying the election results from doing so. They seek such an injunction "so that

the state legislature can lawfully appoint the electors." (Pet. 42.) Once the Legislature has done so, Petitioners ask this Court to compel the Governor to certify that slate of electors. (Pet. at 42.)

Petitioners' requested relief is more than extraordinary—it is unlawful. They do not identify a single source of state law that would allow this Court to ignore the statutorily designated method for choosing presidential electors—a statewide popular vote—and simply turn the choice over to the state legislature. That is because there is not a single statute in our state election code that provides for this kind of extraordinary relief.

Instead, they seem to assert that federal law allows this striking remedy. It does not. Overriding Wisconsin's statutorily designated method for choosing presidential electors after an election has taken place is precluded by Article II of the U.S. Constitution and would violate the constitutional due process rights of the more than 3.2 million voters whom it would disenfranchise.

A. Article II of the U.S. Constitution precludes this Court from judicially creating the novel remedy sought by Petitioners.

Article II of the U.S. Constitution—on which the petitioners themselves purport to rely—precludes a court from making changes to state election law that would retroactively apply to a presidential election that has already taken place. *See Bush v. Gore*, 531 U.S. 98, 111–22 (Rehnquist, C.J., concurring).

The U.S. Constitution provides that each state shall appoint its presidential electors "in such Manner as the Legislature thereof may direct." Art. II, § 1. In accordance with that provision, the Wisconsin Legislature has directed

by statute that Wisconsin's presidential electors shall be appointed by popular election:

> By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress. A vote for the president and vice president nominations of any party is a vote for the electors of the nominees.

Wis. Stat. § 8.25(1); *see also* Wis. Stat. §§ 5.10, 5.64(1)(em). The November 3, 2020, presidential election—which Petitioners seek to invalidate—was conducted via popular vote in furtherance of that legislative directive.

Article II precludes the Court from judicially crafting new election law that would override the Legislature's unequivocal statutory directive that Wisconsin's presidential electors be chosen by a vote of the people. If a different method for choosing those electors is ever to be directed, such direction must come from the Wisconsin Legislature, not from the judicial branch. If the Legislature wants to prescribe a different method for appointing electors, it has the power to amend the relevant statutes, or to repeal them and direct a different method of appointment in future elections.

Respondents are not aware of any case in which this Court has invalidated an election based on the kinds of procedural irregularities that Petitioners allege, let alone a statewide election for President. To the contrary, *McNally v. Tollander*, 100 Wis. 2d 490, 302 N.W.2d 440 (1981), in which the Court invalidated a county election in unique and extreme circumstances, shows that the people's choice for President here cannot be invalidated and turned over to the Legislature. In *McNally*, local election clerks refused to distribute ballots to around 40% of county's eligible voters for a referendum election. *Id.* at 495. This "wholesale deprivation of the right to

vote" was an "anomaly of American law" and justified setting aside the election. *Id.* at 506.

McNally differs from this case in two fundamental ways.

Most importantly, the remedy in *McNally* did not replace the people's choice for an elective office with one selected by the Legislature, as Petitioners request here. Instead, *McNally* emphasized that it was dealing only with a referendum where invalidating the results would "preserve[ ]" the "status quo, as it ha[d] been for more than one hundred years." 100 Wis. 2d at 503. This left the county's electors another opportunity to retry the referendum through another election "in which all qualified voters participate." *Id.* Here, Petitioners seek to alter the status quo and forever deprive Wisconsin voters of their popular selection for the next President of the United States. That kind of relief would be another "anomaly of American law." *Id.* at 506.

Second, the disenfranchisement of 40% of eligible voters in the *McNally* election was nothing like the procedural irregularities alleged here. Indeed, *McNally* emphasized that it was "fundamentally different from other election cases" involving "irregularities in election procedures" because "some forty percent of the qualified voters were actually denied the opportunity to cast ballots." *Id.* at 498.

Here, the irregularities Petitioners allege do not involve the outright deprivation of even a single elector's right to vote, much less forty percent of all electors in Wisconsin. Instead, Petitioners purport to identify procedural irregularities that routinely occur in the administration of any large-scale election. Existing Wisconsin election law provides for remedying such irregularities by correcting the erroneous tabulation of votes through the recount and appeal process,

not by invalidating an entire election and disenfranchising every voter in the state.

B. The remedy Petitioners request would violate the constitutional requirement of due process by retroactively overriding a popular presidential election that has already taken place.

The remedy sought by Petitioners also would be unlawful because it would violate due process by retroactively overriding a popular presidential election that has already been held. Petitioners argue that nullification of the November 3 popular election and substitution of a slate of electors directly appointed by the Wisconsin Legislature is permitted by Article II, § 1, of the U.S. Constitution and 3 U.S.C. § 2. They are incorrect. Both Article II and 3 U.S.C. § 2 must be construed consistent with independent constitutional limitations, such as the constitutional requirement of due process.

Article II, § 1 provides that each state shall appoint its presidential electors "in such Manner as the Legislature thereof may direct." Article II gives each state legislature broad authority to initially direct the manner in which that state's presidential electors shall be appointed, but once a state legislature has directed that the electors shall be appointed by popular election, the people's "right to vote as the legislature has prescribed is fundamental." *Bush*, 531 U.S. at 104 (per curiam). That fundamental right to vote includes "the right of qualified voters within a state to cast their ballots and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941).

In addition, it is well established that Article II does not give a state legislature absolute power to regulate the appointment of presidential electors in any way it pleases,

because that power is granted "subject to the limitation that [it] may not be exercised in a way that violates other specific provisions of the Constitution," including provisions that protect the fundamental right to vote. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Accordingly, where a state legislature has provided for presidential electors to be chosen by popular vote, it may not impose burdens on the right to vote that violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* By the same reasoning, a state legislature that has directed popular election of presidential electors also cannot thereafter regulate such elections in a way that would violate the Due Process Clause of the Fourteenth Amendment.

While Article II allows a state legislature to change a previously prescribed method for choosing the state's electors, it cannot make such a change under circumstances in which the change would violate the due process rights of voters. Accordingly, for *future* elections, the Wisconsin Legislature could amend the existing statutes so as to direct a change from popular election to direct legislative appointment of presidential electors. But Article II does not authorize a state legislature to make such a change *after* a popular vote has already taken place and retroactively apply that change to override the results of that vote.

