

1/16/24, 1:43 PM

SUBJECT:

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: Judge Troupis <[REDACTED]@gmail.com>

DATE: 11/04/2020 14:18

Look forward to hearing from you on Vicki's show today.

I helped observe at central counting last night — fascinating!

Thanks again!

Ken

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TROUPIS 008910

SUBJECT: WTH? — Twitter censoring statistical analysis of Biden vote!!
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 11/08/2020 10:26

Jim,

I just got banned from Twitter by tweeting this out to Scott Adams (Twitter buddy of mine)!: <https://gnews.org/534248/>

Glenn Reynolds reports Facebook is censoring, too: <https://pjmedia.com/instapundit/412541/>

Maybe the statistical analysis will turn out to be Russian disinformation, but it's incredible that one can't even reference it on social media.

I would be happy to volunteer for the Trump legal team, if that would be helpful.

I'm particularly interested in the broadest grounds for challenge, on facts that Dems will have difficulty rebutting — for example, your point about the “card check” system under which election officials admittedly harvested Dem ballots using private funds; the failure to allow actual observation at central count (I was there Tuesday night and was amazed); and statistical anomalies of the sort explored in the banned article (and in a thread @ScottAdamsSays recent RT'd, which I now can't even access!).

On the statistics, my expertise with the law of expert testimony (handled Daubert and Joiner) could be helpful re the formulation of expert affidavits.

If these various systemic abuses can be proven, and found to be pivotal in a court decision and/or detailed legislative findings, I don't see why electoral votes certified by Evers (at least if court proceedings are still pending on the “safe harbor” days) should be counted over an alternative slate sent in by the legislature, whose decisions should have primacy under Article II. At minimum, with such a cloud of confusion, no votes from WI (and perhaps also MI and PA) should be counted, perhaps enough to throw the election to the House.

Thanks for getting me invited to do poll watching. I just wish the watch party had ended more happily!

Ken

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1/16/24, 1:44 PM

SUBJECT: Jim, did you get email I just sent???
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 11/08/2020 10:26

I just wrote you a long email, sparked by Twitter censoring an article on statistical analysis of the Biden vote.

I pushed send, but can't find it in my out box!

Trying to find out if Microsoft is censoring emails.

This:

<https://pjmedia.com/instapundit/412541/>

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TROUPIS 008912

1/16/24, 1:47 PM

SUBJECT: Trump recount -- getting you memo
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 11/11/2020 13:51

Jim,

You asked me for my independent read on the statutory provisions you mentioned.

I've prepared a three-page summary of how I view them.

I know this is sensitive, so **why don't I put it in a password-protected PDF file, upload it to my Google Drive, send you the link, and then delete the document after you download it?**

And then you'd call and I've give you the password.

That way, there would be nothing archived that could be captured -- as long as we're not being in surveilled in real time. If we are, I doubt our phone conversations would be private!

Happy to just discuss on the phone if you'd prefer.

Ken

Kenneth Chesebro
25 Northern Avenue, # 1509
Boston, MA 02210

[REDACTED]
[REDACTED]@post.harvard.edu
(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

TROUPIS 008913

1/16/24, 1:51 PM

SUBJECT: Re: Recount
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 11/13/2020 08:32

Sounds good.

Just read this:

<https://twitter.com/joelpollak/status/1327243124175822849?s=21>

Wow.

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From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Friday, November 13, 2020 9:13:04 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Recount

Ken,
I would like to loop you in to the legal briefing team today. I will let you know a conference call time.
Thank you for a concise memo.
Jim

Sent from my iPhone

TROUPIS 008914

1/16/24, 1:52 PM

SUBJECT: Re: Recount
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 11/13/2020 11:27

Re top Dominion guy hating Trump: <https://twitter.com/michellemalkin/status/1327297773020975104?s=21>

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From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Friday, November 13, 2020 9:32:09 AM
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Re: Recount

Sounds good.

Just read this:

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From: Judge Troupis <[REDACTED]@gmail.com>
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Subject: Recount

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Thank you for a concise memo.
Jim

Sent from my iPhone

TROUPIS 008915

SUBJECT: Re: Recount
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>
DATE: 11/13/2020 14:43

Thank you!
Jim

Sent from my iPhone

On Nov 13, 2020, at 2:38 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Able to join any call today on 20 mins notice.

If not today, next few days are fine too.

In the meantime I'm reading up on election law.

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From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Friday, November 13, 2020 12:27:09 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Re: Recount

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Subject: Recount

1/16/24, 1:52 PM

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Thank you for a concise memo.

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Sent from my iPhone

SUBJECT: Fwd: Recount
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Joe Olson <[REDACTED]@michaelbest.com>, Kenneth Chesebro <[REDACTED]@msn.com>
DATE: 11/13/2020 16:23

Ken, please get in touch with Joe. I would like you working on the Draft Appellate documents and Joe's firm is overseeing those drafts.

Thanks.

Jim

Sent from my iPhone

Begin forwarded message:

From: Kenneth Chesebro <[REDACTED]@msn.com>
Date: November 13, 2020 at 2:38:51 PM CST
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Re: Recount

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Sent from my iPhone

SUBJECT: Re: Recount
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>, Joe Olson <[REDACTED]@michaelbest.com>
DATE: 11/13/2020 16:36

Hi, Joe.

I will try you momentarily.

If now is a bad time, please suggest a time tomorrow morning that would work.

Or try me tonight at [REDACTED].

Ken

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From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Friday, November 13, 2020 5:23:15 PM
To: Joe Olson <[REDACTED]@michaelbest.com>; Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Fwd: Recount

Ken, please get in touch with Joe. I would like you working on the Draft Appellate documents and Joe's firm is overseeing those drafts.

Thanks.

Jim

Sent from my iPhone

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Date: November 13, 2020 at 2:38:51 PM CST
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Re: Recount

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TROUPIS 008920

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From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Friday, November 13, 2020 9:32:09 AM
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Re: Recount

Sounds good.

Just read this:

<https://twitter.com/joelpollak/status/1327243124175822849?s=21>

Wow.

Get [Outlook for iOS](#)

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To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Recount

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Sent from my iPhone

SUBJECT: Re: Recount
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 11/13/2020 16:42

Hi, Joe and I briefly chatted; we will start getting into substance tomorrow.

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From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Friday, November 13, 2020 5:36:23 PM
To: Judge Troupis <[REDACTED]@gmail.com>; Joe Olson <[REDACTED]@michaelbest.com>
Subject: Re: Recount

Hi, Joe.

I will try you momentarily.

If now is a bad time, please suggest a time tomorrow morning that would work.

Or try me tonight at [REDACTED].

Ken

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From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Friday, November 13, 2020 5:23:15 PM
To: Joe Olson <[REDACTED]@michaelbest.com>; Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Fwd: Recount

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Sent from my iPhone

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To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Recount

Ken,
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Thank you for a concise memo.
Jim

Sent from my iPhone

1/16/24, 1:54 PM

SUBJECT: Updated memo on real deadline -- feel free to circulate this if you deem it worthwhile
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
CC: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>, Nick Boerke <[REDACTED]@gmail.com>, George Burnett <[REDACTED]@lcojlaw.com>, "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>
DATE: 11/18/2020 18:02
ATTACHMENTS (20201118-180256-0001301): ["2020-11-18 Chesebro memo on real deadline.pdf"](#)

Jim,

Attached is my final, polished memorandum setting forth the view that January 6 is the real deadline for resolving contests over a State's electoral votes.

I have added a conclusion, designed to illustrate the importance of this issue -- making the point that it's conceivable that Gore would have prevailed in Florida in 2000 if his legal team had adopted this view.

Ken

Kenneth Chesebro
25 Northern Avenue, # 1509
Boston, MA 02210
[REDACTED]
[REDACTED]@msn.com
(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

TROUPIS 008924

Privileged and Confidential

M E M O R A N D U M

TO: Judge James R. Troupis
FROM: Kenneth Chesebro
DATE: November 18, 2020
RE: **The Real Deadline for Settling a State's Electoral Votes**

You asked for a written summary of the legal analysis underlying my suggestion during our conference call that, in any judicial review of the canvassing/recounting in Wisconsin, we should emphasize that the presidential election timetable affords ample time for judicial proceedings, even if initial errors in the recount require a remand for further recounting.

Summary

There is a very strong argument, supported by historical precedent (in particular, the 1960 Kennedy-Nixon contest), that the real deadline for a finding by the Wisconsin courts (or, possibly, by its Legislature) in favor of the President and Vice President is not **December 8** (the “safe harbor” deadline under the Electoral Count Act), nor even **December 14** (the date on which electors must vote in their respective States), but **January 6** (the date the Senate and House meet for the counting of electoral votes).

Assuming the electors pledged to Trump and Pence end up meeting at the Wisconsin Capitol on December 14 to cast their votes, and then send their votes to the President of the Senate in time to be opened on January 6, a court decision (or, perhaps, a state legislative determination) rendered after December 14 in favor of the Trump-Pence slate of electors should be considered timely. On this view, the only real deadline during the next month is the December 14 deadline to cast electoral votes – so that any state judicial proceedings which extend past that date, working toward resolution of who has won Wisconsin's electoral votes, are entirely compatible with federal law provided that they are completed by January 6.

1. The January 6 Hard Deadline

The date which has “ultimate significance” under federal law, as Justice Ginsburg aptly noted, is “the sixth day of January,” the date set by 3 U.S.C. § 15 on which the Senate and House determine “the validity of electoral votes.” Bush v. Gore, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting). That is the first date on which any electoral votes are actually counted. On that date, the Twelfth Amendment directs, “[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”

2. What Must Happen on December 14

The other date of particular federal significance is the date that the ten Wisconsin electors pledged, respectively, to Trump-Pence and Biden-Harris, must meet in Madison to actually cast their electoral votes, if those votes are later to be eligible to be counted in Congress on January 6. Art. II, § 1, cl. 4, gives Congress the power to specify the date “on which [the electors] shall give their Votes, which Day shall be the same throughout the United States.” Exercising that power, Congress has mandated that the electors “shall meet and give their votes on the first Monday after the second Wednesday in December” – this year, December 14 – “at such place in each State as the legislature of such State shall direct.” 3 U.S.C. § 7.

In accord with § 7, the Wisconsin Legislature has directed that “[t]he electors for president and vice president shall meet at the state capitol” at noon on December 14. Wis. Stat. § 7.75(1).

Prudence dictates that the ten electors pledged to Trump and Pence meet and cast their votes on December 14 (unless by then the race has been conceded). It is highly uncertain, given the language in Art. II requiring that all electors throughout the United States vote on the same day, whether Congress could validly count electoral votes cast on a later date.¹

It may seem odd that the electors pledged to Trump and Pence might meet and cast their votes on December 14 even if, at that juncture, the Trump-Pence ticket is behind in the vote count, and no certificate of election has been issued in favor of Trump and Pence. However, a fair reading of the federal statutes suggests that this is a reasonable course of action.

The basic responsibility of the electors is to “make and sign six certificates of the votes given by them” for President and Vice President, 3 U.S.C. § 9; “seal up the certificates so made by them,” *id.*, § 10; and forward them by registered mail to the President of the Senate and to other officials. *Id.*, § 11. These actions are carried out without any involvement by state officials.

¹ In 1857, Congress spent two days debating whether it would count electoral votes from Wisconsin which were cast one day late due to a blizzard in Madison. The result of the presidential election did not turn on the question, and it was left unresolved. Cong. Globe, 34th Cong., 3rd Sess., 644-60, 662-68 (1857).

It also seems clear that if, before the electors cast their votes, the candidates for whom they are voting have been issued certificates of election, it is the duty of the governor to deliver the certificates to the electors “on or before the day” they are required to meet, id. at § 6, and the electors are then to attach the certificates to the electoral votes they transmit to the President of the Senate. Id., § 9.

But nothing in federal law requires States to resolve controversies over electoral votes prior to the meeting of the electors. Indeed, there is no set deadline for a State to transmit to Congress a certification of which slate of electors has been determined to be the valid one. The duty of a state governor is merely to transmit the certification “as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment” Id., § 6.

3. Hawaii’s Electoral Votes in the 1960 Kennedy-Nixon Contest

The reasonableness of the above statutory analysis, and the prudence of the Trump-Pence electors meeting in Madison on December 14 to cast their votes and transmit them to Congress, regardless of the status of the electoral contest in Wisconsin at that juncture, is illustrated by how the Democratic Party handled the uncertainty over Hawaii’s electoral votes in the 1960 presidential election between John F. Kennedy and Richard M. Nixon.²

Remarkably, Hawaii’s electoral votes were counted in favor of Kennedy and Johnson when the votes were opened in Congress on January 6 even though:

(1) they did not arrive in Congress until that very morning;

(2) on the date the Electoral College met, December 19, 1960, Nixon’s electors had in hand a certificate from the Hawaii governor certifying that Nixon had won the state (by 141 votes);

(3) the Kennedy electors nonetheless also met and voted on that day, to preserve the possibility that their votes would eventually be certified as the valid ones;

(4) on the same day, a Hawaii court ordered a recount of the entire state;

² The following summary is adapted from 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 Nov. 17, 2020).

(5) only on December 28 did the Hawaii courts issue a final decision finding that Kennedy had, in fact, won the state (by 105 votes); and

(6) because the Kennedy electors had taken care to vote on the proper day, and the governor signed an amended certificate of election which was then rushed to Washington, in time to be counted in Congress, the electoral votes were awarded to Kennedy (although, it should be noted, the votes were counted only after Vice President Nixon, in his capacity as President of the Senate, suggested without objection that the votes be counted in favor of Kennedy “[i]n order not to delay the further count of the electoral vote,” and “without the intent of establishing a precedent”).

The last-minute counting of the Hawaii electoral votes in favor of Kennedy in 1960 buttresses the conclusion of constitutional law scholar Laurence Tribe that, absent some indication by a State to the contrary, the only real deadline for a state to complete its recount of a presidential election is “before Congress starts to count the votes on January 6.”³

4. Nothing in Wisconsin Law Is Inconsistent With the Trump-Pence Electors Casting Their Votes on December 14, as the Kennedy-Johnson Electors Did in 1960

The Biden camp might well seek to create a sense of urgency, and try to artificially truncate the post-election process of recounting and adjudication, by claiming that Wisconsin has an important interest in having all controversies regarding the election resolved by December 8, in order to gain the benefit of the “safe harbor” provision of the Electoral Count Act, which purportedly mandates that a final result reached in a State by the safe-harbor date “shall be conclusive” when votes are counted in Congress. 3 U.S.C. § 5.⁴ The U.S. Supreme Court’s view that

³ 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).

