FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA, V. KENNETH CHESEBRO *ET AL*., DEFENDANTS.	CASE NO. 23SC188947 JUDGE MCAFEE

PETITION FOR CERTIFICATE OF NEED FOR TESTIMONY BEFORE CRIMINAL PROSECUTION PURSUANT TO THE UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE

COMES NOW Kenneth Chesebro, by and through undersigned counsel, and petitions this Honorable Court for a Certificate of Need for Testimony Before a Criminal Prosecution, pursuant to O.C.G.A. § 24-13-90 et seq., and in support thereof says as follows:

1. The above-styled matter is a criminal prosecution currently pending and specially set for trial beginning October 23, 2023, in the Superior Court of Fulton County, Georgia.
2. Mr. Chesebro is charged with multiple felonies, including with violation of the Georgia RICO Act, based solely on his legal work on behalf of the Trump Campaign in 2020. In fact, the "overt acts" attributable to Mr. Chesebro consistent solely of legal memorandum and attorney-client emails related to

Mr. Chesebro's interpretation of the Twelfth Amendment to the United States Constitution and the Electoral Count Act.

3. Dane County, Wisconsin resident Mike Murphy is a necessary and material witness to Mr. Chesebro's defense.

4. Upon information and belief, Mr. Murphy is an Assistant Attorney General for the Wisconsin Department of Justice, where he has served since 2014, including during the 2020 presidential election.

5. The evidence presented at trial will show that Mr. Chesebro—who at the time was assisting the Trump Campaign with a legal challenge having to do with absentee ballots— helped to draft a petition that was filed in the Wisconsin Supreme Court by the Trump Campaign on December 11, 2020. The evidence will show that Mr. Chesebro added the following footnote to that petition prior to it being filed:

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[3] Following the recommended approach to situations involving court challenges in Presidential elections which are not resolved by the time the Presidential electors must cast their votes pursuant to Art. II, § 1, cl. 4, and 3 U.S.C. § 7 (this year, December 14), the Trump-Pence Campaign has requested its electors to sign and send to Washington on that date their votes, to ensure that their votes will count on January 6 if there is a later determination that they are the duly appointed electors for Wisconsin.

This practice dates back at least as far as 1960, when the Kennedy electors in Hawaii voted on the date the Electoral College met, even though on that date the Nixon electors had been ascertained by the acting Governor to have won the state; only after further litigation were the votes of the Kennedy electors approved and ultimately counted in Congress. *See, e.g.*, Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N. Car. L. Rev. 1654, 1691-92 (2002). *See also* Michael L. Rosin & Jason Harrow, "How to Decide a Very Close Election for Presidential Electors: Part 2," Take Care Blog, Oct. 23, 2020 (https://takecareblog.com/blog/how-to-decide-a-very-close-election-for-presidential-electors-part-2) (visited Dec. 9, 2020) (concluding that if "a state wants to have its electoral votes counted, but which presidential electors were appointed by the voters on election day remains uncertain . . . there is only one possible solution: both potentially-winning slates of electors should cast electoral votes on the day required while the recount continues").

Exhibit A.[1]

6. On December 14, 2020, in part based on the legal advice by Mr. Chesebro, the Wisconsin Republican electors met at the State Capitol in Madison Wisconsin in order to sign and send their ballots to the President of the Senate, in order to preserve the campaign's rights, in the event it was later determined that President Trump had won the Wisconsin election.
7. Sometime after the 2020 Presidential Election, the Wisconsin Department of Justice was asked to investigate whether the alternate elector meeting violated state law. Upon information and belief, on February 9, 2022, Mr. Murphy, in his role as an Assistant Attorney General for the State of Wisconsin, drafted a memorandum wherein he concludes that there was no violation of state law. ***Exhibit B***.
8. In his February 2022 memo, Mr. Murphy specifically notes that the Trump Campaign (through Mr. Chesebro's brief) had put the Wisconsin Supreme Court on notice, *prior to* the alternate elector meeting, that the alternate electors would be meeting on December 14. *Id.* at pp. 4-5.
9. Mr. Chesebro expects that Mr. Murphy will be able to testify to these proactive steps that the Trump Campaign—through Mr. Chesebro's legal

[1] Petitioner's Exhibits A and B are certified copies of exhibits attached to the Affidavit of Matthew Fernholz, which was filed on June 7, 2023 [Docs. 193-196] in *Khary Penebaker, et al. v. Andrew Hitt, et al.*, 2022-cv-1178, Dane County Circuit Court, State of Wisconsin.

brief—took to alert the Wisconsin Supreme Court of its intentions days before the alternate electors met to cast their ballots. Mr. Chesebro submits that this evidence is crucial to negate any unlawful intent, which the State must prove beyond a reasonable doubt. Specifically, evidence of Mr. Chesebro's transparency is significant, particularly considering the State's allegations that he was involved in a conspiracy to commit illegal acts. The element of intent underpins each charge against Mr. Chesebro, making it essential for the jury to fully grasp his actions and motivations. Therefore, it is crucial that the jury is given the opportunity to weigh this evidence.