Petitioners' reliance on 3 U.S.C. § 2 fails for similar reasons. That statute provides that, "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." 3 U.S.C. § 2. Petitioners suggest that, because of the procedural irregularities they purport to identify, Wisconsin "failed to make a choice" of its presidential electors and the Wisconsin Legislature, therefore, may now appoint those electors itself.

This reading of 3 U.S.C. § 2 would be unconstitutional because it would allow a state legislature to retroactively change the rules of a presidential election after that election had taken place, in violation of the constitutional requirement of due process.

Fortunately, the correct interpretation of 3 U.S.C. § 2 does not lead to such constitutional infirmities.

Congress is constitutionally authorized to establish a uniform date for all presidential electors to be selected throughout the nation. U.S. Const. art. II, § 1, cl. 3. Pursuant to that authority, Congress established a national election date in 1845. Act of Jan. 23, 1845, 5 Stat. 721 (1845) (codified at 3 U.S.C. § 1). But Congress also recognized that, in states that adopt a popular vote, no candidate might garner a majority vote on that day, thus requiring a runoff that would make it impossible to select electors on that date. *See* Cong. Globe, 28th Cong., 2d Sess. 10, 14 (1844) (remarks of Rep. Hale). It was similarly noted that natural disasters or extreme weather might interfere with an election on election day. *Id.* at 15 (statement of Rep. Chilton).

To ensure that such reasons would not cause a state to forfeit its electors by failing to complete the appointment process on election day, Congress enacted the provision now codified at 3 U.S.C. § 2. *See* Michael T. Morley, "Postponing Federal Elections Due to Election Emergencies," 77 Washington & Lee Law Review Online 179, 188-89 (2020). The purpose of that statute was to give states flexibility. If a state provides for popular election of its presidential electors on the nationally mandated federal election day, but for some reason cannot complete the election process on that date—perhaps due to a massive natural disaster—then 3 U.S.C. § 2 allows the state legislature to direct that these electors be chosen on a different date.

Under Petitioners' view, if a state held a popular election to choose its presidential electors on election day, and if it subsequently took days or weeks to resolve post-election disputes and determine who won that election, then 3 U.S.C. § 2 would allow the state legislature to simply step in and itself choose a slate of electors without regard to what happened on Election Day. That is not the purpose of 3 U.S.C. § 2, and it is not a reasonable or constitutional interpretation of that statute.

If a state holds a popular election on election day for the purpose of choosing its presidential electors, then the state has made its choice of electors on that date. If it then takes some time to count and recount ballots, canvass the election returns, and possibly conduct election contest procedures in court, that does not mean that the state has "failed to make a choice on the day prescribed by law." 3 U.S.C. § 2. It simply means that the responsible state officials have not yet ascertained what choice the people made on election day.

* * *

In sum, Petitioners have identified no state or federal law that would allow this Court to retroactively override the people of Wisconsin's popular vote for President and turn that decision over to the state legislature. Neither Article II of the U.S. Constitution, the Due Process Clause, nor 3 U.S.C. § 2 allows such an unreasonable and fundamentally unfair outcome.

II. Petitioners fail to state a federal constitutional claim under equal protection or due process.

Leaving aside how Petitioners simply cannot obtain the undemocratic remedy they seek, they also fail to state valid claims for relief. Petitioners assert that the irregularities about which they complain amount to violations of their federal equal protection and due process rights.

(Pet. Mem. 8–14.) But they do not identify any problems that amount to a federal constitutional claim, whether as a matter of law or fact.

A. Petitioners' federal claims fail as a matter of law.

Petitioners' federal claims fail as a matter of law for two basic reasons. First, they have no standing to raise them. Second, even if they did, the federal constitution simply does not provide a cause of action for violations of state election law—whether fraud or innocent mistakes—of the kind that Petitioners purport to identify.

1. Petitioners have no standing to raise their claims.

Petitioners have no standing to raise their federal constitutional claims. Standing requires a party to show some "direct injury or [ ] threat of direct injury" to a "legally protected interest." *Marx v. Morris*, 2019 WI 34, ¶ 74, 386 Wis. 2d 122, 925 N.W.2d 112.

As for the organizational petitioner, it merely alleges that it has an abstract interest in "ensur[ing] . . . public confidence in the integrity of Wisconsin's elections" and that "public officials act in accordance with the law." (Pet. ¶ 9.) But "an abstract injury is not enough to confer standing on a party." *Fox v. Wisconsin Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 525, 334 N.W.2d 532 (1983). This petitioner also alleges that its "membership includes candidates seeking elective offices"—but not that any of its members actually ran for office in the 2020 general election, let alone in the counties at issue. (Pet. ¶ 9.) These allegations also do not show any "direct injury" to the organizational petitioner that is distinct from any other Wisconsin citizen's interest in election integrity.

As for the individual petitioners, they say they are "elector[s], voter[s] and taxpayer[s]." (Pet. ¶ 10.) But none of them allege that they actually voted in the 2020 general election, and so they ultimately rely on taxpayer standing, alone.

"In order to maintain a taxpayers" action, it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss; otherwise the action could only be brought by a public officer." *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961). "Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *Id.* at 22. Any such illegal expenditure "results either in the governmental unit having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure." *Id.*

Petitioners do not identify a single "illegal expenditure" that will deprive the government of revenue. Instead, they purport to challenge "election officials' certification" of "illegal votes counted, legal votes not counted, counting errors and illegalities." (Pet. ¶ 10.) But the act of certifying the 2020 general election results under Wis. Stat. § 7.70 requires no expenditure of public funds at all—just a commitment of officials' time that would have been spent on certification anyway, regardless of Petitioners' allegations. Put differently, certifying the election results will not leave Respondents with "less money to spend for legitimate government objectives" or require the "levy of additional taxes to make up for [a] loss." *S.D. Realty Co.*, 15 Wis. 2d at 22. Allowing taxpayers to sue simply based on the time government officials spend during their ordinary workday on tasks they would perform anyway, even absent alleged illegalities, would eliminate the already-

lenient requirements for taxpayer standing. This Court should decline to take that step.

Given the lack of any alleged illegal expenditures, Petitioners' real standing theory seems to instead rest on the novel theory that their votes were diluted by "illegal votes counted" and "counting errors." (Pet. ¶ 10; Mem. 10, 12.) But this fails from the outset because Petitioners do not even allege that they voted in the 2020 general election. Nonexistent votes cannot be diluted.