⁴ One must use the caveat “purportedly,” because there are substantial reasons to doubt that the Electoral Count Act, enacted by the 50th Congress in 1877, can have any binding effect on the 117th Congress which will convene on January 3, regarding its authority and obligation to count electoral votes as it sees fit. In particular, there is a very strong argument that the Senate which convenes in January has the inherent power to set whatever rules it wishes for deciding challenges to the electoral votes cast in this election. To view the Electoral Count Act as tying the Senate’s hands, unless amended, would mean that the Senate would need the permission of both the House and the President (absent a veto-proof

Florida had a strong interest in qualifying under this safe-harbor provision was a key factor in its decision to halt the ongoing Florida recount in the 2000 presidential election. Bush v. Gore, 531 U.S. 98, 110-11 (2000) (per curiam).

However, nowhere has the Wisconsin Legislature placed any priority on ensuring that post-election procedures in presidential contests are completed by the safe-harbor date. Far from mandating that certificates of election must be issued by this date, the Legislature has, with regard to all elections, affirmatively banned certificates of election from being issued unless and until all timely brought recounts, and subsequent judicial proceedings, have been exhausted:

When a valid petition for recount is filed . . . the governor or commission may not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed, or if appeal until the appeal is decided.

Wis. Stat. § 7.70(5)(a).⁵

voting margin) to change the rules governing its deliberations, a result which cannot be squared with Art. I, § 5, providing that “[e]ach House may determine the Rules of its Proceedings” As Professor Tribe has noted, “[t]here is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way.” Tribe, supra note 3, at 267 n.388 (citing Laurence H. Tribe, 1 American Constitutional Law, § 2-3, at 125-26 n.1 (3d ed. 2000)). See also Chris Land & David Schultz, On the Unenforceability of the Electoral Count Act, 13 Rutgers J. of Law & Pub. Pol’y 340, 368-77, 385-87 (2016); Vasan Kesavan, Is the Electoral Count Act Unconstitutional?, 80 N. Car. L. Rev. 1654, 1729-59, 1779-93 (2002).

⁵ To be sure, in accord with ordinary practice, under which the winner of the electoral votes in Wisconsin will typically be known well in advance of the date when electors cast their votes, the Legislature has provided that in presidential elections, the governor “shall prepare a certificate showing the determination of the results of the canvass and the names of the persons elected,” and send six duplicate originals to one of the electors on or before the date electoral votes are cast. Wis. Stat. § 7.70(b). Obviously this ministerial duty exists only when a certificate of election has already issued under § 7.70(a), after all post-election recounts and related legal proceedings have reached finality. There is nothing in § 7.70(b) that purports to affect the timetable for resolving post-election proceedings.

Conclusion

The position taken by the Trump-Pence campaign regarding the outside deadline for resolving post-election challenges could conceivably end up proving critical to the result of this election. If so, it would not be the first time: the failure of the Gore team in 2000 to focus on the real deadline early enough was a clear mistake. Thus, the issue of the real deadline should be examined carefully in the near future, so that the campaign presents a clear and united front concerning it.

Reflecting on the failure of the Gore challenge to Bush's victory in Florida, Ron Klain observed in a 2002 essay that "time was our enemy" – to an extent that "cannot be underestimated."⁶ Klain's early mistake was to overlook the possibility that January 6 might be the real deadline for resolving the matter of who had won Florida's electoral votes. As Klain recounted, when he went on CNN shortly after the election (on November 10), he "rather offhandedly noted that there was plenty of time for a full and fair counting of the people's votes, given that the electoral votes were not scheduled to be counted until December 18"⁷

The timetable for Gore to win the recount was further truncated by Gore attorney David Boies who, "during the first argument to the Florida Supreme Court," on November 20, "had said that the election would be over on December 12, because of an obscure provision of federal law."⁸ Journalist and lawyer David Kaplan vividly describes Boies's fateful decision in answering the justices' question regarding the outside deadline for resolving the controversy over the recount:⁹

The deadline [Boies] repeatedly cited was December 12, six days before the Electoral College met and twenty-two days hence – a veritable eternity in the day-to-day, minute-to-minute struggle. This was the date mandated by the Electoral Count Act by which states had to get their acts together, in order to prevent Congress from possibly rejecting a slate of presidential electors. December 12 was a so-called

⁶ Ronald A. Klain & Jeremy B. Bash, "The Labor of Sisyphus: The Gore Recount Perspective," in Overtime!: The Election 2000 Thriller (2002) (Larry B. Sabato, ed.), at 161.

⁷ Id.

⁸ Jeffrey Toobin, Too Close to Call: The Third-Six-Day Battle to Decide the 2000 Election 195 (2001).

⁹ David A. Kaplan, The Accidental President: How 413 Lawyers, 9 Supreme Court Justices, and 5,963,110 (Give or Take a Few) Floridians Landed George W. Bush in the White House 142-43 (2001).

Privileged and Confidential
The Real Deadline for Settling a State's Electoral Votes

7

safe harbor, but it was not a requirement ordained by either the U.S. Constitution, the Florida constitution, or even Congress itself. It was only in the nature of a benefit offered, with no penalty other than the absence of the benefit – sort of a no-risk offer. Any electoral slate determined thereafter simply would not be immune from congressional examination in a close election. That might seem like a big deal in theory, but did anyone really believe that in practice the electoral votes of one of the most populous states in the Union might go uncounted altogether? The distinction between a safe harbor as a freebie or absolute requirement was vital, but Boies didn't make it. Boies figured: Why should he? If his client got the time to count, Gore would overtake Bush and hand him the witch's hourglass

Wells pressed Boies on whether he agreed that December 12 represented the outer bounds.

"I do, Your Honor." He said this despite there being no state law or executive pronouncement to that effect.

Boies's concession of the date as a constitutional line over which no recount could cross would come back to haunt him in two weeks at the U.S. Supreme Court. It walled him in from ever offering such dates as December 18 (when the Electoral College convened), January 6 (when Congress met in joint session to count the electoral votes), or even January 20 (Inauguration Day). Indeed, January 20 was the only date mandated by the federal Constitution (in the Twentieth Amendment) – the other dates were mere statutory creations, which could be changed.

But to the extent the justices were going to come up with a new timetable, thinking about December 12 was critical. Any certification of the election – whether it included all, some, or none of the results from manual recounts – had to happen in time for the contest phase of Florida law to play out. A contest lawsuit needed time for trial and appeals. That had to be completed by December 12, according to Boies's answer.

If Boies had instead taken the position that January 6 was the real deadline for resolving the contest over Florida's electoral vote, citing the Hawaii 1960 example, Gore might ultimately have prevailed. So the issue of what is the real deadline is an issue that warrants close examination.

K.C.

SUBJECT: Re: Canvas Board
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>, Joe Olson <[REDACTED]@michaelbest.com>, "Boerke, Nicholas J (12767)" <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>, Dan Kelly <[REDACTED]@wisgop.org>, Chirst Troupis <[REDACTED]@gmail.com>, Joe Voiland <[REDACTED]@yahoo.com>, Stewart Karge <[REDACTED]@gmail.com>
DATE: 11/19/2020 09:06

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1/16/24, 1:57 PM

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DATE: 11/19/2020 09:20
ATTACHMENTS (20201119-092010-0002104): "[image001.png](#)"

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Partner

T [REDACTED] | [michaelbest.com](mailto:[REDACTED]@michaelbest.com)



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TROUPIS 008934

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TROUPIS 008935

1/16/24, 1:57 PM

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DATE: 11/19/2020 09:53

ATTACHMENTS (20201119-095309-0002103): ["image001.png"](#), ["Recount Petition - 29311866.1.pdf"](#), ["Absentee Ballot Applicaton EL-121 - 29311671.1.pdf"](#)

TROUPIS 008937

I think the argument against the envelope as the application is:

1. It fails to meet the statutory requirements for absentee balloting.
 - a. The statute clearly requires the application to be submitted before the ballot is issued to the voter. Wis. Stat. sec. 6.86(1)(ar) (“the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality.”) The envelope cannot satisfy this because the ballot has already been issued by the time the envelope is given to the voter to fill out.
 - b. And, the timing matters. It is part of the process for ensuring the integrity of the election. Wis. Stat. sec. 6.86(1)(ar) continues: “if a qualified elector applies for an absentee ballot in person at the clerk’s office, the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification. **The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector’s application** and shall verify that any photograph appearing on that document reasonably resembles the elector.
2. The envelope is insufficient as an application:
 - a. There is no affirmative request for an absentee ballot on the envelope (in contrast to the clear statement on the application form)
 - b. The statement on the envelope that says “I further certify that I requested this ballot” is insufficient because it is an after the fact statement that does not certify that the voter submitted a written application.

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	Wisconsin Application for Absentee Ballot				(Municipal Clerk) If in-person voter, check here: <input type="checkbox"/>
	Absentee ballots may also be requested at MyVote.wi.gov				
	Confidential Elector ID# <small>(HINDI - sequential #) (Official Use Only)</small>		WisVote ID # <small>(Official Use Only)</small>		Ward No.

Instructions	<p>Detailed instructions for completion are on the back of this form. Return this form to your municipal clerk when completed.</p> <ul style="list-style-type: none"> You must be registered to vote before you can receive an absentee ballot. You can confirm your voter registration at https://myvote.wi.gov <p>⚠️ PHOTO ID REQUIRED, unless you qualify for an exception. See instructions on back for exceptions.</p>
---------------------	--

VOTER INFORMATION					
1	Municipality	<input type="radio"/> Town <input type="radio"/> Village <input type="radio"/> City		County	
2	Last Name		First Name		
	Middle Name		Suffix (e.g. Jr, II, etc.)	Date of Birth <small>(MM/DD/YYYY)</small>	
	Phone		Fax	Email	
3	Residence Address: Street Number & Name				
	Apt. Number		City	State & ZIP	
4	Fill in the appropriate circle – if applicable (see instructions for definitions): <input type="radio"/> Military <input type="radio"/> Permanent Overseas <input type="radio"/> Temporary Overseas				

I PREFER TO RECEIVE MY ABSENTEE BALLOT BY:				(Ballot will be mailed to the address above if no preference is indicated. Absentee ballots may not be forwarded.)		
5	<input type="radio"/> MAIL	Mailing Address: Street Number & Name				
	<input type="radio"/> VOTE IN CLERK'S OFFICE	Apt. Number		City	State & ZIP	
		Care Facility Name (if applicable)				
		C / O (if applicable)				
	<input type="radio"/> FAX	Fax Number	For Military and Overseas Voters Only		Voter must have a computer and printer when receiving a ballot by fax or email. Voted ballots must be returned by mail.	
<input type="radio"/> EMAIL	Email Address	For Military and Overseas Voters Only				

I REQUEST AN ABSENTEE BALLOT BE SENT TO ME FOR: (mark only one)	
6	<input type="radio"/> The election(s) on the following date(s): _____ <input type="radio"/> All elections from today's date through the end of the current calendar year (ending 12/31). <input type="radio"/> For indefinitely-confined voters only: I certify that I am indefinitely confined because of age, illness, infirmity or disability and request absentee ballots be sent to me automatically until I am no longer confined, or I fail to return a ballot. <i>Anyone who makes false statements in order to obtain an absentee ballot may be fined not more than \$1,000 or imprisoned not more than 6 months or both.</i> Wis. Stats. §§ 12.13(3)(i), 12.60(1)(b).

TEMPORARILY HOSPITALIZED VOTERS ONLY (please fill in circle)						
<input type="radio"/> I certify that I cannot appear at the polling place on election day because I am hospitalized, and appoint the following person to serve as my agent, pursuant to Wis. Stat. § 6.86(3).						
7	Agent Last Name		Agent First Name		Agent Middle Name	
	AGENT: I certify that I am the duly appointed agent of the hospitalized absentee elector, that the absentee ballot to be received by me is received solely for the benefit of the above named hospitalized elector, and that such ballot will be promptly transmitted by me to that elector and then returned to the municipal clerk or the proper polling place.					
	Agent Signature	X		Agent Address		

ASSISTANT DECLARATION / CERTIFICATION (if required)			
I certify that the application is made on request and by authorization of the named elector, who is unable to sign the application due to physical disability.			
Agent Signature	X	Today's Date	

VOTER DECLARATION / CERTIFICATION (required for all voters)			
I certify that I am a qualified elector, a U.S. Citizen, at least 18 years old, having resided at the above residential address for at least 28 consecutive days immediately preceding this election, not currently serving a sentence including probation or parole for a felony conviction, and not otherwise disqualified from voting. Please sign below to acknowledge that you have read and understand the above.			
Voter Signature	X	Today's Date	

Wisconsin Application for Absentee Ballot Instructions

General Instructions: This form should be submitted to your municipal clerk, unless directed otherwise.

- This form should only be completed by registered voters; if you are not a registered voter or military elector, please submit a Voter Registration Application (EL-131) with this form.

Photo ID requirement: If you will receive your absentee ballot by mail, and have not previously provided a copy of acceptable photo ID with a prior by-mail absentee ballot request, a copy of photo ID must accompany this application. You may submit your application and a copy of your ID by mail, fax or email. In-person voters must always show acceptable photo ID.

The following documents are acceptable Photo ID (For specific information regarding expired documents visit <http://bringit.wi.gov>.)

State of WI driver license or ID card	Certificate of Naturalization
Military ID card issued by a U.S. uniformed service	WI DOT DL or ID card receipt
Photo ID issued by the federal Dept. of Veterans Affairs	Citation/Notice to revoke or suspend WI DL
University, college or tech college ID and enrollment verification	ID card issued by federally recognized WI tribe
U.S. passport booklet or card	

In lieu of photo ID, the voters listed below may satisfy the voter ID requirement by the following means:

- Electors who are indefinitely confined (see Section 6) – the signature of a witness on the Absentee Certificate Envelope.
- Electors residing in care facilities served by Special Voting Deputies – the signatures of both deputies on the envelope.
- Electors residing in care facilities not served by Special Voting Deputies – the signature of an authorized representative of the facility. If the elector is also indefinitely confined, the elector does not need a representative of the facility to sign.
- Military, Permanent Overseas and Confidential Electors – Exempt from the photo ID requirement.