10. Mr. Murphy, based on the information set forth above, is a necessary and material witness.
11. The testimony of Mr. Murphy will not be cumulative of other evidence in this matter.
12. Mr. Murphy resides outside the jurisdiction of this Honorable Court and is therefore unable to be served with process to compel attendance and testimony. Upon information and belief, Mr. Murphy currently works and resides in Dane County, Wisconsin.
13. Mr. Murphy will be required to be in attendance and testify before the trial in this matter commencing on October 23, 2023. It is not known at this time which specific date he will be called by Mr. Chesebro as a witness, as a jury

has not yet been sworn and the presentation of evidence has not yet begun. Mr. Chesebro reasonably anticipates that Mr. Murphy's testimony will not exceed one day.

14. Mr. Chesebro will pay all reasonable and necessary travel expenses and witness fees required to secure Mr. Murphy's attendance and testimony, in accordance with the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. See O.C.G.A. §24-13-94.
15. Both Georgia and Wisconsin have adopted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. See O.C.G.A. § 24-13-90 et seq.; WI Stat § 976.02.

WHEREFORE, Kenneth Chesebro, by and through undersigned counsel, prays that this Honorable Court issue a Certificate of Need for Testimony Before Criminal Prosecution, pursuant to O.C.G.A. § 24-13-90 et seq., certifying to the proper authorities in the jurisdiction in which Mike Murphy is located that Mike Murphy is a necessary and material witness whose attendance and testimony are required for the above-referenced criminal prosecution, and the presence of Mike Murphy will be needed for the number of days specified above.

Respectfully submitted, this the 12th day of October, 2023.

/s/ Scott R. Grubman
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FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA, V. KENNETH CHESEBRO *ET AL*., DEFENDANTS.	CASE NO. 23SC188947 JUDGE MCAFEE

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing ***Petition for Certificate of Need for Testimony Before Criminal Prosecution Pursuant to the Uniform Act to Secure the Attendance of Witnesses From Without the State*** via the e-filing system.

This the 12th day of October, 2023.

/s/ Scott R. Grubman
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EXHIBIT A

FILED
06-07-2023
CIRCUIT COURT
DANE COUNTY, WI
2022CV001178

EXHIBIT A

No. _____

In the Supreme Court of Wisconsin

DONALD J. TRUMP, MICHAEL R. PENCE, and DONALD J. TRUMP FOR PRESIDENT, INC.,

PETITIONERS,

V.

JOSEPH R. BIDEN, KAMALA D. HARRIS, MILWAUKEE COUNTY CLERK c/o GEORGE L. CHRISTENSON, Milwaukee County Clerk, MILWAUKEE COUNTY BOARD OF CANVASSERS c/o TIMOTHY H. POSNANSKI, Chairman of Milwaukee County Board of Canvassers, DANE COUNTY CLERK c/o SCOTT MCDONNELL, Dane County Clerk, DANE COUNTY BOARD OF CANVASSERS c/o ALAN A. ARNSTEN, Member of Dane County Board of Canvassers, WISCONSIN ELECTION COMMISSION, and ANN S. JACOBS, Chairperson Wisconsin Elections Commission,

RESPONDENTS

ON APPEAL FROM A DECEMBER 11, 2020 DECISION AND ORDER AFFIRMING THE DETERMINATIONS OF THE CANVASSING BOARDS BY HONORABLE JUDGE STEPHEN A. SIMANEK IN MILWAUKEE COUNTY CASE NO. 2020CV7092

EMERGENCY PETITION TO BYPASS COURT OF APPEALS WITH MOTION TO ACCEPT OPENING BRIEF AND APPENDIX AND SET EXPEDITED SCHEDULE

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Counsel for Petitioners

INTRODUCTION[1]

A Presidential election is one of the most important matters in our Republic, representing to all Americans, and to the world, the sanctity of the rule of law. This matter poses the fundamental legal question regarding such an election: Do our state statutes governing elections mean what they say?

Wisconsin has made explicit choices on how it will conduct its elections, including a choice to treat absentee voting with great caution and guard it with mandatory rules. The Wisconsin Elections Commission ("WEC") made choices explicitly contradicting what those statutes required and then, either on WEC's advice or on their own volition, municipal clerks chose not to follow the absentee-voting statutes.

This Court must address these fundamental issues immediately, as identifying the validly appointed Presidential Electors to represent Wisconsin must be done on a timetable set in the United States Constitution which cannot be changed. There is no time for review by the Court of Appeals, the issues posed are of extraordinary statewide importance, and these fundamental legal issues can only be authoritatively resolved by this Court.

[1] Citations to "P. App. ___" refer to the page(s) of the Appendix filed with Petitioners' Emergency Petition to Bypass the Court of Appeals in this matter; citations to the transcript of the Recount proceedings in Milwaukee County appear as "Milwaukee Cty. Trans. [date] at [page:line]"; and citations to the transcript of the Recount proceedings in Dane County appear as "Dane Cty. Trans. [date] at [page:line]."

ISSUES PRESENTED

1. May the State of Wisconsin establish mandatory procedures for absentee voting by law?

2. Were the procedures established by the laws of the State of Wisconsin for absentee voting complied with in Dane and Milwaukee Counties in the November 3, 2020 election?