Further, even if Petitioners had voted, Wisconsin courts have never recognized this kind of voter standing theory and federal courts reject it. Wisconsin courts "look to federal case law as persuasive authority regarding standing questions." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15 n.7, 326 Wis. 2d 1, 783 N.W.2d 855. And that should be especially true here, since Petitioners' voter dilution theory apparently rests on federal constitutional guarantees, including the Electors Clause in article II, § 1, of the federal constitution (Mem. 1, 3–8), the federal equal protection clause (Mem. 8–10), and the federal due process clause (Mem. 10–14).

Most prominently, the Third Circuit very recently rejected an almost identical standing theory in *Bognet v. Sec'y Commonwealth of Pennsylvania*, __ F.3d __, 2020 WL 6686120 (3d. Cir., Nov. 13, 2020). There, the court held that individual voters lacked standing to challenge election results on the theory that illegal votes diluted their legal votes. The Third Circuit rejected the voters' dilution claims resting on the equal protection clause. It explained that "[t]his conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at *11. That is because "vote dilution under the Equal Protection Clause is concerned with votes being weighed differently," such as in gerrymandering cases or one-

person-one-vote malapportionment cases. *Id.* Recognizing an "illegal vote" dilution injury would drastically expand the scope of federal constitutional authority over state elections:

> [I]f dilution of lawfully cast ballots by the "unlawful" counting of invalidly cast ballots "were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity."

Id. (citation omitted).

Petitioners' claims resting on the federal Equal Protection Clause here have the same flaw. They do not rest on recognized gerrymandering or malapportionment theories, but rather alleged "illegal votes" that would transform the federal constitution into a tool that controls every aspect of state election law. Such a theory is not recognized in either state or federal court.

And *Bognet* identified yet another standing problem with the vote dilution theory that Petitioners offer—it is a "paradigmatic generalized grievance that cannot support standing." *Id.* at *12. That is because the "illegal counting of unlawful votes" would "'dilute' the influence of all voters . . . equally" and not "a certain group of voters particularly." *Id.* Courts are "in accord" that this kind of alleged dilution "is not 'particularized' for standing purposes." *Id.* (collecting cases). Opening the courtroom door to such claims would effectively nullify any standing requirements whatsoever.

This Court should decline to accept a petition for original action from a group of petitioners who lack standing to bring the claims they propose.

2. "Garden variety" election irregularities do not support federal constitutional claims.

Turning from standing to the merits, Petitioners greatly understate what is required to transform an ordinary state law election dispute into a federal constitutional claim.

The federal "Constitution is not an election fraud statute." *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986). "It is not every election irregularity . . . which will give rise to a constitutional claim." *Id.* The federal constitution "is implicated only when there is 'willful conduct which undermines the organic processes by which candidates are elected.'" *Id.* (citation omitted). Therefore, "garden variety election irregularities that could have been adequately dealt with through the procedures set forth in [state] law" do not support constitutional due process claims. *Id.*; *see also Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) ("[G]arden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election.").

Relatedly, "'[a] violation of state law does not state a claim under § 1983,' and, more specifically, 'a deliberate violation of state election laws by state election officials does not transgress against the Constitution.'" *Shipley v. Chicago Bd. of Election Commissioners*, 947 F.3d 1056, 1062 (7th Cir. 2020); *see also Donald J. Trump for President, Inc. v. Boockvar*, No. 20-CV-966, 2020 WL 5997680, at *46 (W.D. Pa. Oct. 10, 2020) ("[I]t is well-established that even violations of state election laws by state officials, let alone violations by unidentified third parties, do not give rise to federal constitutional claims except in unusual circumstances.").

"Garden variety irregularities" that do not support federal constitutional claims include many akin to the ones Petitioners raise here:

> [M]alfunctioning voting machines and the refusal to hold a manual recount, *Hennings v. Grafton*, 523 F.2d 861, 864-65 (7th Cir.1975); human error resulting in miscounted votes and a delay in the arrival of voting machines, *Gold v. Feinberg*, 101 F.3d 796, 801-02; mishandling procedurally deficient absentee ballots to the detriment of a minority candidate, *Welch*, 765 F.2d at 1317; an allegedly inadequate State response to illegal cross-over voting, *Curry v. Baker*, 802 F.2d 1302, 1316 (11th Cir. 1986); mechanical and human error in counting votes, *Bodine v. Elkhart County Election Bd.*, 788 F.2d 1270, 1272 (7th Cir.1986); technical deficiencies in formatting and printing ballots, *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983); mistakenly allowing nonparty members to vote in a congressional primary, *Powell v. Power*, 436 F.2d 84, 85-86 (2d Cir. 970); counting some votes that were illegally cast, *Pettengill v. Putnam County R–1 School Dist.*, 472 F.2d 121, 122 (8th Cir. 1973); and arbitrarily rejecting certain ballots, *Johnson v. Hood*, 430 F.2d 610, 612-13 (5th Cir. 1970).

Broyles v. Texas, 643 F. Supp. 2d 894, 900 n.5 (S.D. Tex. 2009).

Put simply, Petitioners must offer evidence of intentional misconduct beyond the ordinary mix-ups that occur in every election in order to conceivably state a federal constitutional claim.

3. Petitioners identify no equal protection violation.

Petitioners' equal protection theory—that the problems they purportedly identify somehow advantaged certain voters over others—suffers from multiple fatal flaws.

First, the theory relies heavily on *Bush v. Gore*, a case that has no precedential value here. (Mem. 8–10.) *Bush*

recognized that "the problem of equal protection in election processes generally presents many complexities," and so the Court expressly limited its "consideration" to those "present circumstances" surrounding the 2000 Florida recount. *Bush*, 531 U.S. at 109. That is why the *Bush* opinion is not "applicable to more than the one election to which the [Supreme] Court appears to have limited it." *Lemons v. Bradbury*, 538 F.3d 1098, 1106 (9th Cir. 2008).[1] Moreover, Petitioners here challenge the administration of absentee and election-day voting requirements, not post-election recount procedures of the sort that *Bush*'s "consideration" addressed. *Bush*, 531 U.S. at 109.

Even if *Bush* had some applicability beyond its specific facts, Petitioners do not allege any actionable disparate treatment of voters from county to county. They identify only two specifics, neither of which reveals an equal protection problem.

First, they say "the CTCL Cities . . . violated the Equal Protection Clause by obtaining and providing more funding for the absentee voting than other counties who did not receive CTCL funding." (Mem. 10.) But *Bush* addressed equal protection problems that arise when different parts of a state use different methods of tabulating votes—there, how to count so-called "dangling chads" in hole-punched ballots. Increased funding to certain Wisconsin cities has nothing to do with the procedures they used to count ballots. The same voting rules apply across Wisconsin, even if some cities had more money available for their voting infrastructure.