1	<ul style="list-style-type: none"> • Indicate the municipality and county of residence. Use the municipality's formal name (for example: City of Ashland, Village of Greendale, or Town of Albion).
2	<ul style="list-style-type: none"> • Provide your name as you are registered to vote in Wisconsin. If applicable, please provide your suffix (Jr, Sr, etc.) and/or middle name. If your current name is different than how you are registered to vote, please submit a Voter Registration Application (EL-131) with this form to update your information. • Provide your month, day and year of birth. Remember to use your birth year, not the current year.
3	<ul style="list-style-type: none"> • Provide your home address (legal voting residence) with full house number (including fractions, if any). • Provide your full street name, including the type (eg., Ave.) and any pre- and/or post-directional (N, S, etc.). • Provide the city name and ZIP code as it would appear on mail delivered to the home address. • <u>You may not enter a PO Box as a voting residence.</u> A rural route box without a number may not be used.
4	<ul style="list-style-type: none"> • A "Military elector" is a person, or the spouse or dependent of a person who is a member of a uniformed service or the merchant marines, a civilian employee of the United States, a civilian officially attached to a uniformed service and serving outside the United States, or a Peace Corp volunteer. Military electors do not need to register to vote. • A "Permanent Overseas elector" is a person who is a United States citizen, 18 years old or older, who resided in Wisconsin immediately prior to leaving the United States, who is now living outside the United States <u>and has no present intent to return</u>, who is not registered in any other location, or who is an adult child of a United States citizen who resided in this state prior to establishing residency abroad. Permanent Overseas electors will receive ballots for federal offices only and must be registered to vote prior to receiving a ballot. • A "Temporary Overseas elector" is a person who is a United States citizen, 18 years of age or older, a resident of Wisconsin and is overseas for a temporary purpose and intends to return to their Wisconsin residence.
5	<ul style="list-style-type: none"> • Fill in the circle to indicate your preferred method of receiving your absentee ballot. • Military and Permanent Overseas voters may request and access their ballot directly at https://myvote.wi.gov. • If no preference is indicated, your absentee ballot will be mailed to your residence address listed in Box 3. • You are encouraged to provide a physical mailing address as backup in case of electronic transmission difficulties. Please only fill the circle for your preferred means of transmission. • If you are living in a care facility, please provide the name of the facility. • If someone will be receiving the ballot on your behalf, please list them after C/O. <u>Please note:</u> The absentee elector is still required to vote their own ballot, although they may request assistance in physically marking the ballot.
6	<ul style="list-style-type: none"> • Select the first option if you would like to receive a ballot for a single election or a specific set of elections. • Select the second option if you would like to have a standing absentee request for any and all elections that may occur in a calendar year (ending December 31). • Select the third option only if you are indefinitely confined due to age, illness, infirmity or disability and wish to request absentee ballots for all elections until you are no longer confined or fail to return a ballot for an election.
7	<ul style="list-style-type: none"> • This section is only to be completed by an elector or the agent of an elector who is currently hospitalized. • An agent completing this form for a hospitalized elector must provide his/her name, signature and address on this application.
Assistant Signature:	In the situation where the elector is unable to sign the Voter Declaration / Certification due to a physical disability, the elector may authorize another elector to sign on his or her behalf. Any elector signing an application on another elector's behalf shall attest to a statement that the application is made on request and by authorization of the named elector, who is unable to sign the application due to physical disability.
Voter Signature:	By signing and dating this form, you certify that you are a qualified elector, a U.S. citizen, at least 18 years old, having resided at your residential address for at least 28 consecutive days immediately preceding this election, not currently serving a sentence including probation or parole for a felony conviction, and not otherwise disqualified from voting.

RECOUNT PETITION

In Re: The 2020 Election for President of the United States

Verified Petition
For Recount

Petitioners Donald J. Trump and Michael R. Pence allege and show to the Wisconsin Elections Commission, as follows:

1. That Petitioners were candidates for the office of President and Vice President of the United States in an election held on November 3, 2020. They appeared together on the ballot as a single candidate. Voters who voted for Donald J. Trump necessarily voted, as well, for Michael R. Pence;
2. That Petitioners are informed and believe that mistakes and fraud were committed throughout the State of Wisconsin, including particularly in the City of Madison, the City of Milwaukee, and throughout Dane County and Milwaukee County in the counting and return of votes cast in the election for President of the United States;
3. That Petitioners are an “aggrieved party” as that term is defined in Wis. Stat. § 9.01(1);
4. That Petitioners are informed and believe that:
 - a. The Wisconsin Legislature has rightly concluded that “voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.” Wis. Stat. § 6.84(1).

- b. Municipal clerks throughout the State of Wisconsin illegally altered absentee ballot envelopes by independently adding witness addresses to absentee ballot envelopes that were returned to the clerk without a witness address supplied, as required by Wis. Stat. §§ 6.87(2), (6d) and (9).
 - c. These actions violate Wis. Stat. § 6.87(6d), which states: “If a certificate is missing the address of a witness, the ballot may not be counted.”
 - d. These actions also violate Wis. Stat. § 6.87(9), which states: “If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector”
 - e. The municipal clerks conducted these illegal actions based on illegal guidance issued by the Wisconsin Election Commission in a memorandum to all municipal clerks dated October 18, 2016. That memo instructed clerks that they “**must** take corrective action” to add a missing witness address.” (emphasis in original) The memorandum further instructed clerks that if they are “reasonably able to discern any missing information from outside sources, clerks are not required to contact the voter” Clerks were instructed that they could rely on their own “personal knowledge,” or unspecified “lists or databases at his or her disposal” to add the missing witness address.
 - f. These actions of the clerks are unlawful. Any envelopes upon which a clerk altered the information supplied, by adding a missing address or part of an address, must be deemed deficient and the ballots provided in those envelopes must not be counted in the certified vote totals.
5. That Petitioners are further informed and believe that:
- a. The Wisconsin Legislature has commanded, “with respect to matters relating to the absentee ballot process,” § 6.86 “shall be construed as mandatory. Ballots cast in contravention of [it] . . . may not be counted. Ballots counted in contravention of [it] . . . may not be included in the certified result of any election.” Wis. Stat. § 6.84(2)

- b. Municipal clerks across Wisconsin issued tens of thousands of absentee ballots to electors in direct contravention of Wis. Stat. § 6.86(1)(ar), which states: “the municipal clerk **shall not issue an absentee ballot unless the clerk receives a written application** therefor from a qualified elector of the municipality.” (emphasis added)
 - c. Despite this clear mandatory requirement, clerks issued absentee ballots without first collecting a written application from persons who requested absentee ballots in person, including during the two week in-person absentee period that ran from October 20, 2020 through November 1, 2020.
 - d. These actions violate Wis. Stat. § 6.86(1)(ar).
 - e. The absentee voting statutes are mandatory and provide detailed and explicit procedural safeguards in substantial part to prevent fraud and undue influence. The Wisconsin Legislature itself acknowledges those factors as it explicitly states in its statutes, Wis. Stat. § 6.84(1), “The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate . . . or other similar abuses.”
 - f. These actions of the clerks in failing to obtain a written application from electors prior to providing that elector with a ballot are illegal and absentee ballots that were issued without a written application must be deemed deficient and the ballots must not be counted in the certified vote totals.
 - g. On information and belief, more than 60,000 votes were cast in Milwaukee County alone in violation of these mandatory statutory provisions.
6. That Petitioners are further informed and believe that:
- a. Voter identification is an essential requirement in Wisconsin and elsewhere to ensure that only eligible voters vote.

- b. In order to facilitate voting by a voter who is, unfortunately, “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period” (Wis. Stat. § 6.86(2)(a)) a special provision of Wisconsin Statutes allows the mailing of absentee ballots, and the return of those ballots without further need to provide proof of the voter’s identity.
 - c. In a clear abuse of those unique provisions, the clerk of Dane County, Scott McDonell, told Dane County voters, and with wide circulation told other voters as well throughout Wisconsin, to declare themselves to be “indefinitely confined” under Wis. Stat. § 6.86(2) in order to, in part, avoid having to provide proof that they are eligible voters. A similar notice was given by the Milwaukee County Clerk.
 - d. The Wisconsin Supreme Court entered an Order against those notices, but the damage was already done and could not be corrected.
 - e. Those claiming to be “indefinitely confined” rose from 72,000 in 2019 to more than 240,000 at the time of the November 3, 2020 election. A substantial number of those claiming that status were sent and returned ballots without proper identification and without otherwise meeting the requirements for that status.
 - f. Ballots cast by those claiming to be indefinitely confined who were not in fact indefinitely confined are fraudulent and the ballots must not be counted in the certified vote totals.
7. That Petitioners are further informed and believe that:
- a. In order to insure free and fair elections, it is the policy of the State of Wisconsin and the United States that citizens are to be provided access sufficient to observe voting and the processing of ballots. Wis. Stat. § 7.41.
 - b. Observation of vote tabulation and observation of polling places is essential to preventing fraud and mistakes.
 - c. On at least the following occasions during the election and tabulation, representatives of the Petitioners were not given access to the process

proceedings or to realistically determine, at that time, whether fraud, mistakes and other unlawful activities law occurred. Specifically:

i.) At the City of Milwaukee Central Count location Petitioners observers were required to remain behind tapelines affixed to the floor. With relation to numerous tables these areas were approximately 30 to 35 feet from tables at which absentee ballots were being processed. The restrictions imposed were so great that the Petitioners observers were required to purchase binoculars which did not end up being effective in allowing Petitioners observers to observe the absentee ballot processing;

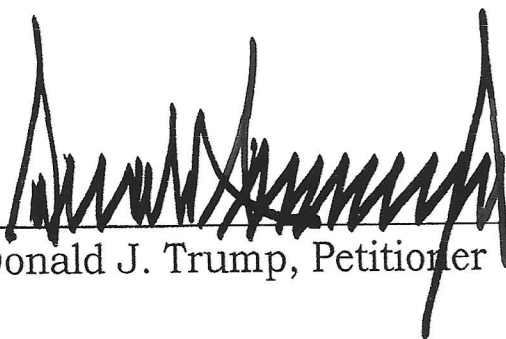
ii.) At the City of Milwaukee Central Count location, the election inspector in charge of the location made an announcement that all challenges to absentee ballots based on the unlawful actions described in paragraphs 4.a-f above had been prejudged and that all such objections were rejected and that election inspectors should not stop processing absentee ballots to hear and determine the objections.

d. On information and belief, once observational access is provided during a recount, mistakes, violations of the law (in addition to the open access violations already known) and fraud will be discovered.

8. The Petitioners are informed and believe that with further investigation, substantial and additional mistakes and fraud will be discovered.

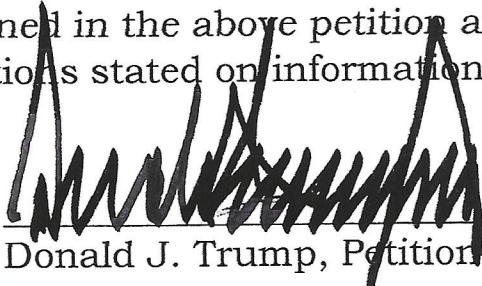
WHEREFORE: Petitioners respectfully requests a recount of those wards, municipalities and counties specified on Exhibit A, attached hereto and made a part hereof.

Dated this 16th day of November, 2020.




Donald J. Trump, Petitioner

I, Donald J. Trump, being first duly sworn, on oath, state that the matters contained in the above petition are known to me to be true except for those allegations stated on information and belief, which I believe to be true.

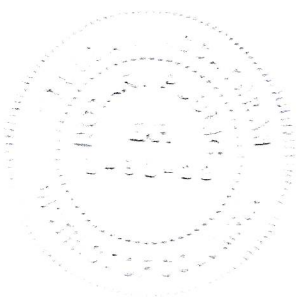


Donald J. Trump, Petitioner

Subscribed and sworn to before me this 16 day of November, 2020.



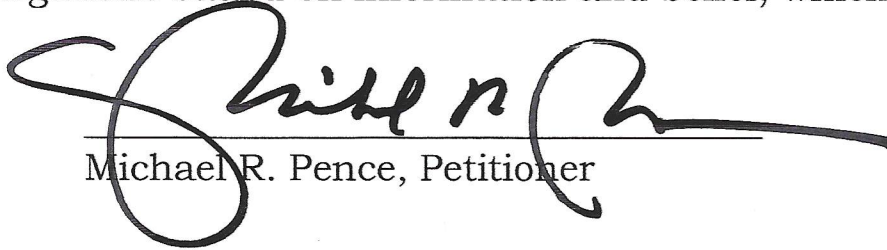
Notary Public
My Commission Expires 1/31/2022





Michael R. Pence, Petitioner

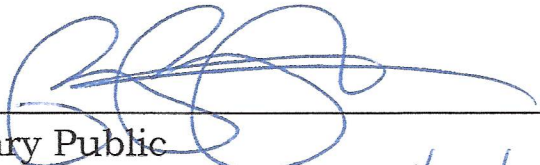
I, Michael R. Pence, being first duly sworn, on oath, state that the matters contained in the above petition are known to me to be true except for those allegations stated on information and belief, which I believe to be true.



Michael R. Pence, Petitioner

Subscribed and sworn to before me this 16th day of November, 2020.

District of Columbia: SS



Notary Public

My Commission Expires 5/31/2022

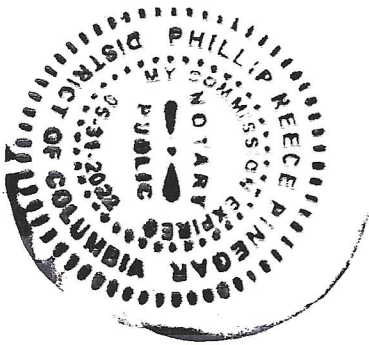


EXHIBIT A

Wards to be Recounted:

All of Dane County (Every City, Village, Town, Ward and other voting unit in the County)

All of Milwaukee County (Every City, Village, Town, Ward and other voting unit in the County)

SUBJECT: PRIVILEGED & CONSTITUTIONAL -- possible strategy on whether Legislature can select the Trump electors
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 11/19/2020 21:42

Jim,

As I briefly sketched in my text, the Nov. 16 memo by legislative attorney Michael Gallagher advising Speaker Voss that after the Wisconsin legislature provides by statute for the people to vote on the president, and the election has been held, "the legislature has no unilateral authority to reverse the choice of the people of the state" (page 2), overlooks a key statutory provision.

In 1845, after the practice of States having their citizens vote for electors had become well established, Congress enacted a fallback which explicitly permits legislatures to appoint electors after an election, in one circumstance.

3 U.S.C. Sect. 2 reads:

Failure to make choice on prescribed day.

Whenever 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 [i.e., election day, here Nov. 3], **the electors may be appointed on a subsequent day** in such a manner as the legislature of such State may direct."

(Emphasis added.)

Now, in the usual course, Sect. 2 will give a legislature no excuse to appoint electors on a subsequent day. The election will be held, following the statutes on the books prior to election day, and the election will be duly certified and the governor will sign certificates of ascertainment by the "safe harbor" day identified in 3 U.S.C. Sect. 5.

But what if that doesn't happen?