3. Are the remedies prescribed by Wisconsin's election laws for violations of absentee-voting requirements mandatory?

RELIEF REQUESTED

1. That this Court take jurisdiction of this matter.

2. That the Court set an expedited schedule for briefing and oral argument within a time period that will allow for complete resolution of this case prior to January 6, 2021, the date for consideration of electoral votes in the United States Congress. If the Brief submitted herewith is accepted as Appellants' Opening Brief, a schedule the Court could consider is: 1) Responsive Briefs of other Parties due Wednesday, December 16, 2020; 2) Appellants' Reply Brief due Saturday, December 19, 2020; and 3) oral argument the week of December 21, 2020.

3. That the Court consider this a Motion to Accept the Brief filed herewith as the Petitioner/Appellants' Opening Brief.

STATEMENT OF THE CASE

I. Procedural Posture.

This matter was previously before this Court on a request for Original Action. *Trump v. Evers*, No. 2020AP1971-OA, 2020 Wisc. LEXIS 191, at *1 (Dec. 3, 2020). After this Court declined the Petitioners' request, Petitioners immediately began an action by Notice of Appeal in the Circuit Courts of Dane and Milwaukee Counties, the matters were consolidated, the parties presented the appeal, and the Circuit Court ruled. (P. App. 537-544). A Notice of Appeal of the Circuit Court's December 11, 2020 Final Order was immediately filed, and this Petition to Bypass was filed as quickly as possible with the Clerk of this Court. (P. App. 550).

II. Granting the Petition to Bypass is Essential to the Law of this State and to the Public Confidence in the Integrity of the Presidential Election and Future Elections.

This Court should immediately take jurisdiction because there is an exigent and compelling public interest in obtaining a prompt and authoritative determination of the election for President and Vice President of the United States. A decision by this Court is essential both as to the November 3, 2020 election and to all future elections. A determination of the legal issues unquestionably will control the outcome of this case.

The outcome of this case will affect the voting rights of all the citizens of Wisconsin and, particularly, those voting as absentee electors. A failure to immediately address the fundamental legal issues would leave in doubt the outcome of the 2020 election for President and Vice President of the United States and would

forever negatively affect the public's confidence in our elections, as well as the capacity of the Judiciary to serve as the ultimate arbiter of legal disputes. Only this Court can act with authoritative finality.

A. Bypass Rules.

Wis. Stat. § 808.05(1) provides that this Court may take jurisdiction of an appeal if "[i]t grants direct review upon a petition to bypass filed by a party[.]" Wis. Stat. § 809.62(1r) sets out some of the criteria the Court will apply to determine if a Bypass will be granted, but notes those are "neither controlling nor fully measur[e] the Court's discretion . . ."

Wis. Stat. § (Rule) 809.60(1) provides that a party may file with this Court "a petition to bypass the court of appeals pursuant to § 808.05 no later than 14 days following the filing of the respondent's brief under § 809.19[.]" The petition to bypass "must include a statement of reasons for bypassing the court of appeals." *Id.*

This Court's Internal Operating Procedures also address a petition to bypass:

> 2. *Petition to Bypass, Certification and Direct Review.* A party may request the court to take jurisdiction of an appeal or other proceeding pending in the Court of Appeals by filing a petition to bypass pursuant to Wis. Stat. § (Rule) 809.60. A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1),[2] and one the court concludes it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues. At times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.

[2] The criteria for granting a petition for review in this Court are found in Wis. Stat. § (Rule) 809.62(1r).

Wisconsin Supreme Court Internal Operating Procedures, II.B.2.

B. The Petition Satisfies the Criteria for Bypass and Should Be Granted.

In our country, the Presidential election is one of the most solemn and significant events for all citizens. It represents the ultimate statement by all American citizens concerning the sanctity of the rule of law and the peaceful transfer of Executive power. It is unlike any other election, and its importance is recognized uniformly by American courts. *Bush v. Gore*, 531 U.S. 98, 112 (2000); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 594 (6th Cir. 2006); *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1367 (N.D. Ga. 2016); *Nader v. Keith*, No. 04 C 4913, 2004 U.S. Dist. LEXIS 16660, at *22 (N.D. Ill. Aug. 23, 2004)

As such, the legal issues raised during the Recount, addressed in this Appeal, are certainly as "special" and "important" as any case this Court is likely ever to hear. This Court has previously granted bypass in election-law cases of lesser moment. *Elections Bd. of Wisconsin v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 653, 670, 597 N.W.2d 721 (1999). *See also NAACP v. Walker*, 2014 WI 98, ¶¶1, 18, 357 Wis. 2d 469, 851 N.W.2d 262 (2014).

The legal issues posed are more fully described in the Brief of Petitioners filed simultaneously with this Petition, and Petitioners respectfully incorporate that Brief by reference. The circuit court's decision has fully decided any factual matters, so no factual determinations remain to be made. The sole remaining issues are legal and, thus, fall squarely within the purview of the Court. Wis. Stat. § 809(1r)(3).