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[1] *See also Wise v. Circosta*, No. 20-2104, 2020 WL 6156302, at *5 (4th Cir. Oct. 20, 2020) ("Of course, *Bush* is of limited precedential value."); *Green Party v. Weiner*, 216 F. Supp. 2d 176, 192 (S.D.N.Y. 2002) ("The Supreme Court explicitly warned that *Bush*, if not entirely a one-day ticket, was decided on extraordinary facts, such that its holding is 'limited to the present circumstances.'").

Accordingly, such funding does not "value one person's vote over that of another," in the sense that votes in those cities were more likely to be counted or weighed more heavily than votes elsewhere. *Bush*, 531 U.S. at 104–05.

Differences in state-wide resources for voting are to be expected and are not unconstitutional. That is consistent with a long line of authority holding 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); *see also Fla. State Conference of N.A.A.C.P. v. Browning*, 569 F. Supp. 2d 1237, 1258 (N.D. Fla. 2008) (in election case, noting that "as with countless public services delivered through [a state's] political subdivisions—such as law enforcement and education—resource disparities are to some degree inevitable" and that "[t]hey are not, however, unconstitutional"); *Paher v. Cegavske*, No. 20CV243, 2020 WL 2748301, at *9 (D. Nev. May 27, 2020) ("Clark County's Plan may make it easier or more convenient to vote in Clark County, but does not have any adverse effects on the ability of voters in other counties to vote. Plaintiffs are unlikely to succeed on their claim of an Equal Protection violation where they provide no evidence—and cannot provide any—that the CC Plan makes it harder for voters in other counties to vote.").

Simply put, Petitioners offer no authority to support their novel theory that accepting private money above and beyond a baseline level of state funding for voting infrastructure somehow threatens equal protection guarantees. In fact, a Wisconsin federal court recently rejected this kind of *Bush v. Gore* argument only in reverse, where plaintiffs argued that *fewer* voting resources in certain areas violated equal protection. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 5627186, at *28 (W.D. Wis. Sept. 21, 2020).

Second, Petitioners argue that an equal protection issue arose because the City of Milwaukee, relying on Commission guidance, allowed clerk staff to complete the address of an absentee voter's witness certificate. (Mem. 10.) But Petitioners undermine their argument by acknowledging that the Commission issued *statewide* guidance about how to administer Wis. Stat. § 6.87(6)(d). (Pet. ¶¶ 87–89, 102.) Even if some municipalities did not follow that guidance, that is unsurprising—and wholly constitutional—in a statewide election where some municipalities must prioritize different aspects of election administration given their differing resources. Even *Bush* itself emphasized that it was not deciding whether "local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109. And again, as with increased funding in certain cities, the fact that some places tried to make it *easier* to vote cannot state a federal equal protection claim. *See Short v. Brown*, 893 F.3d 671, 677–78 (9th Cir. 2018) ("Nor have the appellants cited any authority explaining how a law that makes it easier to vote would violate the Constitution.").

And even if certain counties' attempts to help people vote somehow violated state law, "a deliberate violation of state election laws by state election officials does not transgress against the Constitution." *Shipley*, 947 F.3d at 1062. That must be true, because a contrary result "would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim"—but that "is not the law." *Boockvar*, 2020 WL 5997680, at *46.

More fundamentally, these isolated issues cannot suffice to show an equal protection violation because it is simply impossible for Wisconsin to ensure complete uniformity in statewide election administration. Instead, the

best the state can do is provide guidance on uniform procedures and assist local election officials in conducting their elections. Some variances in election administration are inevitable in any statewide election run primarily by 72 counties and 1,850 municipalities. Indeed, accepting Petitioners' "election perfection" theory would throw into serious constitutional doubt Wisconsin's entire decentralized system of election administration, which inevitably will create some differences from place to place.

Courts recognize this obvious fact in the equal protection context by requiring a showing of intentional discrimination to state an equal protection claim. *See, e.g.*, *Green Party,* 216 F. Supp. 2d at 188 ("Uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.'" (quoting *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970))). Petitioners offer no allegations of intentional discrimination, and certainly none by the respondents.

4. Petitioners do not even attempt to develop their federal due process argument, which would fail even if they had.

Petitioners also appear to pursue a claim resting on the Due Process Clause. (Mem. 10–14.) But they offer only half an argument: a recitation of various due process legal principles with no attempt to apply those principles to the facts. This Court should not accept an issue on original jurisdiction that is not even properly presented or developed.

Even had Petitioners tried to connect their factual allegations with the standards for a due process claim, that claim would have failed out of the box. None of the petition's allegations clear the high hurdle of identifying issues that rise

beyond the "garden variety election irregularities" that cannot support a federal constitutional claim. *Bodine*, 788 F.2d at 1271. Much like in the equal protection context, run-of-the-mill errors, or even state law violations, cannot suffice to gin up a due process claim. Otherwise, carefully crafted state law procedures for addressing election disputes (like Wis. Stat. § 9.01, the recount statute) could always be evaded by pleading a federal constitutional claim. "This is not the law." *Boockvar*, 2020 WL 5997680, at *46.

B. Petitioners' federal claims fail as a matter of fact.

Even if Petitioners could offer a valid federal constitutional theory, they lack any credible evidence to support it. They have not offered proof of any failure in Wisconsin's fall election, much less the type of colossal failure that could conceivably invalidate the election on constitutional grounds.

Instead, they offer only a dubious so-called "expert report" that likely does not clear the threshold for admissibility given its obvious methodological defects. And even if that report were accepted, it comes nowhere near showing that any issues with Wisconsin's election would have changed the results.

1. Petitioners' "expert report" lacks an actual expert or a credible methodology and crediting it would require this Court to make findings of fact.

Petitioners' factual assertions about the breadth of issues in Wisconsin's general election rest solely on the "expert report" of Matthew Braynard. But that report is full of disputed facts and may not even be admissible evidence under Wis. Stat. § 907.02(1). This Court should not accept an

original action that would involve disputed facts—like the credibility of Braynard's opinions—and would require discovery into his work.

At a minimum, this Court cannot simply accept the report at face value; instead, significant factual development would be necessary to determine whether his opinions are reliable or credible. As this Court has held, "[i]t is within the province of the factfinder to determine the weight and credibility of expert witnesses' opinions." *Metro. Assocs. v. City of Milwaukee*, 2018 WI 4, ¶ 25, 379 Wis. 2d 141, 905 N.W.2d 784.