The result of the Wisconsin election is supposed to be certified on December 1, and the "safe harbor" date is December 8. Suppose that, as December 8 nears, Trump is still behind in the recount, but there are ongoing judicial proceedings which involve serious allegations that election officials willfully disregarded, and twisted, the statutes and procedures in place prior to election day.

In that event, there would be a serious risk that the election result would not be finalized by December 8 -- and even if it was finalized by then, because of the election officials' (and the courts'?) failure to decide the contest using only "judicial or other procedures" in place before election day," the result might not be respected by Congress.

Wisconsin clearly has an interest in having electors selected by the "safe harbor" day, to ensure that Congress will regard that selection as conclusive (this assumes the Electoral Count Act is constitutional -- the state legislators might want to take that position, but we never should; we should keep the flexibility for pro-Trump Members of Congress to argue the Act cannot bind them).

In my view, a responsible state legislature could conclude that the failure of the election officials and the courts to definitely resolve the result of the election, pursuant to extant law, without doing something creative that sparked controversy, constituted a "fail[ure] to make a choice on the day prescribed law by" within the meaning of Sect. 2. In other words, if by December 8 we can't be sure how the voters elected on November 3, based on procedures that were in place on November 3, we should conclude that the State didn't actually make a choice on November 3 -- thereby authorizing the state legislature to appoint the electors.

This is precisely what the Florida Legislature planned to do during Bush v. Gore. (I can go into that in more detail if needed.) And in his book analyzing that controversy, Judge Posner credited that approach as reasonable:

Failing to make a choice and uncertainty about what choice has been made are not the same thing; the outcome of a close election is often not known on election day. But at some point continued uncertainty about the outcome of the November 7 election might be deemed a failure to have chosen electors on that day, in which event the Florida legislature could elect its own slate, which, given the composition of the legislature, would have been a slate pledged to Bush.

Richard A. Posner, Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts 133 (2001).

This is not the only theory under which the legislature could select electors. It might be argued that legislatures have plenary power to impose their own will at any time, even after an election, and there is support for that in McPherson v. Blacker, 146 U.S. 1, 35 (1892), particularly in a Senate report cited there.

But it strikes me as the only theory that can be easily squared with the statutes, and that is modest enough that it might lead state legislators to think that they have a role to play here. We already have ample indications that the Wisconsin election officials are playing fast and loose with the controlling statutes and the recount procedures, and there is every reason to expect that lower court judges will do the same.

If one adopts the view in my earlier memo, that the real deadline for resolving controversies is January 6, the date Congress meets in joint session to count electoral votes, a possible strategy emerges.

One, proceed deliberately after losing the recount, through challenges in the lower courts, unworried about meeting the December 8 deadline. Trump can afford to do this, because if he ultimately wins in the Wisconsin Supreme Court, and the governor has to sign a certificate stating that he is the winner, these electoral votes will almost surely be honored in Congress, despite not meeting the "safe harbor" date.

Two, assuming the case does not look like it will be reaching finality by December 8, and if there are real concerns that the election officials and courts are disregarding pre-election law, and the Florida courts did in Bush v. Gore, have state legislators willing to take the lead adopt the approach of the Florida Legislature, and urge that the legislature resolve the matter of the electoral votes by December 8, to ensure that Wisconsin is represented with votes in the electoral college that Congress will defer to.

In other words, try to pursue a shot at having two bites at the apple -- litigate, hoping to ultimately win by January 6, but also use delay in litigation to try to win in the state legislature on December 8. If Trump can get the Wisconsin legislature to award him the electoral votes, he could still continue with the litigation, as winning it would remove any argument Biden could have in Congress.

The whole idea is a long shot. Probably it would only be viable if by early December there was a palpable sense among conservatives that there was a concerted effort by Democrats to steal this election in multiple states, and that the Wisconsin vote and vote counting were so egregiously manipulated and opaquely handled that it

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1/16/24, 2:00 PM

would be unacceptable to credit the electoral votes that emerge out of this corrupted sausage factory. But there would be a sound textual basis for the legislature to consider awarding the electoral votes to Trump in such a circumstance, and it seems worthwhile to try to start educating the legislators about this possibility.

If you think this is a promising avenue of investigation, I could take a stab at writing up a more formal memo that might be suitable to provide Speaker Voss or others.

Ken

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25 Northern Avenue, # 1509
Boston, MA 02210

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(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

SUBJECT: Re: PRIVILEGED & CONSTITUTIONAL -- possible strategy on whether Legislature can select the Trump electors
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 11/19/2020 22:07

I should add a note about a more aggressive version of this strategy.

This approach could be a good way to hoist Dem election officials and complicit courts on their own petard.

I'm thinking particularly of Pennsylvania. There, the Dems are basically saying: "Ha, ha, we used our total control over election mechanics, plus Covid19 as an excuse, to lard the election with 100s of thousands of absentee ballots which were never observed during the initial count, and now there's nothing you can do about it!"

Well, possibly there's nothing the courts can do about it. But by so brazenly flouting the procedures in place before the election, the Dems and the judges who were in league with them have utterly deprived Pennsylvania of Sect. 5's "safe harbor" protection.

The State has a clear interest in having its electoral votes protected by the "safe harbor," as the Court noted in Bush v. Gore. And now, the only way that can be satisfied is for the legislature to conclude that the State failed to make a choice on Nov. 3 (because the counting was totally irregular, so we don't know what the hell happened), so the legislature has the power to appoint the electors under Sect. 2. A choice which might arguably then be entitled to "safe harbor" protection.

The beauty of this is that the Republican legislators, if they adhere carefully to this theory, can emphasize that they're simply acting in the interests of the State, to ensure the electoral vote is protected from interference in Congress, because the election officials acted in a way that stripped the State of the "safe harbor" protection. In other words, they can blame the Dems for making them do this -- if the Dems had just followed regular procedures, they would be okay letting the process play out.

There is nothing inherently partisan about the legislature voting to select the electors. Maybe enough Republican legislatures would in the end decide to vote for the Biden slate that the result wouldn't change, though presumably most Republicans would vote the way their district voted, and/or vote their conscience, which wouldn't favor Biden.

Hope these ideas are of interest.

Ken

From: Kenneth Chesebro
Sent: Thursday, November 19, 2020 10:42 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: PRIVILEGED & CONSTITUTIONAL -- possible strategy on whether Legislature can select the Trump electors

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Ken

Kenneth Chesebro

1/16/24, 2:00 PM

25 Northern Avenue, # 1509
Boston, MA 02210

@msn.com

(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

SUBJECT: Re: Democracy in the park
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Dan Kelly <[REDACTED]@wisgop.org>
CC: Judge Troupis <[REDACTED]@gmail.com>, "[REDACTED]@michaelbest.com" <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>
DATE: 11/23/2020 22:17

Well, I'm not suggesting it's an independent legal violation, but it adds to the sense that the Democracy in the Park events were a partisan affair, with clerks working hand in glove with Dem operatives.

One thing I'm wondering: has a conscious decision been made to avoid articulating a federal-law objection under Article II, alleging that there was such a departure, in the election and counting, from the ordinary process for holding an election, under Wisconsin statutes, that the election wasn't held in the "manner" prescribed by the Legislature?

I can see how such a federal-law violation could arise later on, as it did in 2000, when Rehnquist, Scalia & Thomas opined that the Florida Supreme Court had violated Article II by warping the state statutes involved. So I can see this as a possible objection to a WI Supreme Court decision ruling against us.

But can't a federal-law objection also be raised at this juncture? At minimum, alleging it might help alert the Legislature that it should consider the option of naming an alternative, perhaps conditional, slate of electors, in case a court later holds that no slate of electors can be named based on the Nov. 3 vote, because the election wasn't held in the manner the Legislature directed.

I haven't studied the PA litigation in detail, but apparently this theory was raised there as early as June. See this complaint, starting at para. 33:

<https://www.brennancenter.org/sites/default/files/2020-07/Trump%20Complaint.pdf>

I can see upsides and possible downsides to alleging federal-law violations, and I recognize that claiming a federal-law violation may seem quite a stretch. I'm flagging this to be sure it's not overlooked.

Ken

From: Dan Kelly <[REDACTED]@wisgop.org>
Sent: Monday, November 23, 2020 5:29 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Judge Troupis <[REDACTED]@gmail.com>; [REDACTED]@michaelbest.com <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: Democracy in the park

What would be the basis?

Daniel Kelly
Special Counsel
Republican Party of Wisconsin

On Nov 23, 2020, at 12:28 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

TROUPIS 008959

Will we be objecting to Democracy in the Park being funded with private funds donated by rich leftists?

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From: Dan Kelly <[REDACTED]@wisgop.org>
Sent: Monday, November 23, 2020 12:31:21 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Judge Troupis <[REDACTED]@gmail.com>; [REDACTED]@michaelbest.com <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: Democracy in the park

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PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

Hi, Jim,

Regarding "Democracy in the Park," and the matter of "indefinitely confined" voters, a quick thought -- one related to a memo I'm currently working on, explaining the legitimacy, indeed, the necessity, of the Legislature appointing an alternative slate of electors, ideally by December 8.

In some ways, the ballot harvesting in the parks, and the "indefinitely confined" scam, are more vulnerable to Article II attack than the point about the absentee ballot envelopes.

I can imagine a state court, and maybe even the U.S. Supreme Court, saying that the absentee envelopes could, without totally torturing the meaning of the statute as it existed before Election Day, be regarded as some sort of "application." I mean, we have a pretty technical argument, mostly about the chronology of voting vs. signing the envelope.

But looking back at the Rehnquist opinion in Bush v. Gore (531 U.S. at 114-15), requiring an examination of state law "as it existed prior to the action of the court," reading the statute about how alternative polling locations can be set up, one would read it as allowing overflow areas near the clerks' office, not as allowing clerks to join in league with nonprofits and Dem activists to host voting fairs, with free food, etc., in parks. It's absurd to think that the Legislature meant to permit the clerks to participate in such ballot-harvesting operations. **I mean, the summary Joe just sent around re the legal violations is mind-boggling!**

Maybe even worse, one could never read the statute allowing people too sick and homebound to obtain a photo i.d., and/or to upload it to the internet, as authorizing election officials to allow 100s of thousands of able-bodied people to vote on this basis, just to avoid the voter-id requirement.

It seems to me that if a factual record on these points can be developed, if you look in combination at all the problems with this election -- the # of ballots affected by these two points, plus all those involved with the envelopes -- it can fairly be said that **the presidential election in Wisconsin was NOT held "in such Manner as the Legislature thereof" directed**, thus violating Article II.

The point here is that the Bush v. Gore Rehnquist analysis for three justices doesn't only apply to the counting of votes (there, Florida came up with novel ways of conducting the recount which could not be squared with the statutes on the books), right? It also applies to how the election was conducted on and prior to Election Day. And here it was conducted, by Dem officials who were desperate to ramp up Dem voter turnout, in ways that cannot possibly be squared with Wisconsin statutes.

So assume we show that the Wisconsin Legislature delegated to election officials the power to allow Wisconsin citizens to appoint the electors, but the officials failed to carry out the election in the manner they were directed to do it. What's the solution?

TROUPIS 008961

Well, if courts can cleanly fix errors by throwing out ballots, like with the absentee envelopes, and the person who challenged the election ends up ahead, then the courts can fix the problem by certifying the challenger as the winner. That's the ideal result in Wisconsin, and it looks like we have a good chance of achieving it.

But, if courts can't cleanly fix the errors in that way (for example, assume we lose on the absentee envelope legal issue, and all we have are factually murkier objections to ballot harvesting and "indefinitely confined"), then **the Legislature should decree that the voters of Wisconsin, due to malfeasance by election officials, have FAILED TO MAKE A CHOICE in the manner directed by the Legislature which delegated the appointment process to voters.**

In that event, contrary to the view of the Wisconsin Legislative Reference Bureau, it seems clear that Wisconsin can appoint electors. The Bureau has overlooked 3 U.S.C. Sect. 2, captioned "Failure to make choice on prescribed day":

Whenever 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.

On this view, if we can show that election officials in Wisconsin, in a material way, failed to carry out the presidential election in the "Manner" that the Legislature "direct[ed]," as the Legislature was authorized by Art. II to insist on, then it means that the citizens of Wisconsin "failed to make a choice" on Election Day, and the Legislature is free to appoint electors.

Doing so doesn't disenfranchise voters. It's clear that citizens have no right to vote for president. And it's clear that if a Legislature chooses to let citizens vote for president, the voting has to be done in the manner the Legislature directed -- not in some other manner, manipulated by a particular political party for partisan advantage. So it logically follows that partisan election officials go too far over the line, the election just doesn't count.

Of course, we don't currently know whether courts will ultimately rule that the election was not conducted in the way the Legislature directed. Such a determination, especially if by the U.S. Supreme Court, might not come until much later, even after the electors must vote on December 14. So the prudent thing would be for the Legislature to at least vote an alternative slate of electors as a backup, and for the Trump-Pence electors to cast electoral votes and send them to D.C. on December 14. This would preserve the ability of Trump and Pence to benefit from an eventual U.S. Supreme Court ruling that the Wisconsin election was held in violation of Article II, so that the certification of Biden and Harris as the winners is constitutionally invalid. In that event, the only electoral votes validly before Congress would be the Trump-Pence slate.

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Sent: Monday, November 23, 2020 9:21 AM

To: Joe Olson <[REDACTED]@michaelbest.com>; Dan Kelly <[REDACTED]@wisgop.org>; Kenneth Chesebro <[REDACTED]@msn.com>; George Burnett <[REDACTED]@lcojlaw.com>

Subject: Democracy in the park

18000 votes were cast at Democracy in the park. We want to argue to toss them. City Attorney will set exact #. We argue against counting tomorrow.

Joe, please circulate all our arguments and background. Please set 11:30 for a call

Joe.

Jim

Sent from my iPhone

1/16/24, 2:00 PM

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FROM: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>
CC: Dan Kelly <[REDACTED]@wisgop.org>, Judge Troupis <[REDACTED]@gmail.com>, George Burnett <[REDACTED]@lcojlaw.com>
DATE: 11/23/2020 22:55

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TROUPIS 008964

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TROUPIS 008965

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=====

1/16/24, 2:03 PM

SUBJECT: Re: Democracy in the park
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>
CC: Dan Kelly <[REDACTED]@wisgop.org>, Judge Troupis <[REDACTED]@gmail.com>, George Burnett <[REDACTED]@lcojlaw.com>
DATE: 11/24/2020 07:37

Oh, I wasn't suggesting any resort to federal *court*; merely consideration of a federal *claim*.

An upside to including one would be to remind judges that if they depart from the plain meaning of the state statutes, they create an Art 2 issue.

But that might be done just by briefing.