Ultimately, only this Court can issue a decision with statewide effect. Wis. Stat. § 809.62(1r)(2). A decision not to bypass would be, in effect, a decision by this Court never to allow a meaningful review of the Presidential election results in Wisconsin prior to January 6, 2021. A stop in the Court of Appeals would be little more than an exercise in futility with regard to one of the central errors committed during the election and Recount— the municipal clerk's issuance of 170,140 absentee ballots without first having received a written application from the electors, and the Boards of Canvassers' failure to exclude those ballots. (P. App. 18, 20-21, 29-30). That issue has already been addressed and decided in a published opinion of the Court of Appeals. *See Lee v. Paulson (in re Ballot Recount)*, 2001 WI App 19 (applying the plain language of Wis. Stat. §§ 6.84(2) & 6.86(1)(ar) and ordering the removal of all absentee ballots issued without a corresponding written application from the final vote totals and changing the outcome of an election). In light of *Lee*, the Court of Appeals cannot do anything other than reach the same conclusion in this case. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246, 256 (1997) ("we conclude that the constitution and statutes must be read to provide that only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals"). After the Court of Appeals conforms its ruling in this case to *Lee*, there is no doubt Respondents would then petition this Court to review the case. As to these, and the other matters of statutory construction, there is not sufficient time to follow that course.

In addition, there can be little doubt that the issues regarding the statutes governing absentee voting are of the type that will "recur unless resolved by the Supreme Court." Wis. Stat. § 809.62(1r)(3). Absentee voting has dramatically increased over the years and will likely continue to increase. The issues raised by Petitioners concerning the mandatory character of the statutes, the remedies required for violations, and the legal effect of WEC advice, will most certainly recur in future recounts and elections and will control how future absentee voters cast their ballots. If this Court does not act, every future absentee voter will doubt if the vote they cast will be counted. The resulting lack of confidence in all future Wisconsin elections would be catastrophic.

C. The Court Should Grant Bypass Because the Time for a Meaningful Decision is Too Short to Allow for Intermediate Appellate Review.

In a more ordinary case— involving for example, the election of a member of a multi-member government body, such as a legislative chamber which can function without every member—this Court might wait for the Court of Appeals to issue a ruling before considering the case. However, here a grant of bypass is essential to ensure that the issues raised in this case are resolved so there can be a determination in Congress on January 6, 2021, of which slate of

electors, those pledged to Trump-Pence or those pledged to Biden-Harris, are properly counted as Wisconsin's votes for President and Vice President.[3]

Final resolution of judicial controversies can take as long as January 6th because, under the Constitution, none of the votes cast for President and Vice President are *opened* before that date. As the WEC explained in its earlier filing in this Court, the winner of Wisconsin's ten electoral votes can be certified "after the electors have convened and cast their electoral votes," and before January 6. Response of Respondents Wisconsin Elections Commission and Commissioner Ann Jacobs in Case. No. 20AP1971-OA, filed Dec. 1, 2020, at 8.[4]

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[3] Following the recommended approach to situations involving court challenges in Presidential elections which are not resolved by the time the Presidential electors must cast their votes pursuant to Art. II, § 1, cl. 4, and 3 U.S.C. § 7 (this year, December 14), the Trump-Pence Campaign has requested its electors to sign and send to Washington on that date their votes, to ensure that their votes will count on January 6 if there is a later determination that they are the duly appointed electors for Wisconsin.

This practice dates back at least as far as 1960, when the Kennedy electors in Hawaii voted on the date the Electoral College met, even though on that date the Nixon electors had been ascertained by the acting Governor to have won the state; only after further litigation were the votes of the Kennedy electors approved and ultimately counted in Congress. *See, e.g.*, Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N. Car. L. Rev. 1654, 1691-92 (2002). *See also* Michael L. Rosin & Jason Harrow, "How to Decide a Very Close Election for Presidential Electors: Part 2," Take Care Blog, Oct. 23, 2020 (https://takecareblog.com/blog/how-to-decide-a-very-close-election-for-presidential-electors-part-2) (visited Dec. 9, 2020) (concluding that if "a state wants to have its electoral votes counted, but which presidential electors were appointed by the voters on election day remains uncertain . . . there is only one possible solution: both potentially-winning slates of electors should cast electoral votes on the day required while the recount continues").

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

We agree with WEC that because January 6, not December 14, is the real deadline, it is not "necessary to super-expedite state court proceedings . . ." *Id.* Nonetheless, any realistic prospect that this matter can be given due deliberation by this Court, and resolved soon enough that any aggrieved party would have a reasonable opportunity to seek United States Supreme Court review, *does* require that this Court grant bypass and set the appeal for expedited briefing and argument. It is simply not plausible that this appeal could be definitively concluded in the next three weeks or so if the parties were first required to brief and argue in the Court of Appeals.

CONCLUSION

This Court should grant the Petition for Bypass, and enter such other and further orders so as to ensure that the matter can be entirely resolved before January 6, 2021.

Dated this 11th day of December, 2020.