First, Braynard's report may not be admissible under Wis. Stat. § 907.02(1). In order for an expert's opinions to be admissible, (1) the witness must be "qualified as an expert by knowledge, skill, experience, training, or education," (2) he must base his testimony on "sufficient facts or data," (3) his opinions must be "the product of reliable principles and methods," and (4) he must "apply the principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1). It is questionable whether Braynard's report meets any of these standards. His report may very well be the "junk science" that Wis. Stat. § 907.02(1) is intended to prevent from being introduced as evidence. *In re Commitment of Jones*, 2018 WI 44, ¶ 33, 381 Wis. 2d 284, 911 N.W.2d 97.

Braynard does not appear to be qualified to offer the opinions in his report. He offers statistical conclusions based on a purported sampling of voters in certain categories, sample which he opines are representative of various larger categories of voters. Yet Braynard has no formal education in statistics or statistical surveys. Instead, his resume indicates he has a degree in business administration and a master's degree in fine arts. (Braynard Rep. Ex. 1.) Nor is it at all clear that his work experience—including as an employee of one of

the presidential campaigns at issue here—provided him with any relevant statistical training.

Second, it is dubious whether Braynard's opinions are based on "sufficient facts and data" or whether his methods are reliable. Braynard says he used voter information provided by "L2 Political" (Braynard Rep. 3), but it is unknown whether this data reliably reflects information on Wisconsin voters. He also purports to rely on a database of address changes, but it is unclear whether this database accurately reflects electors' correct addresses for voting purposes. Further, his conclusions are based on the results of telephone calls made by call centers and "social media researchers" that are of unknown quality. (Braynard Rep. 3.) These telephone surveys could easily include bad data and unreliable methods, given that the report does not disclose exactly how these surveys were conducted. Leaving common sense aside, news reports indicate that these calls may not be a reliable way of gathering data.[2]

Lastly, Braynard has not established that he applied his methods reliably to this case. Simply put, Petitioners have not shown that phone surveys like these can reliably obtain information about voters or that his limited sample of voters who responded is representative of the whole. And there is reason to think the methods are not reliable. In a recent Pennsylvania election dispute, a professor opined about possible election fraud relying on data supplied by Braynard but then disavowed his opinions after discovering serious problems with that data.[3]

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[2] https://whyy.org/articles/former-trump-staffer-fishing-for-fraud-with-thousands-of-cold-calls-to-pa-voters-is-short-on-proof/

[3] https://www.berkshireeagle.com/news/local/williams-prof-disavows-own-finding-of-mishandled-gop-ballots/article_9cfd4228-2e03-11eb-b2ac-bb9c8b2bfa7f.html

2. At a minimum, Respondents have the right to contest Braynard's opinions, and this Court would have to make findings of fact in order to accept them.

Braynard's opinions do not appear to be credible and, at the very least, Respondents would need an opportunity to contest those opinions—via discovery or even their own expert. Expert credibility is a question of fact, the very type of question this Court ordinarily does not determine in an original action. *Metro. Assocs.*, 379 Wis. 2d 141, ¶ 25. Below are some of the potential flaws found in Braynard's report in the few days since this case was filed; more would likely emerge through discovery.

First, Branyard's opinions on absentee ballots that were sent despite allegedly not being requested are irrelevant. (Braynard Rep. 7–8.) By the report's own terms, these ballots were not returned and therefore were not included in the vote totals. As a result, these unrequested ballots do not show any fraudulent votes or "Illegal Votes Counted," contrary to what the Petition asserts. (Pet. 3 ¶ 117.) If someone else voted these ballots illegally, then they would have shown up as having been returned.

Further, the petition makes incorrect assertions regarding alleged "Republican" ballots—that there were 14,426 ballots "requested in the name of a registered Republican" and 12,071 "Republican ballots" that were returned but not counted. (Pet. 3 ¶¶ 117–18.) These assertions cannot be true because Wisconsin does not have party registration. It is unclear whether Braynard made this error (and thus is unreliable) or whether Petitioners do not understand Wisconsin law and/or Braynard's report.

In addition, Braynard's analysis of indefinitely confined voters appears to be extremely flawed. First, Braynard has

not shown that his "social media researchers" were viewing social media posts by actual Wisconsin voters who claimed to be indefinitely confined. But even overlooking that important fact, Braynard says his team looked at only 429 of these voters, of which 381 were inconclusive. (Braynard Rep. Ex. 3.) Thus, Braynard's opinion is based on a sample of 84 people—who may not even be the relevant Wisconsin voters—out of 213,215 voters listed as indefinitely confined. While this small sample likely is not sufficient to be statistically significant, it also is biased. Voters who are truly indefinitely confined—such as those in long-term care facilities, the elderly, those homebound with illness, etc.—would seem to be less likely to use social media than younger, healthier people. Thus, there is every reason to doubt that Braynard's sample of 84 voters is not representative of the entire population of 213,215 voters who claimed to be indefinitely confined.

And perhaps most importantly, Braynard provides no names of the voters his team allegedly contacted, making it impossible for the respondents or this Court to determine if the surveys he conducted were accurate.

Given all of these issues, and more that would likely emerge with sufficient time to review and analyze the report, this Court cannot rely on Braynard's report—the sole factual basis for Petitioners' assertion that the purported issues they identify may have changed the election's results.

3. Even taken on their face, the "facts" in this report come nowhere near showing a constitutional violation.

More basically, Petitioners' allegations do not add up to numbers casting into doubt the election results, even if the "facts" in their expert report are considered.

As one example, Petitioners include allegations about voters improperly claiming to be indefinitely confined

(Pet. ¶¶ 73–83), but they have no evidence of whether that occurred. The identical affidavits from municipal clerks (Pet. ¶ 81) do not show that anyone actually improperly voted as indefinitely confined. Instead, they aver only that the affiants lacked reliable information that an absentee elector was no longer qualified for that status. (Pet. Ex. 17A, e.g., Town Clerk of Foster: "If I had or would have had 'receipt of reliable information than [sic] an elector no longer qualifies' for 'indefinitely confined' status, I would have removed that elector from "name of [that] elector from the list"). Nor do Petitioners offer any way to determine how many of these voters cast ballots for one candidate of the other.

The same is true for the other allegations about ballots returned but not counted, double votes, out-of-state votes, and votes cast by electors where they did not reside. (Pet. at 3, ¶¶ 118, 120, 122–23.) Lacking any partisan breakdown, nothing in the "expert" report provides any reason to believe that enough votes would be invalidated for the leading candidate (or counted for the trailing candidate) to change the election results. (Braynard Rep. 8–10.)