A downside might be the risk Biden would seize on a federal claim to remove to federal court.

There might be defenses (like abstention, exclusive jurisdiction, remand of the state-law claims), but removal should be risked only if we *want* the legal issues on the recount decided by the 7th Circuit, not by the Wisconsin Supreme Court.

Which at least conceivably we might want?

One, it would make it harder for Biden to beat our plain-language argument, given the textualist conservatives on the 7th Cir, plus the doctrine that when a party removes from state court, it loses the latitude to argue for creative interpretation of state law. I argue that Biden would be stuck with the intermediate appellate decision on point, which favors us.

Two, the life-tenured 7th Cir judges might be more likely to have the independence and prestige to actually rule for us — and, unlike the WI judges, would be less likely to be called political hacks for doing so.

Three, a win in the 7th Cir would carry more weight in influencing proceedings in other states.

Four, a loss in the 7th Cir, over a dissent by a respected judge, might increase the odds of cert.

On balance, I think it may be worth including a federal claim only if we think the WI Supreme Court likely won't rule for us anyway, so this is a possible way to get into a more favorable appellate court which would be bound by the lower court decision favorable to us. The Biden lawyers might remove, thinking they're thwarting us by creating delay, when in fact they'd be playing into our hands.

Even if we think we likely will lose in the WI Supreme Court, it still might be best to stay there, if the main aim is to fix these problems for future elections — for you not that court can definitely clear up WI law. I'm trying here to think outside the box, to identify every option that might increase Trump's chance of winning Wisconsin's electoral votes.

Ken

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TROUPIS 008967

1/16/24, 2:03 PM

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Sent: Monday, November 23, 2020 5:29 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Judge Troupis <[REDACTED]@gmail.com>; [REDACTED]@michaelbest.com <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: Democracy in the park

What would be the basis?

Daniel Kelly
Special Counsel
Republican Party of Wisconsin

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Will we be objecting to Democracy in the Park being funded with private funds donated by rich leftists?

Get Outlook for iOS<<https://eur02.safelinks.protection.outlook.com/?url=https%3A%2F%2Faka.ms%2FoUkef&data=04%7C01%7C%7C865ea44837404c17a21608d890352ae2%7C84df9e7fe9f640afb435aaaaaaaaaaaa%7C1%7C0%7C637417905310>>

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For the following reasons, I think it would be good to slow up on the rush towards challenging the "Democracy in the Park" ballots.

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2. Both the RPW and RNC took the position in DNC v. Bostleman that drop boxes are perfectly legal.
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4. Keep in mind that voting in Wisconsin started sometime around September 17, much earlier than the alternate sites authorized by 6.855. That's the date clerks started mailing out absentee ballots to those who had a request on file. As soon as the person received the ballot, he could vote it and either take it to the clerk's office or mail it in. Consequently, the question with respect to DP and drop boxes is whether they function as an extension of the clerk's office. The drop boxes are installed by the clerk's office, so there's a decent argument there, but not dispositive. With respect to DP, the argument is much stronger — the election inspectors collected the ballots and then they were transported directly to the clerk's office. There is no statutory ban against ballot harvesting in Wisconsin, this does not appear to violate the law.
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I don't believe there is any statutory authorization for DP or drop boxes, but nor do I see any statutory prohibition.

Dan.

Daniel Kelly
Special Counsel
Republican Party of Wisconsin

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PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

Hi, Jim,

Regarding "Democracy in the Park," and the matter of "indefinitely confined" voters, a quick thought -- one related to a memo I'm currently working on, explaining the legitimacy, indeed, the necessity, of the Legislature appointing an alternative slate of electors, ideally by December 8.

In some ways, the ballot harvesting in the parks, and the "indefinitely confined" scam, are more vulnerable to Article II attack than the point about the absentee ballot envelopes.

I can imagine a state court, and maybe even the U.S. Supreme Court, saying that the absentee envelopes could, without totally torturing the meaning of the statute as it existed before

TROUPIS 008968

Election Day, be regarded as some sort of "application." I mean, we have a pretty technical argument, mostly about the chronology of voting vs. signing the envelope.

But looking back at the Rehnquist opinion in Bush v. Gore (531 U.S. at 114-15), requiring an examination of state law "as it existed prior to the action of the court," reading the statute about how alternative polling locations can be set up, one would read it as allowing overflow areas near the clerks' office, not as allowing clerks to join in league with nonprofits and Dem activists to host voting fairs, with free food, etc., in parks. It's absurd to think that the Legislature meant to permit the clerks to participate in such ballot-harvesting operations. I mean, the summary Joe just sent around re the legal violations is mind-boggling!

Maybe even worse, one could never read the statute allowing people too sick and homebound to obtain a photo i.d., and/or to upload it to the internet, as authorizing election officials to allow 100s of thousands of able-bodied people to vote on this basis, just to avoid the voter-id requirement.

It seems to me that if a factual record on these points can be developed, if you look in combination at all the problems with this election -- the # of ballots affected by these two points, plus all those involved with the envelopes -- it can fairly be said that the presidential election in Wisconsin was NOT held "in such Manner as the Legislature thereof" directed, thus violating Article II.

The point here is that the Bush v. Gore Rehnquist analysis for three justices doesn't only apply to the counting of votes (there, Florida came up with novel ways of conducting the recount which could not be squared with the statutes on the books), right? It also applies to how the election was conducted on and prior to Election Day. And here it was conducted, by Dem officials who were desperate to ramp up Dem voter turnout, in ways that cannot possibly be squared with Wisconsin statutes.

So assume we show that the Wisconsin Legislature delegated to election officials the power to allow Wisconsin citizens to appoint the electors, but the officials failed to carry out the election in the manner they were directed to do it. What's the solution?

Well, if courts can cleanly fix errors by throwing out ballots, like with the absentee envelopes, and the person who challenged the election ends up ahead, then the courts can fix the problem by certifying the challenger as the winner. That's the ideal result in Wisconsin, and it looks like we have a good chance of achieving it.

But, if courts can't cleanly fix the errors in that way (for example, assume we lose on the absentee envelope legal issue, and all we have are factually murkier objections to ballot harvesting and "indefinitely confined"), then the Legislature should decree that the voters of Wisconsin, due to malfeasance by election officials, have FAILED TO MAKE A CHOICE in the manner directed by the Legislature which delegated the appointment process to voters.

In that event, contrary to the view of the Wisconsin Legislative Reference Bureau, it seems clear that Wisconsin can appoint electors. The Bureau has overlooked 3 U.S.C. Sect. 2, captioned "Failure to make choice on prescribed day":

Whenever any State<https://eur02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.law.cornell.edu%2Fdefinitions%2Fuscode.php%3Fwidth%3D840%26height%3D800%26iframe%3Dtrue%26def_id%3D3-USC-80204913-1227756099%26term_occur%3D999%26term_src%3Dtitle%3A3%3Achapter%3A1%3Asection%3A2&data=04%7C01%7C%7C865ea44837404c17a21608d890352ae2%7C84df9e> 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<https://eur02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.law.cornell.edu%2Fdefinitions%2Fuscode.php%3Fwidth%3D840%26height%3D800%26iframe%3Dtrue%26def_id%3D3-USC-80204913-1227756099%26term_occur%3D999%26term_src%3Dtitle%3A3%3Achapter%3A1%3Asection%3A2&data=04%7C01%7C%7C865ea44837404c17a21608d890352ae2%7C84df9e> may direct.

On this view, if we can show that election officials in Wisconsin, in a material way, failed to carry out the presidential election in the "Manner" that the Legislature "direct[ed]," as the Legislature was authorized by Art. II to insist on, then it means that the citizens of Wisconsin "failed to make a choice" on Election Day, and the Legislature is free to appoint electors.

Doing so doesn't disenfranchise voters. It's clear that citizens have no right to vote for president. And it's clear that if a Legislature chooses to let citizens vote for president, the voting has to be done in the manner the Legislature directed -- not in some other manner, manipulated by a particular political party for partisan advantage. So it logically follows that partisan election officials go too far over the line, the election just doesn't count.

Of course, we don't currently know whether courts will ultimately rule that the election was not conducted in the way the Legislature directed. Such a determination, especially if by the U.S. Supreme Court, might not come until much later, even after the electors must vote on December 14. So the prudent thing would be for the Legislature to at least vote an alternative slate of electors as a backup, and for the Trump-Pence electors to cast electoral votes and send them to D.C. on December 14. This would preserve the ability of Trump and Pence to benefit from an eventual U.S. Supreme Court ruling that the Wisconsin election was held in violation of Article II, so that the certification of Biden and Harris as the winners is constitutionally invalid. In that event, the only electoral votes validly before Congress would be the Trump-Pence slate.

What I like about this setup is that there would be no effort to get the Legislature to override the will of the people. The Legislature would merely active proactively, to fill a possible vacuum that might end up existing, if a court later rules that the election itself violated Article II. For the Legislature not to act in this way would create the risk that on January 6, Wisconsin would be unrepresented in the Electoral College, because there would be no valid electoral votes to be counted.

The above is very, very rough, but I wanted to get it out to you asap for your consideration, as it may bear on how the "Democracy in the Park" and "indefinitely confined" points are developed.

Ken

From: Judge Troupis <[redacted]@gmail.com<mailto:[redacted]@gmail.com>>
Sent: Monday, November 23, 2020 9:21 AM
To: Joe Olson <[redacted]@michaelbest.com<mailto:[redacted]@michaelbest.com>>; Dan Kelly <[redacted]@wisgop.org<mailto:[redacted]@wisgop.org>>; Kenneth Chesebro <[redacted]@msn.com<mailto:[redacted]@msn.com>>; George Burnett <[redacted]@lcojlaw.com<mailto:[redacted]@lcojlaw.com>>
Subject: Democracy in the park

18000 votes were cast at Democracy in the park. We want to argue to toss them. City Attorney will set exact #. We argue against counting tomorrow. Joe, please circulate all our arguments and background. Please set 11:30 for a call Joe.
Jim

Sent from my iPhone

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=====

1/16/24, 2:03 PM

SUBJECT: Re: Democracy in the park
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>
CC: Dan Kelly <[REDACTED]@wisgop.org>, Judge Troupis <[REDACTED]@gmail.com>, George Burnett <[REDACTED]@lcojlaw.com>
DATE: 11/24/2020 07:40

... for only *that* Court can definitively clear up WI law.

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From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Tuesday, November 24, 2020 8:37:58 AM
To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>
Cc: Dan Kelly <[REDACTED]@wisgop.org>; Judge Troupis <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: Democracy in the park

Oh, I wasn't suggesting any resort to federal *court*; merely consideration of a federal *claim*.

An upside to including one would be to remind judges that if they depart from the plain meaning of the state statutes, they create an Art 2 issue.

But that might be done just by briefing.

A downside might be the risk Biden would seize on a federal claim to remove to federal court.

There might be defenses (like abstention, exclusive jurisdiction, remand of the state-law claims), but removal should be risked only if we *want* the legal issues on the recount decided by the 7th Circuit, not by the Wisconsin Supreme Court.

Which at least conceivably we might want?

One, it would make it harder for Biden to beat our plain-language argument, given the textualist conservatives on the 7th Cir, plus the doctrine that when a party removes from state court, it loses the latitude to argue for creative interpretation of state law. I argue that Biden would be stuck with the intermediate appellate decision on point, which favors us.

Two, the life-tenured 7th Cir judges might be more likely to have the independence and prestige to actually rule for us — and, unlike the WI judges, would be less likely to be called political hacks for doing so.

Three, a win in the 7th Cir would carry more weight in influencing proceedings in other states.

Four, a loss in the 7th Cir, over a dissent by a respected judge, might increase the odds of cert.

On balance, I think it may be worth including a federal claim only if we think the WI Supreme Court likely won't rule for us anyway, so this is a possible way to get into a more favorable appellate court which would be bound by the lower court decision favorable to us. The Biden lawyers might remove, thinking they're thwarting us by creating delay, when in fact they'd be playing into our hands.

Even if we think we likely will lose in the WI Supreme Court, it still might be best to stay there, if the main aim is to fix these problems for future elections — for you not that court can definitely clear up WI law. I'm trying here to think outside the box, to identify every option that might increase Trump's chance of winning Wisconsin's electoral votes.

Ken

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From: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>
Sent: Monday, November 23, 2020 11:55:23 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Dan Kelly <[REDACTED]@wisgop.org>; Judge Troupis <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: Democracy in the park

Federal court is a very unfriendly venue. We have lost every election related litigation in the district courts here for the last year or so.

I also think the federal case would be a distraction from the arguments we do have and would make them look weaker than they are. We have several legitimate arguments for a much less drastic remedy than tossing out the entire election or naming two slates of electors.

My opinion is we would not be able to prove that the entire election was so corrupted as to justify throwing out the results. The largest systemic error we have is the lack of voters being required to file an application. I don't think that is going to carry the day under Bush v. Gore when there is no actual evidence that anything underhanded occurred. The argument failed in PA. But our arguments do have a chance in state court, where the remedy is proscribed by statute.

I think we also have to remember that we didn't expect to win anything during the recount. We're loosing our objects just as we expected, but we're building the record we need. I don't see a reason to change course.

That said, I'm always happy to be wrong...

On Nov 23, 2020, at 10:17 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Well, I'm not suggesting it's an independent legal violation, but it adds to the sense that the Democracy in the Park events were a partisan affair, with clerks working hand in glove with Dem operatives.

One thing I'm wondering: has a conscious decision been made to avoid articulating a federal-law objection under Article II, alleging that there was such a departure, in the election and counting, from the ordinary process for holding an election, under Wisconsin statutes, that the election wasn't held in the "manner" prescribed by the Legislature?

I can see how such a federal-law violation could arise later on, as it did in 2000, when Rehnquist, Scalia & Thomas opined that the Florida Supreme Court had violated Article II by warping the state statutes involved. So I can see this as a possible objection to a WI Supreme Court decision ruling against us.

TROUPIS 008971

But can't a federal-law objection also be raised at this juncture? At minimum, alleging it might help alert the Legislature that it should consider the option of naming an alternative, perhaps conditional, slate of electors, in case a court later holds that no slate of electors can be named based on the Nov. 3 vote, because the election wasn't held in the manner the Legislature directed.

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TROUPIS 008972

1/16/24, 2:03 PM

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So assume we show that the Wisconsin Legislature delegated to election officials the power to allow Wisconsin citizens to appoint the electors, but the officials failed to carry out the election in the manner they were directed to do it. What's the solution?

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DATE: 11/24/2020 12:53
ATTACHMENTS (20201124-125306-0000454): ["text.htm"](#)

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It seems to me that if a factual record on these points can be developed, if you look in combination at all the problems with this election -- the # of ballots affected by these two points, plus all those involved with the envelopes -- it can fairly be said that **the presidential election in Wisconsin was NOT held "in such Manner as the Legislature thereof" directed**, thus violating Article II.