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EXHIBIT B

ATTORNEY CLIENT PRIVILEGED
CONFIDENTIAL

EXHIBIT C

Date: February 9, 2022

To: Wisconsin Elections Commission

Subject: 2021 EL 21-13: *Sickel v. Hitt, et al.*
Memorandum on Complaint under Wis. Stat. § 7.75 and 5.10

This matter involves an allegation that ten presidential elector nominees violated certain Wisconsin election laws when they met on December 14, 2020, to vote as presidential electors for Donald Trump and Michael Pence. That vote occurred after a statement of canvas certified election results in favor of Joseph Biden and Kamala Harris, after a recount was completed, but while court challenges to the election result were pending. Complainants argue that the December 14, 2020, meeting was an unlawful attempt to undermine the election, and the Respondents argue that the meeting was necessary to avoid missing a statutory deadline while legal challenges were pending. Based upon the text of the relevant statutes, and in light of the facts, historical precedent, and related federal authorities, this memorandum concludes that the Complaint does not raise a reasonable suspicion that Respondents violated Wisconsin election law.

Complainants also argue that eight of the Respondents forfeited any defenses by not filing separate responses to the Complaint. Under the Commission's procedures for deciding complaints of this nature, a respondent does not default by declining to individually respond.

I. Nature of the proceeding.

This action is commenced under Wis. Stat. § 5.05. In a section 5.05 complaint, the Commission makes one of three initial findings. It may (1) find by a preponderance of the evidence that a complaint is frivolous, (2) fail to find that there is reasonable suspicion of a violation and dismiss the complaint, or

(3) find that there is reasonable suspicion of a violation. Wis. Stat. §§ 5.05(2m)(c)2.am, 5.05(2m)(c)(4).

If the Commission finds that there is reasonable suspicion of a violation, it then has two options for how to proceed. First, it may authorize the commencement of an investigation. Wis. Stat. § 5.05(2m)(c)(4) ("if the commission believes that there is reasonable suspicion . . . the commission may by resolution authorize the commencement of an investigation.") At the end of such investigation, the Commission would determine whether probable cause exists to believe that a violation has occurred, whether to conduct further investigation, or whether to terminate the investigation due to lack of sufficient evidence to indicate a violation has occurred. Wis. Stat. § 5.05(2m)(c)(5). Additionally, "[a]t the conclusion of its investigation, the commission shall, in preliminary written findings of fact and conclusions based thereon, make a determination of whether or not probable cause exists to believe that a violation. . . has occurred or is occurring. Wis. Stat. § 5.05(2m)(c)(9).

Second, the Commission may make a finding of probable cause without an investigation. Wis. Stat. § 5.05(2m)(c)(6). The Commission could then authorize the administrator to file a civil complaint against the alleged violator or refer the matter to a district attorney. Wis. Stat. §§ 5.05(2m)(c)(6), (11).

No court decision has interpreted "reasonable suspicion" in the context of section 5.05. In other contexts, courts have indicated that reasonable suspicion exists when there is a particularized and objective basis to suspect there has been a violation of the law. This can be drawn using common sense inferences from everyday life, as well as the person's experiences. Reasonable suspicion is more than a hunch, but less than probable cause. *Kansas v. Glover*, 140 S.Ct. 1183 (2020); *see also State v. Newer*, 2007 WI App 236; *State v. Post*, 2007 WI 60, ¶ 18, 301 Wis. 2d 1, 11, 733 N.W.2d 634 ("this court has consistently maintained that the determination of reasonable suspicion is based upon the totality of the circumstances"); *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84, 88 (Wis. Ct. App. 1997) ("[t]he question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present. . ."); *State v. Patton*, 2006 WI App 235, ¶ 9, 297 Wis. 2d 415, 297 Wis.2d 415 (in the traffic stop context reasonable suspicion is a particularized and objective basis for suspecting the person stopped of criminal activity.")

Probable cause is a higher standard than reasonable suspicion. *State v. Houghton*, 2015 WI 79, ¶ 21, 364 Wis. 2d 234; *Patton*, 297 Wis.2d 415 ¶ 9. Probable cause is defined in Wis. Admin. Code § EL 20.02(4) to mean "the facts and reasonable inferences that together are sufficient to justify a reasonable, prudent person, acting with caution, to believe that the matter asserted is probably true."

II. Scope of the Complaint.

The Complaint alleges that the respondents violated Wisconsin Statutes sections 7.75 and 5.10 and "[b]y this sworn Complaint [requests] that the Wisconsin Elections Commission investigate the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl. ¶ 32.) It further requests that the Commission "initiate an investigation pursuant to Wis. Stat. § 5.05(2m)(c)4. of the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl.[1] ¶ 33; Compl. Form[2] p. 1)

The complaint documents state that the Complainants have separately requested that the District Attorney for Milwaukee County investigate apparent criminal violations including crimes affecting the administration of government and forgery. (Compl. ¶ 35.) Complainants note that such investigation is "distinct from the civil actions [Complainants] request the Wisconsin Elections Commission to undertake." (Compl. ¶ 36.)

Consistent with the Complaint, this memorandum addresses the facts and arguments that the parties have raised regarding Wis. Stats. §§ 5.10 and 7.75. This memorandum does not address other potential violations of law, such as election fraud under Wis. Stat. § 12.13 or matters that the Complainants have raised to other authorities or discussed in the media, such as forgery under Wis. Stat. § 943.38, false swearing under Wis. Stat. § 946.32, falsely assuming to act as a public officer under Wis. Stat. § 946.69, simulating legal process under Wis. Stat. § 946.68, misconduct in public office under Wis. Stat. § 946.12, conspiracy, aiding, or attempt to commit such acts, or any other matter outside the scope of the complaint.