* * *

At bottom, even if Petitioners had standing to challenge the election results, they do not identify any valid federal constitutional claims. Their allegations about the breadth of purported problems rest on a shoddy "expert report" that should be disregarded, and they otherwise identify nothing more than "garden variety election irregularities that could have been adequately dealt with through the procedures set forth in [state] law." *Bodine*, 788 F.2d at 1272. These individual voters cannot transform their complaints about conformance with state election law into federal constitutional claims.

III. Petitioners state law claims have multiple threshold defects.

Petitioners appear to rely primarily on federal constitutional law to justify invalidating the choice the people of Wisconsin made in the general election—and their federal law theories fail for all the reasons described above. To the extent Petitioners also advance claims purely based on state election law, they again identify no source of state law entitling them to the drastic relief they seek. Any consideration of those state law claims could end there.

In any event, those state law claims have three threshold defects, even before considering their merits.[4] First, laches bars the bulk of these state law claims because Petitioners could have challenged them long before the election occurred and in time for the people of Wisconsin to adjust. Second, Petitioners' claim about private grant money to Wisconsin cities is barred by issue preclusion because they already litigated it in federal court. Third, all that remains of their claims are complaints about ordinary issues that arise in every election and must be resolved through the exclusive recount remedy in Wis. Stat. § 9.01.

A. Laches bars the bulk of Petitioners' state law claims.

Laches stands for the simple proposition that "equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 14, 389 Wis. 2d 516, 936 N.W.2d 587 (internal quotations omitted). Dismissal based on laches is warranted where the balance of equities favors its

[4] This section leaves aside how the substance of those state law election claims lack any merit, an issue Respondents would address at greater length during any full merits briefing.

application and where the party asserting the defense establishes three elements: (1) unreasonable delay in bringing a claim; (2) the defending party's lack of knowledge that the first party would raise the claim; and (3) prejudice to the defending party caused by the delay. *Wisconsin Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 12, 393 Wis. 2d 308, 946 N.W.2d 101.

At issue here are three procedures that Petitioners assert are contrary to Wisconsin law. First, they contend that five Wisconsin cities illegally accepted grant funds from a private organization and used those grants to fund activities that violated various provisions of Wisconsin election law. (Pet. ¶¶ 49-72). Second, they allege that officials in Dane County and Milwaukee County induced voters to improperly claim "indefinitely confined" status and thereby avoid Wisconsin's voter identification requirements, and that the Commission improperly advised election officials throughout the state that they could not unilaterally remove a voter's indefinitely confined designation. (Pet. ¶¶ 73–83). Finally, they complain that election officials, following four-year-old guidance from the Commission, improperly wrote in witness address information on absentee ballot certifications in order to have those ballots counted. (Pet. ¶¶ 84–104).

Petitioners' tardy claims regarding each of these issues check all the boxes for laches.

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

voters cast their ballots in reliance on those procedures. That delay is unreasonable under both the law and common sense.

The allegedly improper grant of private funds to cities for voting infrastructure (*see generally* Pet. ¶ 67) was known at least as early as July 2020. *See* Mary Spicuzza, *Wisconsin's five largest cities awarded $6.3 million in effort to make elections safer amid coronavirus pandemic*, Milwaukee J. Sentinel, July 6, 2020 (*available at* https://www.jsonline.com/story/news/politics/2020/07/06/wisconsins-five-largest-cities-awarded-6-3-million-effort-make-elections-safer-amid-coronavirus-pand/5382546002/). And, as explained below, this issue in fact *was* already litigated by the same lead petitioner. *See supra* Argument IV.

As for Petitioners' challenge to voters who claimed to be "indefinitely confined," that issue again was litigated almost *eight months* ago. On March 27, 2020, Mark Jefferson and the Republican Party of Wisconsin filed a petition for an original action with this Court to address the issue. *See* Pet. for Original Action, date March 27, 2020, Supreme Court of Wisconsin, No. 2020AP000557-OA. This Court reviewed the Commission guidance on indefinite confinement to local officials and concluded that it "provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." (Pet. Ex. 15 at 2 (Supreme Court March 31, 2020 Order).) And it also enjoined the Dane County clerk from dispensing his advice about indefinite confinement during the Governor's Safer at Home emergency order. (Pet. ¶ 73; Pet. Ex. 15 at 3 (enjoining County Clerk for Dane County from "posting advice . . . inconsistent with . . . WEC guidance" regarding voters claiming indefinitely confined status and finding the WEC guidance "provides the clarification . . . that is required at this time").

Given that litigation, Petitioners obviously could have pressed this indefinite confinement issue in the many months

between when it emerged and the November general election, thus allowing Wisconsin voters to adjust accordingly.

And regarding the propriety of clerks filling in missing address information for absentee ballot witness certificates, the Commission's guidance to local election officials has been in place for over four years. *Compare* Wisconsin Elections Commission, *Am. Memo. Re Absentee Certificate Envelopes*, dated Oct. 18, 2016 (Pet. Ex. 18) *with* Wisconsin Elections Commission, *Memo. Re Spoiling Absentee Ballot Guidance*, dated Oct. 19, 2020 (Pet. Ex. 19). Again, this issue could have been ironed out *years* before the 2020 general election, without any risk of disenfranchising voters who already cast their ballots in reliance on the Commission's advice.

The second laches requirement—lack of notice to Respondents—is also met here. In the context of election litigation, where arrangements must be made and procedures put in place well before an election so that electors can effectively exercise their right to vote, it is expected that legal challenges will be presented with sufficient time to adjust course. *See Fulani*, 917 F.2d at 1031 ("[A]ny claim against a state electoral procedure must be expressed expeditiously."); *cf. Republican Nat. Comm. v. Democratic Nat. Comm.*, 140 S. Ct. 1205, 1207 (2020) (observing that the Supreme Court has "repeatedly emphasized" that courts should not alter election rules "on the eve of an election"). Petitioners made no such effort here.

Lastly, the prejudice caused by Petitioners' delay is obvious and profound. Petitioners sat on their claims, allowing the Commission and local officials to carry out the state election in accordance with their understanding of the law, allowing millions of Wisconsinites to vote in reliance on those procedures, only to attack those decisions after they became irreversible. *See Fulani*, 917 F.2d at 1031 ("As time passes, the state's interest in proceeding with the election

increases in importance as . . . irrevocable decisions are made."). This is precisely the type of prejudice the laches doctrine exists to prevent.