The point here is that the Bush v. Gore Rehnquist analysis for three justices doesn't only apply to the counting of votes (there, Florida came up with novel ways of conducting the recount which could not be squared with the statutes on the books), right? It also applies to how the election was conducted on and prior to Election Day. And here it was conducted, by Dem officials who were desperate to ramp up Dem voter turnout, in ways that cannot possibly be squared with Wisconsin statutes.

So assume we show that the Wisconsin Legislature delegated to election officials the power to allow Wisconsin citizens to appoint the electors, but the officials failed to carry out the election in the manner they were directed to do it. What's the solution?

Well, if courts can cleanly fix errors by throwing out ballots, like with the absentee envelopes, and the person who challenged the election ends up ahead, then the courts can fix the problem by certifying the challenger as the winner. That's the ideal result in Wisconsin, and it looks like we have a good chance of achieving it.

But, if courts can't cleanly fix the errors in that way (for example, assume we lose on the absentee envelope legal issue, and all we have are factually murkier objections to ballot harvesting and "indefinitely confined"), then **the Legislature should decree that the voters of Wisconsin, due to malfeasance by election officials, have FAILED TO MAKE A CHOICE in the manner directed by the Legislature which delegated the appointment process to voters.**

In that event, contrary to the view of the Wisconsin Legislative Reference Bureau, it seems clear that Wisconsin can appoint electors. The Bureau has overlooked 3 U.S.C. Sect. 2, captioned "Failure to make choice on prescribed day":

Whenever 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.

On this view, if we can show that election officials in Wisconsin, in a material way, failed to carry out the presidential election in the "Manner" that the Legislature "direct[ed]," as the Legislature was authorized by Art. II to insist on, then it means that the citizens of Wisconsin "failed to make a choice" on Election Day, and the Legislature is free to appoint electors.

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DATE: 11/24/2020 14:58

This makes a great deal of sense.

In particular, this laser-focused approach would help insulate the Wisconsin litigation effort from the impression created in some other states that Trump supporters are just throwing out a grab bag of complaints.

If the WI Supreme Court ended up reaching the merits and denies relief in a way that seems to rewrite the plain meaning of statutes, Trump might still be able to get US Sup Ct review on an Art II claim, without prior mention of it — the violation would be triggered by the court's decision, just as in Florida 2000.

Ken

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Republican Party of Wisconsin

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2. Both the RPW and RNC took the position in DNC v. Bostleman that drop boxes are perfectly legal.
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5. The alternate sites are not overflow sites. They are alternative sites. If the municipality designates such sites, it may no longer conduct any voting activity at the clerk's office.
6. The location of the alternate sites is unlikely to have any legal significance. Originally, the proximity to the clerk's office was required because it was conceived of as a single location, and keeping it close to the clerk's office would reduce inconvenience. However, the statute was subsequently amended so that the municipality could set up multiple alternate sites. I don't know if the proximity requirement now has any practical effect, but I am quite certain that no court will invalidate a single ballot because the alternate site is not sufficiently proximate to the clerk's office.

I don't believe there is any statutory authorization for DP or drop boxes, but nor do I see any statutory prohibition.

Dan.

Daniel Kelly
Special Counsel
Republican Party of Wisconsin

TROUPIS 008989

On Nov 23, 2020, at 10:07 AM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

Hi, Jim,

Regarding "Democracy in the Park," and the matter of "indefinitely confined" voters, a quick thought -- one related to a memo I'm currently working on, explaining the legitimacy, indeed, the necessity, of the Legislature appointing an alternative slate of electors, ideally by December 8.

In some ways, the ballot harvesting in the parks, and the "indefinitely confined" scam, are more vulnerable to Article II attack than the point about the absentee ballot envelopes.

I can imagine a state court, and maybe even the U.S. Supreme Court, saying that the absentee envelopes could, without totally torturing the meaning of the statute as it existed before Election Day, be regarded as some sort of "application." I mean, we have a pretty technical argument, mostly about the chronology of voting vs. signing the envelope.

But looking back at the Rehnquist opinion in Bush v. Gore (531 U.S. at 114-15), requiring an examination of state law "as it existed prior to the action of the court," reading the statute about how alternative polling locations can be set up, one would read it as allowing overflow areas near the clerks' office, not as allowing clerks to join in league with nonprofits and Dem activists to host voting fairs, with free food, etc., in parks. It's absurd to think that the Legislature meant to permit the clerks to participate in such ballot-harvesting operations. **I mean, the summary Joe just sent around re the legal violations is mind-boggling!**

Maybe even worse, one could never read the statute allowing people too sick and homebound to obtain a photo i.d., and/or to upload it to the internet, as authorizing election officials to allow 100s of thousands of able-bodied people to vote on this basis, just to avoid the voter-id requirement.

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1/16/24, 2:05 PM

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FROM: George Burnett <[REDACTED]@lcojlaw.com>

TO: Judge Troupis <[REDACTED]@gmail.com>, Dan Kelly <[REDACTED]@wisgop.org>

CC: Kenneth Chesebro <[REDACTED]@msn.com>, "[REDACTED]@michaelbest.com" <[REDACTED]@michaelbest.com>, "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>

DATE: 11/24/2020 15:26

TROUPIS 008993

I believe whatever approach taken merits further and serious discussion. Just as Dan doubts the Court will take up a petition that presents a scattergun approach to the issues, I doubt the court will take up one that advances a technical interpretation of the statutes and omits all mention of the unfairness underlying this election.

We must give the Court reason to believe the results of this election are wrong—or at least the process was unfair and likely tainted the result. Democracy in the Park, and the tactics that increased indefinitely confined voters two to three fold for no reason other than to avoid voter ID leave that impression. Our statutory argument that in person voting must be preceded by an application does not, even if that is what the written law requires. It is hard to say that a voter presenting in person to the clerk's office asking for a ballot has not applied, especially when they eventually sign a witnessed envelope containing the ballot.

Like it or not, our audience is both judges and the public. Even more, there are only four justices we can possibly persuade. An argument that has no appeal to the public will not compel our Court to act. Any petition must demonstrate the unfair aspects of this election, whether or not we can ultimately demonstrate that unfairness translated into a specific number of votes. No matter how correct, lawyerly arguments alone will not carry the day.

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6. The location of the alternate sites is unlikely to have any legal significance. Originally, the proximity to the clerk's office was required because it was conceived of as a single location, and keeping it close to the clerk's office would reduce inconvenience. However, the statute was subsequently amended so that the municipality could set up multiple alternate sites. I don't know if the proximity requirement now has any practical effect, but I am quite certain that no court will invalidate a single ballot because the alternate site is not sufficiently proximate to the clerk's office.

I don't believe there is any statutory authorization for DP or drop boxes, but nor do I see any statutory prohibition.

Dan.

Daniel Kelly
Special Counsel
Republican Party of Wisconsin

On Nov 23, 2020, at 10:07 AM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

Hi, Jim,

Regarding "Democracy in the Park," and the matter of "indefinitely confined" voters, a quick thought -- one related to a memo I'm currently working on, explaining the legitimacy, indeed, the necessity, of the Legislature appointing an alternative slate of electors, ideally by December 8.

In some ways, the ballot harvesting in the parks, and the "indefinitely confined" scam, are more vulnerable to Article II attack than the point about the absentee ballot envelopes.

I can imagine a state court, and maybe even the U.S. Supreme Court, saying that the absentee envelopes could, without totally torturing the meaning of the statute as it existed before Election Day, be regarded as some sort of "application." I mean, we have a pretty technical argument, mostly about the chronology of voting vs. signing the envelope.

But looking back at the Rehnquist opinion in Bush v. Gore (531 U.S. at 114-15), requiring an examination of state law "as it existed prior to the action of the court," reading the statute about how alternative polling locations can be set up, one would read it as allowing overflow areas near the clerks' office, not as allowing clerks to join in league with nonprofits and Dem activists to host voting fairs, with free food, etc., in parks. It's absurd to think that the Legislature meant to permit the clerks to participate in such ballot-harvesting operations. **I mean, the summary Joe just sent around re the legal violations is mind-boggling!**

Maybe even worse, one could never read the statute allowing people too sick and homebound to obtain a photo i.d., and/or to upload it to the internet, as authorizing election officials to allow 100s of thousands of able-bodied people to vote on this basis, just to avoid the voter-id requirement.

It seems to me that if a factual record on these points can be developed, if you look in combination at all the problems with this election -- the # of ballots affected by these two points, plus all those involved with the envelopes -- it can fairly be said that **the presidential election in Wisconsin was NOT held "in such Manner as the Legislature thereof" directed**, thus violating Article II.

The point here is that the Bush v. Gore Rehnquist analysis for three justices doesn't only apply to the counting of votes (there, Florida came up with novel ways of conducting the recount which could not be squared with the statutes on the books), right? It also applies to how the election was conducted on and prior to Election Day. And here it was conducted, by Dem officials who were desperate to ramp up Dem voter turnout, in ways that cannot possibly be squared with Wisconsin statutes.

So assume we show that the Wisconsin Legislature delegated to election officials the power to allow Wisconsin citizens to appoint the electors, but the officials failed to carry out the election in the manner they were directed to do it. What's the solution?

Well, if courts can cleanly fix errors by throwing out ballots, like with the absentee envelopes, and the person who challenged the election ends up ahead, then the courts can fix the problem by certifying the challenger as the winner. That's the ideal result in Wisconsin, and it looks like we have a good chance of achieving it.

But, if courts can't cleanly fix the errors in that way (for example, assume we lose on the absentee envelope legal issue, and all we have are factually murkier objections to ballot harvesting and "indefinitely confined"), then **the Legislature should decree that the voters of Wisconsin, due to malfeasance by election officials, have FAILED TO MAKE A CHOICE in the manner directed by the Legislature which delegated the appointment process to voters.**

In that event, contrary to the view of the Wisconsin Legislative Reference Bureau, it seems clear that Wisconsin can appoint electors. The Bureau has overlooked 3 U.S.C. Sect. 2, captioned "Failure to make choice on prescribed day":

Whenever 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.

On this view, if we can show that election officials in Wisconsin, in a material way, failed to carry out the presidential election in the "Manner" that the Legislature "direct[ed]," as the Legislature was authorized by Art. II to institute, then it means that the citizens of Wisconsin "failed to make a choice" on Election Day, and the Legislature is free to appoint electors.

Doing so doesn't disenfranchise voters. It's clear that citizens have no right to vote for president. And it's clear that if a Legislature chooses to let citizens vote for president, the voting has to be done in the manner the Legislature directed -- not in some other manner, manipulated by a particular political party for partisan advantage. So it logically follows that partisan election officials go too far over the line, the election just doesn't count.

Of course, we don't currently know whether courts will ultimately rule that the election was not conducted in the way the Legislature directed. Such a determination, especially if by the U.S. Supreme Court, might not come until much later, even after the electors must vote on December 14. So the prudent thing would be for the Legislature to at least vote an alternative slate of electors as a backup, and for the Trump-Pence electors to cast electoral votes and send them to D.C. on December 14. This would preserve the ability of Trump and Pence to benefit from an eventual U.S. Supreme Court ruling that the Wisconsin election was held in violation of Article II, so that the certification of Biden and Harris as the winners is constitutionally invalid. In that event, the only electoral votes validly before Congress would be the Trump-Pence slate.

What I like about this setup is that there would be no effort to get the Legislature to override the will of the people. The Legislature would merely act proactively, to fill a possible vacuum that might end up existing, if a court later rules that the election itself violated Article II. For the Legislature not to act in this way would create the risk that on January 6, Wisconsin would be unrepresented in the Electoral College, because there would be no valid electoral votes to be counted.

The above is very, very rough, but I wanted to get it out to you asap for your consideration, as it may bear on how the "Democracy in the Park" and "indefinitely confined" points are developed.

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Monday, November 23, 2020 9:21 AM
To: Joe Olson <[REDACTED]@michaelbest.com>; Dan Kelly <[REDACTED]@wisgop.org>; Kenneth

Chesebro <[REDACTED]@msn.com>; George Burnett <[REDACTED]@lcojlaw.com>

Subject: Democracy in the park

18000 votes were cast at Democracy in the park. We want to argue to toss them. City Attorney will set exact #. We argue against counting tomorrow. Joe, please circulate all our arguments and background. Please set 11:30 for a call Joe.
Jim

Sent from my iPhone

This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.

SUBJECT: Re: Democracy in the park
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: George Burnett <[REDACTED]@lcojlaw.com>, Judge Troupis <[REDACTED]@gmail.com>, Dan Kelly <[REDACTED]@wisgop.org>
CC: "[REDACTED]@michaelbest.com" <[REDACTED]@michaelbest.com>, "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>
DATE: 11/24/2020 15:42

George raises a valid concern.

One possible way to balance between his and Dan's concerns would be to have the material on the grave concerns among the public re the legitimacy of the election appear at the end of the petition, under a heading about the importance of granting review.

The idea being that though petitioners have narrowly focused on clear legal issues that are outcome determinative, and worthy of review even considered in isolation, review is doubly warranted to ensure the public knows that complaints about the election have been carefully examined. I.e., even justices inclined to rule vs us should see the value of review given the heated concerns about the fairness of this election.

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Subject: RE: Democracy in the park

I believe whatever approach taken merits further and serious discussion. Just as Dan doubts the Court will take up a petition that presents a scattergun approach to the issues, I doubt the court will take up one that advances a technical interpretation of the statutes and omits all mention of the unfairness underlying this election.

We must give the Court reason to believe the results of this election are wrong—or at least the process was unfair and likely tainted the result. Democracy in the Park, and the tactics that increased indefinitely confined voters two to three fold for no reason other than to avoid voter ID leave that impression. Our statutory argument that in person voting must be preceded by an application does not, even if that is what the written law requires. It is hard to say that a voter presenting in person to the clerk's office asking for a ballot has not applied, especially when they eventually sign a witnessed envelope containing the ballot.

Like it or not, our audience is both judges and the public. Even more, there are only four justices we can possibly persuade. An argument that has no appeal to the public will not compel our Court to act. Any petition must demonstrate the unfair aspects of this election, whether or not we can ultimately demonstrate that unfairness translated into a specific number of votes. No matter how correct, lawyerly arguments alone will not carry the day.