III. Nature of the Complaint.

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[1] "Compl." refers to the document titled "Sworn Complaint against fraudulent electors under Wis. Stat. § 5.05."

[2] "Compl. Form" refers to the document titled "State of Wisconsin Elections Commission Complaint Form."

On February 15, 2021, Complainant Paul Sickel filed a Complaint against Andrew Hitt, Robert Spindell, Kathy Kiernan, Bill Feehan, Carol Brunner, Scott Grabins, Darryl Carlson, Pam Travis, Kelly Ruh, and Mary Buestrin (the "Respondents"). The Complaint and supporting briefs allege that the Respondents violated Wis. Stat. §§ 5.05 and 7.75.

The Complaint involves events following the November 3, 2020, presidential election. On November 19, 2020, the Commission issued an order for recount.[3] On November 30, 2020, the Chairperson of the Commission executed a statement of canvass certifying that electors for candidates Biden and Harris received the greatest number of votes. (Compl. Ex. D.) On the same day, Governor Evers executed a certificate of ascertainment, certifying that result. (Compl. Ex. E.)

Simultaneously with the canvassing, recount, and certification, several election-related lawsuits were pending in both state and federal court, including legal challenges to the results. *E.g.*, *Donald J. Trump, et al. v. Joseph R. Biden, et al.*, Milwaukee Cty. Case No. 20-CV-7092; *Donald J. Trump, et al. v. The Wisconsin Elections Commission, et al.*, E.D. Wis. 2:20-CV-01785-BHL. These lawsuits were not finally concluded until February and March 2021, when the U.S. Supreme Court denied certiorari review in both cases. As of December 14, 2020, the recount results had been upheld but appeals, or appeal opportunities, remained. (*See* timeline in Sur-Reply, p. 2–3.) In the state court case, on December 14, 2020, the Wisconsin Supreme Court rejected a Trump campaign challenge. The campaign then filed a petition for writ of certiorari with the United States Supreme Court on December 29, 2020, which was denied on February 22, 2021. In the federal case, the district court dismissed the Trump complaint on December 12, 2020, an appeal was filed on December 14, 2020, and the court of appeals affirmed the dismissal on December 24, 2020. The campaign then filed a petition for writ of certiorari with the United States Supreme Court on December 30, 2020, which was denied on March 8, 2021.

On December 11, 2020, the Trump plaintiffs in the state-court recount case filed a petition with the Wisconsin Supreme Court that addressed the meeting and electoral college votes in a footnote:

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[3] Available at *Order for Recount,* Wisocnsin Elections Commission, https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/WEC%20-%20Final%20Recount%20Order_0.pdf (last accessed November 3, 2021.)

> Following the recommended approach to situations involving court challenges in Presidential elections which are not resolved by the time the Presidential electors must cast their votes pursuant to Art. II, § 1, cl. 4, and 3 U.S.C. § 7 (this year, December 14), the Trump-Pence Campaign has requested its electors to sign and send to Washington on that date their votes, to ensure that their votes will count on January 6 if there is a later determination that they are the duly appointed electors for Wisconsin.

(Goehre Aff. Ex. A: 8 n.3.)

On December 14, 2021, the Respondents met in the state Capitol building as electors for candidates Trump and Pence. (Compl. Ex. G.) Each executed a "Certificate of the Votes of the 2020 Electors From Wisconsin" indicating presidential votes for Trump and Pence. (Compl. Ex. G.) Respondents Hitt and Ruh sent the document to the President of the United States Senate, the Wisconsin Secretary of State, the Archivist of the United States, and the Chief Judge for the Western District of Wisconsin. (Compl. Ex. G.) The transmittal letter has only one signature, which appears to be of Andrew Hitt. (Compl. Ex. G.)

In a social media post, Respondent Feehan indicated that the Trump and Pence electoral college votes were "[j]ust keeping our legal options open." (Compl. Ex. H.) The Republican Party of Wisconsin, via Respondent Hitt, stated: "While President Trump's campaign continues to pursue legal options for Wisconsin, Republican electors met today in accordance with statutory guidelines to preserve our role in the electoral process with the final outcome still pending in the courts." (Compl. Ex. I.)

The Complaint alleges that "[t]he only reasonable inference that can be drawn from these documents [indicating electoral votes for Trump and Pence] is that the fraudulent electors created and delivered these documents for the purpose, and with the intent, that they be received as valid documentation for the purpose of inducing the United States Congress to credit the wrong candidates with having earned Wisconsin's ten electoral votes." (Compl. ¶ 24.) This, the Complainants contend, constituted fraud and an intent to undermine the presidential election. (Compl. ¶ 26.)

The Respondents deny this allegation, and state that they "acted with the sole intent of preserving standing and ensuring that if any of the pending legal

cases were successful, the courts did not claim it was too late for the appropriate remedy to be awarded." (Resp. 2–3.)