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

The equities weigh heavily in favor of applying laches here. Nothing less than the right of every Wisconsinite to have their vote for President counted is at stake if Petitioners' requests are granted. It is difficult to imagine an equitable

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[5] *See also Williams v. Rhodes*, 393 U.S. 23, 34–35 (1968) (upholding denial of equitable relief to litigant seeking ballot access, noting that delay in pursuing claim created potential for "serious disruption of election process"); *Liddy v. Lamone*, 398 Md. 233, 245, 919 A.2d 1276 (2007) (noting in context of challenges to state election procedure claims must be pursued "without unreasonable delay, so as to not cause prejudice to the defendant" and collecting cases); *Blankenship v. Blackwell*, 103 Ohio St. 3d 567, 572–74, 817 N.E.2d 382 (2004) ("If relators had acted more diligently, the Secretary of State would have had more time to defend against relators' claims . . . ."); *Marsh v. Holm*, 238 Minn. 25, 55 N.W.2d 302 (1952) ("One who intends to question the form or contents of an official ballot to be used at state elections must realize that serious delays, complications, and inconvenience must follow any action he may take and that, unless a reasonable valid excuse be presented, . . . he should not be permitted to complain.").

consideration favoring Petitioners that could outweigh so fundamental a right. *See State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949) ("The right of a qualified elector to cast a ballot for the election of a public officer . . . is one of the most important of the rights guaranteed to him by the constitution."); *see also Roth v. Lafarge School Dist. Bd. of Canvassers*, 2004 WI 6, ¶ 19, 268 Wis. 2d 335, 677 N.W.2d 599 ("Wisconsin courts have consistently noted that they do not want to deprive voters of the chance to have their votes counted.").

As the U.S. Supreme Court has recognized, "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). "If citizens are deprived of th[e] [right to vote], which lies at the very basis of our Democracy, we will soon cease to be a Democracy." *Frederick*, 254 Wis. at 613. One could not shake the public's confidence in our electoral process more vigorously than by allowing unforeseeable post-election legal challenges to nullify an entire state's election for President.

In light of Petitioners' inexcusable delay, equitable considerations must bar the outrageous and unprecedented relief Petitioners seek—the wholesale disenfranchisement of millions of Wisconsin voters. *See Donald J. Trump for Pres., Inc. v. Boockvar*, -- F. Supp. 3d --, 2020 WL 6821992, *1 (M.D. Pa. 2020) ("Plaintiffs ask this Cousrt to disenfranchise almost seven million voters. This Court has been unable to find any case in which a plaintiff sought such a drastic remedy in the contest of an election . . . .").

B. Issue preclusion bars Petitioners' claim about private funding to cities because that issue has already been litigated.

One of these state law issues—whether certain cities unlawfully received private funding to improve their voting infrastructure—also is barred by issue preclusion because it has already been litigated in federal court.

Issue preclusion means that "[o]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979). The doctrine is "designed to limit the relitigation of issues that have been contested in a previous action" between the same parties or even one or more different parties. *Michelle T. by Sumpter v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993)).

Issue preclusion applies where two criteria are met: the issue of fact or law must have been "actually litigated and determined by a valid and final judgment," and the issue decided must have been "essential to the judgment." *Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 174 Wis. 2d 381, 396, 497 N.W.2d 756 (Ct. App. 1993). If these criteria are met, the court must determine "whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand." *Mrozek v. Intra Fin. Corp.*, 281 Wis. 2d 448, 464, 699 N.W.2d 54 (2005).

Perfect identity of parties is not necessary to apply issue preclusion. Rather, preclusion applies so long as the party to be precluded had a full and fair opportunity to litigate the issue in the first action, and there are no other circumstances that support giving *that party* another opportunity to litigate the issue. *See Cirilli v. Country Ins. & Fin. Servs.*, 2013 WI App 44, ¶ 8, 347 Wis. 2d 481, 830 N.W.2d 234.

Again, one central issue in Petitioners' case is whether "Wisconsin election officials, "primarily in the cities which received Zuckerberg money, fail[ed] to administer and conduct the November 3, 2020 election . . . in accordance with Wisconsin law." (Pet. ¶ 8.)

But the organizational petitioner already litigated the legality of those cities' accepting private grant monies in federal court. There, it asserted that those cities acted ultra vires and without legal authority in accepting grants from the Center for Technology and Civic Life (CTCL), a nonprofit organization that allegedly received $250 million from Mark Zuckerberg, to assist in conducting the general election. (Pet. ¶ 49; Compl. ¶¶ Introduction, 22, 27, 29, 34, 44–66, 77, 80–95, *Wisconsin Voters Alliance v. City of Racine*, No. 20-cv-1487-WCG (E.D. Wis.), R.-App. at 101–40). Just like here, it argued that the cities' acceptance of those CTCL grants reveal a public-private relationship that privatizes federal elections to skew the outcome of an election by encouraging and facilitating voting by favored demographic groups.[6] (Order Denying Motion for Preliminary Relief, *Wisconsin Voters Alliance v. City of Racine*, No. 20-cv-1487-WCG (E.D. Wis.), R.-App. at 143).

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[6] Contradicting their current position that this Court can invalidate an entire election, Petitioners argued in this federal litigation that injunctive relief was necessary *before* the election to avoid irreparable injury: "Once the November election occurs, the damage to what is to be fair and uniform elections is complete." Mot. (Dkt. 33:13), *Wisconsin Voters Alliance v. City of Racine*, No. 20-cv-1487-WCG (E.D. Wis.); *see also* Mot. (Dkt. 4:18–19), *Wisconsin Voters Alliance v. City of Racine*, No. 20-3002 (7th Cir.). These aforementioned documents are not part of the Commission's appendix, but judicial notice can be taken of them.

The district court rejected those arguments, twice. (Order Denying Preliminary Relief, *Wisconsin Voters Alliance v. City of Racine*, No. 20-cv-1487-WCG (E.D. Wis., Oct. 14, 2020), R.-App. at 142–44) ; Order [Denying Relief Pending Appeal], *Wisconsin Voters Alliance v. City of Racine*, No. 20-cv-1487-WCG (E.D. Wis., Oct. 21, 2020), R.-App. at 145–46). And Petitioners dropped them when agreeing to dismissal their appeal of the district court order. (Order [Dismissing Appeal], *Wisconsin Voters Alliance v. City of Racine*, No. 20-3002 (7th Cir., Nov. 6, 2020), R.-App. at 147).