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Tuesday, November 24, 2020 2:58 PM
To: Dan Kelly <[REDACTED]@wisgop.org>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>; [REDACTED]@michaelbest.com; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: Democracy in the park

i COMPLETELY AGREE WITH DAN'S COMMENTS!
THE OTHER CLAIMS ARE BACKGROUND NOISE AND WILL NOT BE IN THE ULTIMATELY REQUEST FOR REVIEW. I DO THINK WE MUST INCLUDE SOMETHING THAT INCORPORATES KEN'S ANALYSIS ON
TROUPIS 009001

TIMING SO THAT WE ARE NOT ASKING THE COURT TO RULE ANY FASTER THAN IT MUST. I BELIEVE THE COURT CAN BUY TIME BY ORDERING THE APPOINTMENT OF TWO SETS OF ELECTORS BY ? DATE. OTHER THAN THAT, TO RELIEVE SOME IMMEDIATE PRESSURE, THE PETITION MUST BE VERY PRECISE AND VERY NARROW..

TODAY I FINALLY GOT A CHANCE TO REVIEW WHAT WE HAVE, AND WHILE THE CLAIMS WE EMPHASIZE MAY BE SOMEWHAT DIFFERENT, THE IDEA DAN SAYS APPEARS TO BE THE RULE IN THOSE DRAFTS.

BE ASSURED THIS IS NO PR STUNT. THESE ARE DEADLY SERIOUS ISSUES THAT HAVE EVADED COURT REVIEW FOR FAR TOO LONG.

JIM

On Tue, Nov 24, 2020 at 12:53 PM Dan Kelly <[REDACTED]@wisgop.org> wrote:

Just a few framing thoughts about this and related allegations. If you plan to file the appeal in circuit court, there may be some value in adding a bunch of allegations that don't actually add up to a legal violation. Not my style of litigation, but I understand the strategy. But if you really want the Wisconsin Supreme Court to look at this case, this is counter-productive. The SCOW will not pick through a tangle of allegations and sort out the ones with legal merit. In fact, potpourri pleadings are, as a rule, rejected — by both liberal and conservative justices. The SCOW exists for the purpose of authoritatively declaring the law on specific and discrete legal issues. If you ask it to do anything other than that, it will almost certainly choose not to accept your petition.

That also answers, at least in part, Jim's question about getting the SCOW to at least declare what the law is on these issues, even if it is not going to grant the relief requested. For the rest of the answer, let's start with the understanding that the appeal to circuit court following the recount is, if not expressly described as such, functionally a certiorari review. The court does need to make legal conclusions, and that could at least be a hook on which to ask the SCOW to declare the law on the issues raised during the recount. So I suppose you could ask for declaratory relief in the alternative, but I think there are two reasons this would make it less likely that the SCOW would even be interested in considering the case.

First, the sole purpose of the review is to determine whether to affirm the ballot count. So a declaration of the law that has no impact on resolving the issue before it will be of little interest to the SCOW because it is outside the scope of the appeal. Consequently, a request for declaratory relief would be seen as a request for an advisory opinion, which the SCOW will not grant.

Second, if the court accepts an OA petition under a compressed timeframe, it will never do more than is absolutely required to resolve the matter at hand. The court is institutionally allergic to anything more, as it should be. This is miles away from a circuit court in which a snap decision cannot affect more than the case in front of it. The SCOW understands and takes seriously the proposition that its opinions are to last for the ages, and so it is extraordinarily reluctant to decide anything more than it absolutely must without a full briefing schedule, oral argument, and the time necessary for the members to conclude they aren't making a rushed and incorrect ruling.

On a broader note, I think you need to decide whether the primary purpose of this petition is for its PR value or is instead for the purpose of obtaining relief based on a meritorious legal claim. If it is the first, it makes sense to load it up with all manner of allegations about the messiness of the election, even when you aren't claiming the messiness violated a legal requirement. But if that is the case, I recommend in the strongest possible terms that you not file it. If, on the other hand, the primary purpose of the petition is to obtain relief on a meritorious legal claim, then the petition must be stripped of everything that does not address that meritorious legal claim. I cannot even begin to tell you how many petition conferences we had in which we rejected petitions (whether OA, bypass, or review) specifically because the background was messy.

Dan.

Daniel Kelly
Special Counsel
Republican Party of Wisconsin

On Nov 23, 2020, at 10:17 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Well, I'm not suggesting it's an independent legal violation, but it adds to the sense that the Democracy in the Park events were a partisan affair, with clerks working hand in glove with Dem operatives.

One thing I'm wondering: has a conscious decision been made to avoid articulating a federal-law objection under Article II, alleging that there was such a departure, in the election and counting, from the ordinary process for holding an election, under Wisconsin statutes, that the election wasn't held in the "manner" prescribed by the Legislature?

I can see how such a federal-law violation could arise later on, as it did in 2000, when Rehnquist, Scalia & Thomas opined that the Florida Supreme Court had violated Article II by warping the state statutes involved. So I can see this as a possible objection to a WI Supreme Court decision ruling against us.

But can't a federal-law objection also be raised at this juncture? At minimum, alleging it might help alert the Legislature that it should consider the option of naming an alternative, perhaps conditional, slate of electors, in case a court later holds that no slate of electors can be named based on the Nov. 3 vote, because the election wasn't held in the manner the Legislature directed.

I haven't studied the PA litigation in detail, but apparently this theory was raised there as early as June. See this complaint, starting at para. 33:

<https://www.brennancenter.org/sites/default/files/2020-07/Trump%20Complaint.pdf>

I can see upsides and possible downsides to alleging federal-law violations, and I recognize that claiming a federal-law violation may seem quite a stretch. I'm flagging this to be sure it's not overlooked.

Ken

From: Dan Kelly <[REDACTED]@wisgop.org>
Sent: Monday, November 23, 2020 5:29 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Judge Troupis <[REDACTED]@gmail.com>; [REDACTED]@michaelbest.com<[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: Democracy in the park

What would be the basis?

Daniel Kelly
Special Counsel
Republican Party of Wisconsin

On Nov 23, 2020, at 12:28 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Will we be objecting to Democracy in the Park being funded with private funds donated by rich leftists?

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From: Dan Kelly <[REDACTED]@wisgop.org>
Sent: Monday, November 23, 2020 12:31:21 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>

Cc: Judge Troupis

<[REDACTED]@gmail.com>; [REDACTED]@michaelbest.com <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>

Subject: Re: Democracy in the park

For the following reasons, I think it would be good to slow up on the rush towards challenging the “Democracy in the Park” ballots.

1. There is no functional or legal distinction between Democracy in the Parks (DP) and drop boxes, with the possible exception that with DP an election inspector receives them directly, and with drop boxes, they are fetched by clerk’s office employees or election inspectors.
2. Both the RPW and RNC took the position in *DNC v. Bostleman* that drop boxes are perfectly legal.
3. Neither DP nor drop boxes constituted illegal early in-person absentee voting. Section 6.855 governs that activity, the key distinctive of which is that the elector can receive a ballot at that site, immediately vote it, and tender it to an employee of the clerk’s office. Ballots were not available at the DP event, nor obviously were they available at drop boxes.
4. Keep in mind that voting in Wisconsin started sometime around September 17, much earlier than the alternate sites authorized by 6.855. That’s the date clerks started mailing out absentee ballots to those who had a request on file. As soon as the person received the ballot, he could vote it and either take it to the clerk’s office or mail it in. Consequently, the question with respect to DP and drop boxes is whether they function as an extension of the clerk’s office. The drop boxes are installed by the clerk’s office, so there’s a decent argument there, but not dispositive. With respect to DP, the argument is much stronger — the election inspectors collected the ballots and then they were transported directly to the clerk’s office. There is no statutory ban against ballot harvesting in Wisconsin, this does not appear to violate the law.
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TROUPIS 009004

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CC: George Burnett <[REDACTED]@lcojlaw.com>, Dan Kelly <[REDACTED]@wisgop.org>, [REDACTED]@michaelbest.com, "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>
DATE: 11/24/2020 15:52

George is of course correct. This is an issue of a. what we raise (Dan's Point) and b.) The factual context (George's point). We'll find the balance.

Jim

Sent from my iPhone

On Nov 24, 2020, at 3:42 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

George raises a valid concern.

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Subject: Re: Democracy in the park

i COMPLETELY AGREE WITH DAN'S COMMENTS!
THE OTHER CLAIMS ARE BACKGROUND NOISE AND WILL NOT BE IN THE ULTIMATELY REQUEST FOR REVIEW. I DO THINK WE MUST INCLUDE SOMETHING THAT INCORPORATES KEN'S ANALYSIS ON TIMING SO THAT WE ARE NOT ASKING THE COURT TO RULE ANY FASTER THAN IT MUST. I BELIEVE THE COURT CAN BUY TIME BY ORDERING THE APPOINTMENT OF TWO SETS OF ELECTORS BY ? DATE. OTHER THAN THAT, TO RELIEVE SOME IMMEDIATE PRESSURE, THE PETITION MUST BE VERY PRECISE AND VERY NARROW..
TODAY I FINALLY GOT A CHANCE TO REVIEW WHAT WE HAVE, AND WHILE THE CLAIMS WE EMPHASIZE MAY BE SOMEWHAT DIFFERENT, THE IDEA DAN SAYS APPEARS TO BE THE RULE IN THOSE DRAFTS.
BE ASSURED THIS IS NO PR STUNT. THESE ARE DEADLY SERIOUS ISSUES THAT HAVE EVADED COURT REVIEW FOR FAR TOO LONG.
JIM

On Tue, Nov 24, 2020 at 12:53 PM Dan Kelly <[REDACTED]@wisgop.org> wrote:

Just a few framing thoughts about this and related allegations. If you plan to file the appeal in circuit court, there may be some value in adding a bunch of allegations that don't actually add up to a legal violation. Not my style of litigation, but I understand the strategy. But if you really want the Wisconsin Supreme Court to look at this case, this is counter-productive. The SCOW will not pick through a tangle of allegations and sort out the ones with legal merit. In fact, potpourri pleadings are, as a rule, rejected — by both liberal and conservative justices. The SCOW exists for the purpose of authoritatively declaring the law on specific and discrete legal issues. If you ask it to do anything other than that, it will almost certainly choose not to accept your petition.

That also answers, at least in part, Jim's question about getting the SCOW to at least declare what the law is on these issues, even if it is not going to grant the relief requested. For the rest of the answer, let's start with the understanding that the appeal to circuit court following the recount is, if not expressly described as such, functionally a certiorari review. The court does need to make legal conclusions, and that could at least be a hook on which to ask the SCOW to declare the law on the issues raised during the recount. So I suppose you could ask for declaratory relief in the alternative, but I think there are two reasons this would make it less likely that the SCOW would even be interested in considering the case.

First, the sole purpose of the review is to determine whether to affirm the ballot count. So a declaration of the law that has no impact on resolving the issue before it will be of little interest to the SCOW because it is outside the scope of the appeal. Consequently, a request for declaratory relief would be seen as a request for an advisory opinion, which the SCOW will not grant.

Second, if the court accepts an OA petition under a compressed timeframe, it will never do more than is absolutely required to resolve the matter at hand. The court is institutionally allergic to anything more, as it should be. This is miles away from a circuit court in which a snap decision cannot affect more than the case in front of it. The SCOW understands and takes seriously the proposition that its opinions are to last for the ages, and so it is extraordinarily reluctant to decide anything more than it absolutely must without a full briefing schedule, oral argument, and the time necessary for the members to conclude they aren't making a rushed and incorrect ruling.

On a broader note, I think you need to decide whether the primary purpose of this petition is for its PR value or is instead for the purpose of obtaining relief based on a meritorious legal claim. If it is the first, it makes sense to load it up with all manner of allegations about the messiness of the election, even when you aren't claiming the messiness violated a legal requirement. But if that is the case, I recommend in the strongest possible terms that you not file it. If, on the other hand, the primary purpose of the petition is to obtain relief on a meritorious legal claim, then the petition must be stripped of everything that does not address that meritorious legal claim. I cannot even begin to tell you how many petition conferences we had in which we rejected petitions (whether OA, bypass, or review) specifically because the background was messy.

Dan.

Daniel Kelly
Special Counsel
Republican Party of Wisconsin

On Nov 23, 2020, at 10:17 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Well, I'm not suggesting it's an independent legal violation, but it adds to the sense that the Democracy in the Park events were a partisan affair, with clerks working hand in glove with Dem operatives.

One thing I'm wondering: has a conscious decision been made to avoid articulating a federal-law objection under Article II, alleging that there was such a departure, in the election and counting, from the ordinary process for holding an election, under Wisconsin statutes, that the election wasn't held in the "manner" prescribed by the Legislature?

I can see how such a federal-law violation could arise later on, as it did in 2000, when Rehnquist, Scalia & Thomas opined that the Florida Supreme Court had violated Article II by warping the state statutes involved. So I can see this as a possible objection to a WI Supreme Court decision ruling against us.

But can't a federal-law objection also be raised at this juncture? At minimum, alleging it might help alert the Legislature that it should consider the option of naming an alternative, perhaps conditional, slate of electors, in case a court later holds that no slate of electors can be named based on the Nov. 3 vote, because the election wasn't held in the manner the Legislature directed.

I haven't studied the PA litigation in detail, but apparently this theory was raised there as early as June. See this complaint, starting at para. 33:

<https://www.brennancenter.org/sites/default/files/2020-07/Trump%20Complaint.pdf>

I can see upsides and possible downsides to alleging federal-law violations, and I recognize that claiming a federal-law violation may seem quite a stretch. I'm flagging this to be sure it's not overlooked.

Ken

From: Dan Kelly <[REDACTED]@wisgop.org>
Sent: Monday, November 23, 2020 5:29 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Judge Troupis <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@michaelbest.com>; [REDACTED] <[REDACTED]@michaelbest.com>;
George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: Democracy in the park

What would be the basis?

Daniel Kelly
Special Counsel
Republican Party of Wisconsin

On Nov 23, 2020, at 12:28 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Will we be objecting to Democracy in the Park being funded with private funds donated by rich leftists?

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From: Dan Kelly <[REDACTED]@wisgop.org>
Sent: Monday, November 23, 2020 12:31:21 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Judge Troupis <[REDACTED]@gmail.com>; [REDACTED]@michaelbest.com <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: Democracy in the park

For the following reasons, I think it would be good to slow up on the rush towards challenging the "Democracy in the Park" ballots.