IV. Issue 1: Whether the Respondents' December 14, 2020, meeting or execution of documents including a "Certificate of Nomination Presidential Electors Meeting: October 6, 2020" violated Wis. Stat. §§ 5.10 or 7.75.

The Complainants request that the Commission "initiate an investigation pursuant to Wis. Stat. § 5.05(2m)(c)4. of the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl. ¶ 33.)

a. Laws at issue:

Sections 5.10 and 7.75 state:

5.10 Presidential electors

Although the names of the electors do not appear on the ballot and no reference is made to them, a vote for the president and vice president named on the ballot is a vote for the electors of the candidates for whom an elector's vote is cast. Under chs. 5 to 12, all references to the presidential election, the casting of votes and the canvassing of votes for president, or for president and vice president, mean votes for them through their pledged presidential electors.

7.75 Presidential electors meeting

(1) The electors for president and vice president shall meet at the state capitol following the presidential election at 12:00 noon the first Monday after the 2nd Wednesday in December. If there is a vacancy in the office of an elector due to death, refusal to act, failure to attend or other cause, the electors present shall immediately proceed to fill by ballot, by a plurality of votes, the electoral college vacancy. When all electors are present, or the vacancies filled, they shall perform their required duties under the constitution and laws of the United States.

(2) The presidential electors, when convened, shall vote by ballot for that person for president and that person for vice president who are, respectively, the candidates of the political party which nominated them

> under s. 8.18, the candidates whose names appeared on the nomination papers filed under s. 8.20, or the candidate or candidates who filed their names under s. 8.185(2), except that at least one of the persons for whom the electors vote may not be an inhabitant of this state. A presidential elector is not required to vote for a candidate who is deceased at the time of the meeting.

Wis. Stat. §§ 5.10, 7.75. These statutes describe that Wisconsin voters select presidential electors by voting for the presidential candidates, and that electors shall meet on a certain date and cast electoral college votes for their candidates. In 2020, December 14 was the deadline for presidential electors to meet. After that date, the Section 7.75 deadline would have been missed.

b. Analysis:

The issue in this complaint is whether the Trump and Pence electors violated these statutes when they met, voted, and documented their votes, after the canvassing, recount, and certification were complete, but before court challenges to the recount outcome were complete.

Applying sections 5.10 and 7.75 begins with the plain language of the statutes. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Nothing in either statute prohibits or otherwise limits a party from meeting to cast electoral votes during a challenge to an election tabulation. Instead, section 5.10 merely says that while 'the presidential candidates' names appear on the ballot, votes for those candidates are votes for their electors. And section 7.75 merely lays out the procedure for presidential electors to cast their votes. They say nothing about an alternative set of electors casting votes and do not expressly prohibit a slate of electors form casting votes to preserve their votes in case pending legal challenges prove successful.

Petitioners contend that "Because the Republican candidates for the offices of President and Vice President of the United States did not win Wisconsin's statewide November 2020 election, the Republican Party's designees were not elected as Wisconsin's Presidential Electors. Accordingly, they had no legal duty to meet on December 14, 2020." (Compl. ¶ 17.) The argument, in essence, is that the Respondents were not "electors" to begin with, so they had no duty to meet and vote.

As an initial matter, even assuming the Complainants were right that the Respondents had no *duty* to meet, it does not necessarily follow that meeting violated the law. The remainder of this argument has some facial appeal because the U.S. Constitution describes presidential electors as a product of the state election process. U.S. Const. art. II, § 1, cl. 2 ("Presidential Electors Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.") In other words, individuals nominated by a party to be electors are not actually electors until the state process decides who won the election. However, the Complainant's argument—that the Respondents were not electors—presumes the outcome of the state procedures. And as noted above, Wisconsin law does not prohibit an alternative set of electors from meeting.

Respondents point out that the election outcome was still under judicial review, so their votes were a necessary protection against missing the deadline should the challenges to the November 30 canvassing have succeeded. Court pleadings, a news release, and social media indicate that the Respondents' intent was to avoid missing the December 14, 2020, deadline while court challenges were pending. Respondents point out that if they did not meet that day, they risked having no electoral votes that could possibly be counted if their legal challenges were successful and Trump were declared the successful candidate by legal process. Respondents' concern is reasonable; courts have found that candidates' delays can bar legal rights. *See Trump v. Biden*, 2020 WI 91, ¶¶ 13–22, 394 Wis. 2d 629, 951 N.W.2d 568 (barring claims where "[t]he Campaign offers no justification for this delay; it is patently unreasonable"); *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877 ("petitioners delayed in seeking relief in a situation with very short deadlines and that under the circumstances, including the fact that the 2020 fall general election has essentially begun, it is too late to grant petitioners any form of relief"); *Joseph R. Santeler Complaint against Kanye West,* Case No. EL 20-30[4] (nomination papers rejected when submitted shortly after 5:00 p.m. deadline)

Complainants reply that if the intent was to preserve the deadline, the letter transmitting the record of Trump electoral votes could have stated expressly that the votes were contingent on the outcome of pending litigation,

[4] Meeting minutes available at *Notice of open and Closed Meeting,* Wisconsin Elections Commission, https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/August%2020%20Open%20Session%20Packet.pdf (last accessed November 3, 2021.)

which is what occurred in other states such as Pennsylvania and New Mexico. (Compl. Reply p. 2–3.) That is a valid criticism of the transmittal letter signed by Respondent Hitt. (Compl. Ex. G.) The letter would have been more accurate, and may have prevented confusion or concern, if it had expressly stated that the votes were being transmitted only to meet the statutory deadline in case they became operative after the lawsuits were resolved. That would have been better practice, and may have prevented this proceeding, but it likely not a violation of election statutes.