Issue preclusion bars Petitioners from raising the same complaints about the private grant money, now dressed up as a challenge to the result of the election. The issue presented is the same: whether cities that received "Zuckerberg money" somehow violated state or federal election law by doing so. They cannot recycle that claim now, much less obtain the remedy of nullifying Wisconsin's election.

C. The exclusive remedy for alleged voting irregularities is a recount challenge by a candidate.

All that remains after filtering out Petitioners' state law claims that are barred by laches and issue preclusion are their allegations about ordinary issues that arise in every single election: absentee ballots sent but never requested (Pet. ¶ 117), votes that were mistakenly not counted (Pet. ¶ 118), people who voted where they did not reside (Pet. ¶ 120), out-of-state residents who voted in Wisconsin (Pet. ¶ 122), and people who double-voted (Pet. ¶ 123).

Wisconsin law provides an orderly procedure for addressing these types of irregularities and ensuring that votes are accurately counted: a recount pursuant to Wis. Stat. § 9.01. Indeed, under Wisconsin law, that is the "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." Wis. Stat. § 9.01(11); *see also Carlson v. Oconto Cty. Bd. of Canvassers*, 2001 WI App 20, ¶ 7, 240 Wis. 2d 438, 623 N.W.2d 195 (describing Wis. Stat. § 9.01 as the "exclusive remedy for any claimed election fraud or irregularity").

That exclusive remedy defeats these state law claims, since "jurisdiction for a declaratory judgment will not ordinarily be entertained where another equally or more appropriate remedy is available for the issues or rights sought to be determined.'" *Hancock v. Regents of Univ. of Wisconsin*, 61 Wis. 2d 484, 491, 213 N.W.2d 45 (1973). Similarly, "where statutory remedies are provided, the procedure prescribed by the statute must be strictly pursued to the exclusion of other methods of redress." *Essock v. Town of Cold Spring*, 10 Wis. 2d 98, 104, 102 N.W.2d 110 (1960).

The exclusive remedy under Wis. Stat. § 9.01 entitles only candidates, not electors, to act to challenge the result of a contest for elected office. A recount petition is filed by an "aggrieved candidate" (Wis. Stat. § 9.01(1)(a)1.)—that is, a candidate who trails by a specified amount after the initial canvass (Wis. Stat. § 9.01(1)(a)5.). After the recount ends, "any candidate" may appeal the result to a circuit court (Wis. Stat. § 9.01(6)(a)), and then "any party aggrieved by the order" may appeal to the court of appeals (Wis. Stat. § 9.01(9)).

Nowhere in this exclusive judicial remedy is there room for an individual voter to challenge whether a candidate who seemed to prevail only did so because of "an alleged irregularity, defect or mistake committed during the voting or canvassing process." That is made especially clear by the fact that Wis. Stat. § 9.01(1)(a)1. does grant rights to individual voters under certain circumstances—specifically, when the challenge involves a "referendum question." In that situation, "any elector who voted" on the referendum may petition for a

recount. *Id.* After that referendum recount, "any elector" may appeal to circuit court and then to the court of appeals. Wis. Stat. § 9.01(6)(a), (9). By expressly granting electors the right to challenge referendum results but not the results of a race between candidates, the Legislature necessarily rejected a role for electors in the latter type of challenge.

A contrary result—that is, allowing a voter to pursue a remedy ordinarily reserved to candidates yet totally outside Wis. Stat. § 9.01's prescribed process—would enable near-total circumvention of the supposedly "exclusive" recount statute. In any election, a trailing candidate who wished to avoid Wis. Stat. § 9.01 could simply have an elector who voted for him file a lawsuit just like this one, without needing to follow the statute's strict procedural requirements. Perhaps the candidate missed the deadline under Wis. Stat. § 9.01(1)(a)1., or perhaps he wishes to offer evidence he neglected to present to the board of canvassers during an ordinary recount, which would ordinarily fall outside the proper scope of review under Wis. Stat. § 9.01(8).

Those requirements should not—and cannot—be tossed aside. The recount statute functions to set up a careful, deliberate process for considering election challenges just like this one. First, election officials consider poll lists (Wis. Stat. § 9.01(1)(b)1.), absentee ballot envelopes (Wis. Stat. § 9.01(1)(b)2.), and then the bags holding absentee ballots (Wis. Stat. § 9.01(1)(b)3.). All ballots are then recounted, accompanied by procedures to check the reliability of electronic voting systems. *See* Wis. Stat. §§ 7.51, 9.01(1)(b)5.–11. Candidates and their representatives may be present at all steps and may object at any point. Wis. Stat. § 9.01(1)(b)12.

Any subsequent court challenges have their own procedures designed for review of election disputes. The circuit court is to receive "all ballots, papers and records affecting the appeal." Wis. Stat. § 9.01(7)(a). The appealing

candidate must again serve notice on the opposing candidate (Wis. Stat. § 9.01(6)(a)) and then "file a complaint enumerating with specificity ever alleged irregularity, defect, mistake or fraud committed during the recount" (Wis. Stat. § 9.01(7)(a)). The candidate ordinarily may not introduce new evidence or make new objections. Wis. Stat. § 9.01(8)(c). And the appeals courts must affirm any factual finding that is supported by substantial evidence. Wis. Stat. § 9.01(8)(d).

This recount process is already underway in Dane and Milwaukee counties. Petitioners seek to bring a parallel proceeding in this Court through an original action, but one lacking *any* procedures tailored to such a dispute. This kind of procedure-free litigation is not what the Legislature envisioned when it created "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." Wis. Stat. § 9.01(11).

* * *

Petitioners' state law claims simply cannot get them the radical relief they seek—invalidating a statewide election. No state law provides for that result outside of a recount, an exclusive remedy reserved to candidates, and one that is already proceeding. And leaving aside the merits of those claims, both laches and issue preclusion bar Petitioners from pulling a bait-and-switch on Wisconsin voters who cast their ballots in reliance on rules established by election officials. If Petitioners had a problem with those rules, they could and should have raised them long ago.

CONCLUSION

The fundamentally undemocratic and unprecedented nature of Petitioners' request to invalidate Wisconsin's general election results for President cannot be overstated. The people of Wisconsin have been entrusted to select our

state's presidential electors, and they made their decision on November 3, 2020. In a representative democracy like ours, that choice must be respected. The petition for an original action should be denied.

Dated this 27th day of November 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 27th day of November 2020.

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