In addition to Pennsylvania and New Mexico in 2020, there is additional historical precedent for protective presidential elector votes. In the 1960 presidential election between Nixon and Kennedy, Hawaii's canvassing showed Nixon a winner by 141 votes and the governor issued a certificate of election to the Republican slate. The results were challenged in a lawsuit brought by Democratic voters, and a recount was commenced. The recount was not completed by the date that presential electors voted, December 19, and both the Democrats and Republicans met and cast their votes for their respective candidates. The recount concluded on December 28, and two days later the court declared that Kennedy had won the election by 115 votes. Ultimately, three certificates of electoral college votes and the court's judgment was submitted to Congress, and the votes were counted for Kennedy in light of the December 30 court ruling. (Goehre Aff. Ex. C–F.)

The Respondents actions here were similar to those of the Democratic presidential electors in Hawaii. They cast their votes, even though the canvass did not reflect a Trump victory, in order to preserve the opportunity for the votes to be counted if a court challenge found that Trump received the majority of votes. Petitioners point out a difference that the recount was still underway in Hawaii when the Democratic electors met, but in Hawaii it was the court decision that ultimately ended the dispute. As a federal court recognized in the 2020 election litigation, an election canvassing is not necessarily final while legal challenges are pending:

> The final determination of the next President and Vice President of the United States has not been made, however, and the issuance of a Certificate of Ascertainment is not necessarily dispositive on a state's electoral votes. . . . Under the federal statute governing the counting of electoral votes, a state governor may issue a certificate of ascertainment based on the canvassing and then a subsequent certificate of "determination" upon the conclusion of all election challenges. 3 U.S.C.

> § 6. The certificate of "determination" notifies the U.S. Congress of the state decision when Congress convenes . . . to count the electoral votes.

Trump v. Wisconsin Elections Comm'n, No. 20-CV-1785-BHL, 2020 WL 7318940, at *9 (E.D. Wis. Dec. 12, 2020). In the Wisconsin 2020 election, there was no final court decision by December 14.

Although the Commission's decision is confined to a state law inquiry, it is notable that federal law and Supreme Court commentary contemplate the possibility of multiple slates of electors. Federal statutes include procedures for Congress to follow "in such case of more than one return or paper purporting to be a return from a State" (3 U.S.C. § 15), and deadlines for state courts to resolve election-related disputes. 3 U.S.C. § 5. In a case involving the 2000 presidential election, the Supreme Court noted, in a dissent, that these rules "do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines." *Bush v. Gore*, 531 U.S. 98, 127, 121 S. Ct. 525 (2000) (J. Stevens, dissenting). These authorities acknowledge the possibility that state procedures may result in multiple electoral votes being transmitted to the federal legislature.

Finally, Complainants argue that the Respondents "met in a concerted effort to ensure that they would be mistaken, as a result of their deliberate forgery and fraud, for Wisconsin's legitimate Presidential Electors." (Compl. 25.) The record does not support this allegation. Before and after the December 14 meeting, the Respondents publicly stated, including in court pleadings, that they were meeting to preserve legal options while litigation was pending. (Compl. Ex. H–I; Goehre Aff. Ex. A: 8.)

Under the plain text of Wis. Stats. §§ 5.10 and 7.75, and in light of the facts, historical precedent, and related federal authorities, the Complaint does not raise a reasonable suspicion that Wis. Stats. §§ 5.10 or 7.75 were violated.

V. Issue 2: Whether Respondents Robert Spindell, Kathy Kiernan, Carol Brunner, Scott Grabins, Darryl Carlson, Pam Travis, Kelly Ruh, and Mary Buestrin defaulted this action.

The Commission received two responses to the Complaint; the Response to Complaint filed by counsel for Andrew Hitt and an email from Bill Feehan

stating that he joins the Hitt response. Complainants argue that all Respondents other than Hitt and Feehan have forfeited their opportunities to present facts and arguments or elected to not dispute the allegations. (Compl. Reply p. 1; Sur-Response p. 2.)

The statutes governing this complaint do not require a response and contain no provision for a default. The procedures in Wis. Stat. § 5.05 permit a respondent "to demonstrate to the commission . . that the commission should take no action against the person on the basis of the complaint," but there is no response requirement. Wis. Stat. § 5.05(2m)(c)2.a. There is no indication that a respondent defaults by not individually responding to a complaint. The Respondents other than Hitt and Feehan therefore did not default in this action by not submitting individual responses.

CONCLUSION

The allegations in the Complaint, and the supporting arguments and evidence, do not indicate that the Respondents violated Wis. Stats. §§ 5.10 or 7.75. Additionally, no Respondent is in default of those allegations.