1. There is no functional or legal distinction between Democracy in the Parks (DP) and drop boxes, with the possible exception that with DP an election inspector receives them directly, and with drop boxes, they are fetched by clerk's office employees or election inspectors.
2. Both the RPW and RNC took the position in DNC v. Bostleman that drop boxes are perfectly legal.
3. Neither DP nor drop boxes constituted illegal early in-person absentee voting. Section 6.855 governs that activity, the key distinctive of which is that the elector can receive a ballot at that site, immediately vote it, and tender it to an employee of the clerk's office. Ballots were not available at the DP event, nor obviously were they available at drop boxes.
4. Keep in mind that voting in Wisconsin started sometime around September 17, much earlier than the alternate sites authorized by 6.855. That's the date clerks started mailing out absentee ballots to those who had a request on file. As soon as the person received the ballot, he could vote it and either take it to the clerk's office or mail it in. Consequently, the question with respect to DP and drop boxes is whether they function as an extension of the clerk's office. The drop boxes are installed by the clerk's office, so there's a decent argument there, but not dispositive. With respect to DP, the argument is much stronger — the election inspectors collected the ballots and then they were transported directly to the clerk's office. There is no statutory ban against ballot harvesting in Wisconsin, this does not appear to violate the law.
5. The alternate sites are not overflow sites. They are alternative sites. If the municipality designates such sites, it may no longer conduct any voting activity at the clerk's office.
6. The location of the alternate sites is unlikely to have any legal significance. Originally, the proximity to the clerk's office was required because it was conceived of as a single location, and keeping it close to the clerk's office would reduce inconvenience. However, the statute was subsequently amended so that the municipality could set up multiple alternate sites. I don't know if the proximity requirement now has any practical effect, but I am quite certain that no court will invalidate a single ballot because the alternate site is not sufficiently proximate to the clerk's office.

I don't believe there is any statutory authorization for DP or drop boxes, but nor do I see any statutory prohibition.

Dan.

Daniel Kelly
Special Counsel
Republican Party of Wisconsin

On Nov 23, 2020, at 10:07 AM, Kenneth Chesebro
<[REDACTED]@msn.com> wrote:

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

Hi, Jim,

Regarding "Democracy in the Park," and the matter of "indefinitely confined" voters, a quick thought -- one related to a memo I'm currently working on, explaining the legitimacy, indeed, the necessity, of the Legislature appointing an alternative slate of electors, ideally by December 8.

In some ways, the ballot harvesting in the parks, and the "indefinitely confined" scam, are more vulnerable to Article II attack than the point about the absentee ballot envelopes.

I can imagine a state court, and maybe even the U.S. Supreme Court, saying that the absentee envelopes could, without totally torturing the meaning of the statute as it existed before Election Day, be regarded as some sort of "application." I mean, we have a pretty technical argument, mostly about the chronology of voting vs. signing the envelope.

But looking back at the Rehnquist opinion in Bush v. Gore (531 U.S. at 114-15), requiring an examination of state law "as it existed prior to the action of the court," reading the statute about how alternative polling locations can be set up, one would read it as allowing overflow areas near the clerks' office, not as allowing clerks to join in league with nonprofits and Dem activists to host voting fairs, with free food, etc., in parks. It's absurd to think that the Legislature meant to permit the clerks to participate in such ballot-harvesting operations. **I mean, the summary Joe just sent around re the legal violations is mind-boggling!**

Maybe even worse, one could never read the statute allowing people too sick and homebound to obtain a photo i.d., and/or to upload it to the internet, as authorizing election officials to allow 100s of thousands of able-bodied people to vote on this basis, just to avoid the voter-id requirement.

It seems to me that if a factual record on these points can be developed, if you look in combination at all the problems with this election -- the # of ballots affected by these two points, plus all those involved with the envelopes -- it can fairly be said that **the presidential election in Wisconsin was NOT held "in such Manner as the Legislature thereof" directed**, thus violating Article II.

The point here is that the Bush v. Gore Rehnquist analysis for three justices doesn't only apply to the counting of votes (there, Florida came up with novel ways of conducting the recount which could not be squared with the statutes on the books), right? It also applies to how the election was conducted on and prior to Election Day. And here it was conducted, by Dem officials who were desperate to ramp up Dem voter turnout, in ways that cannot possibly be squared with Wisconsin statutes.

So assume we show that the Wisconsin Legislature delegated to election officials the power to allow Wisconsin citizens to appoint the electors, but the officials failed to carry out the election in the manner they were directed to do it. What's the solution?

Well, if courts can cleanly fix errors by throwing out ballots, like with the absentee envelopes, and the person who challenged the election ends up ahead, then the courts can fix the problem by certifying the challenger as the winner. That's the ideal result in Wisconsin, and it looks like we have a good chance of achieving it.

But, if courts can't cleanly fix the errors in that way (for example, assume we lose on the absentee envelope legal issue, and all we have are factually murkier objections to ballot harvesting and "indefinitely confined"), then **the Legislature should decree that the voters of Wisconsin, due to malfeasance by election officials, have FAILED TO MAKE A CHOICE in the manner directed by the Legislature which delegated the appointment process to voters.**

In that event, contrary to the view of the Wisconsin Legislative Reference Bureau, it seems clear that Wisconsin can appoint electors. The Bureau has overlooked 3 U.S.C. Sect. 2, captioned "Failure to make choice on prescribed day":

Whenever 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.

On this view, if we can show that election officials in Wisconsin, in a material way, failed to carry out the presidential election in the "Manner" that the Legislature "direct[ed]," as the Legislature was authorized by Art. II to insist on, then it means that the citizens of Wisconsin "failed to make a choice" on Election Day, and the Legislature is free to appoint electors.

Doing so doesn't disenfranchise voters. It's clear that citizens have no right to vote for president. And it's clear that if a Legislature chooses to let citizens vote for president, the voting has to be done in the manner the Legislature directed -- not in some other manner, manipulated by a particular political party for partisan advantage. So it logically follows that partisan election officials go too far over the line, the election just doesn't count.

Of course, we don't currently know whether courts will ultimately rule that the election was not conducted in the way the Legislature directed. Such a determination, especially if by the U.S. Supreme Court, might not come until much later, even after the electors must vote on December 14. So the prudent thing would be for the Legislature to at least vote an alternative slate of electors as a backup, and for the Trump-Pence electors to cast electoral votes and send them to D.C. on December 14. This would preserve the ability of Trump and Pence to benefit from an eventual U.S. Supreme Court ruling that the Wisconsin election was held in violation of Article II, so that the certification of Biden and Harris as the winners is constitutionally invalid. In that event, the only electoral votes validly before Congress would be the Trump-Pence slate.

What I like about this setup is that there would be no effort to get the Legislature to override the will of the people. The Legislature would merely act proactively, to fill a possible vacuum that might end up existing, if a court later rules that the election itself violated Article II. For the Legislature not to act in this way would create the risk that on January 6, Wisconsin would be unrepresented in the Electoral College, because there would be no valid electoral votes to be counted.

The above is very, very rough, but I wanted to get it out to you asap for your consideration, as it may bear on how the "Democracy in the Park" and "indefinitely confined" points are developed.

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Monday, November 23, 2020 9:21 AM
To: Joe Olson <[REDACTED]@michaelbest.com>; Dan Kelly <[REDACTED]@wisgop.org>;
 Kenneth Chesebro <[REDACTED]@msn.com>; George Burnett

TROUPIS 009013

1/16/24, 2:06 PM

<[REDACTED]@lcojlaw.com>

Subject: Democracy in the park

18000 votes were cast at Democracy in the park. We want to argue to toss them. City Attorney will set exact #. We argue against counting tomorrow.

Joe, please circulate all our arguments and background. Please set 11:30 for a call Joe.

Jim

Sent from my iPhone

This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.

SUBJECT: Re: Confidential
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 11/25/2020 15:04

Jim,

Good you are moving these points up the chain of authority.

FYI, by tomorrow I should have you a memo in draft form, which could be circulated to the rest of our WI team, and potentially Clark, by Friday, boiling down some of the practical points in question and answer format, and concluding (tentatively) with the following:

1. Trump can't push the decision to the House merely by preventing enough States where Biden is currently ahead from certifying, thus dropping Biden below 270 electoral votes -- because the House Democrats will insist that only a majority of the electoral votes actually cast is needed. Even if this is a strained view (it's probably the correct view), it's plausible enough that Pelosi would never hold an election for President just because Biden dropped below 270. In that event, unless the Supreme Court ruled otherwise, an election in the House is an idea dead on arrival.
2. Trump might move the decision to the House by getting enough state legislatures to back his slate of electors, in conflict with the slate certified by the governor, so as to "tie" enough States to deny Biden 270 votes. (There is a legally complicated caveat here; will have to think that through more carefully).
3. So the most plausible path to Trump being reelected is for **Trump, through court decisions, and/or legislative intervention, in enough contested states, to end up with, by January 6, with a majority of electoral votes from the States in which there is only one slate of electors recognized as valid** by either the courts or the state legislature. This could include states in which the state legislature has authoritatively nixed the result of the election as not valid under Art. II (for example, possibly PA, depending on how the current legislative hearings come out).

As I will try to explain clearly in the memo, the only way I can see the Democrats caving in the January 6 joint session is under the plain language of the Electoral Count Act, which states that if there is only one slate of electors returned from a given State, even if it's not a slate certified by the governor (i.e., even if it is appointed by the state legislator, without the governor's approval), it must be counted. If there is any argument that Biden has a valid claim to the State, obviously the House will count Biden as winning that state's electoral vote, and if enough electoral votes are in question to deny Trump a clear majority, there will be a political impasse.

Probably most, perhaps all, of these points have already been examined by the national Trump people, and I'll take care to word the memo modestly so as not to assume otherwise. But I think it's worth setting forth this analysis to make sure no potentially important points are missed!

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Wednesday, November 25, 2020 3:44 PM
To: Justin Clark <[REDACTED]@donaldtrump.com>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Confidential

Justin,

1/16/24, 2:06 PM

Here is the memo we discussed about potentially moving the drop dead date back by several weeks in naming electors.

This requires some very careful research for a given State, and some very precise actions the Trump electors must take in those States.

Feel free to contact me or Ken Chesebro if you have any questions. Ken has thought this through on many different levels and is an experienced appellate advocate.

Jim

SUBJECT: Re: Memorandum
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>, Joe Olson <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>, "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>, Nick Boerke <[REDACTED]@gmail.com>
DATE: 11/27/2020 20:49

All,

Draft overall looks great!

But I want to flag a point regarding p. 17 & footnote 4, regarding exactly what we should say as to the urgency of the Court granting the petition.

The present draft warns that if the Court doesn't intervene, the Biden electors will be certified as the winners and will vote on December 14, which impliedly will be the end of the line for Trump.

But is it really clear that, absent the Court's action, the certificate of election would issue that soon?

Under Sect. 7.70(5)(a), a certificate of election can't be issued after the recount "and the time allowed for filing an appeal has passed, or if appealed until the appeal is decided."

If the petition isn't granted, won't we file a regular appeal in the circuit court, which would stop the certificate of election from being issued?

If so, the basic reason we're doing the petition, to try to hurry things up, is we recognize this matter can only be definitively settled by the Court, and we want to give it as much time as possible to review it, and to have time for any remand.

More importantly, I don't think we should include anything like footnote 4, which reads:

In the event more time is required to reach a complete tabulation, the Court can Order the appointment of both Trump and Biden electors prior to December 13, 2020, and, once the result is known the correct slate may vote when the Electoral College meets in early January. (cite)

We shouldn't in any way suggest that whether the Trump electors can and should meet in the Capitol on December 14, and cast their votes, requires intervention by the Court, or the Legislature. The Trump electors can do that on their own.

And we shouldn't refer to the Electoral College "meet[ing]" in early January.

The Electoral College, in terms of 500+ people, never actually meets. Rather, the electors in each state meet at the same time, on December 14 (the idea in 1787 was then they couldn't communicate and conspire on the vote, cuz no smart phones), and cast their votes, which are then sent to D.C.

All that happens on January 6 is that the votes are counted.

Which is why the Trump electors have the option to cast their votes on December 14, without any government authorization to do so, on the hope that later on the courts, and/or Legislature, and/or Congress will decide that their votes are the legally valid ones.

I think we should discuss on the call what would be safe to say here. Perhaps we should note that the electors are to meet to vote on December 14, and that Wisconsin statutes (Section 7.70(5)(b)) assume the winner will be known before then, so the governor can provide the electors with certificates to send in with their votes -- and thus Wisconsin has an interest in having legal challenges over by December 14.

But, if lawyers calling the shots nationally authorize it, we might also want to preserve the theory that the only hard deadline is January 6, as illustrated by the Hawaii 1960 example -- we don't want to be litigating with a good chance of success as we near December 14, and then have the Court declare the matter moot because time has, supposedly, run out.

In an ideal situation, the Court would rule for us by December 8, so Trump gets "safe harbor" protection -- though, as I can explain later, practically speaking I don't think Trump needs "safe harbor" protection; Biden is the one here who has a vital interest in rushing to get "safe harbor" protection (because by doing that he might be able to make irrelevant a Trump win after December 8).

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Friday, November 27, 2020 6:59 PM
To: Joe Olson <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Nick Boerke <[REDACTED]@gmail.com>
Subject: Memorandum

All,
Attached are the redline and non-redline 3 pm 11-27 versions of the Memorandum. It is now under the control of Kurt and Nick.

Kurt & Nick: Please make the citation insertions, placeholders, etc. Please complete your work by 10 or so on Saturday. At that point Joe and I will discuss, and i would like to have a meeting with Ken and George. We need to make any big picture organizational decisions (I do have some ideas) JOE--can you set a conference call for 10 a.m. (George, Ken & Joe--you'll need to read the latest Petition and Memo for that discussion.)

Joe has control of the Complaints which he will then forward on to Kurt and Nick.

I believe Nick and Kurt have the Petition.

Enjoy. I am meeting now with folks to work on transcripts. So if you have items for them to look for let me know. They are tonight getting familiar and beginning spreadsheets on absentee envelopes redline, incomplete, failure of signatures, etc.

Jim

SUBJECT: Re: IMPORTANT
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>, Judge Troupis <[REDACTED]@gmail.com>, George Burnett <[REDACTED]@lcojlaw.com>, "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>, "Boerke, Nicholas J (12767)" <[REDACTED]@michaelbest.com>, Stewart Karge <[REDACTED]@gmail.com>
DATE: 12/01/2020 11:58

One aspect of my writeup was to make clear -- and maybe this could backfire with the Justices (I'm not urging it, just floating the idea) -- that **if the Justices don't rule by 5 p.m. on December 13, they may force the Legislature to appoint electors**, as that might then be the only way to ensure that Wisconsin will be represented in the Electoral College.

Because our view is that until the Justices decide, while our challenge is still live, no certificate of election can issue.

So that the Legislature appointing electors directly would be the only option for certifying the electors before Dec. 14.

This was exactly the scenario presented in Florida in 2000. The Legislature specifically advised the Florida Supreme Court that unless it decided the recount, in close conformity with Florida statutes (to avoid an Art. II problem), it would have to step in and appoint electors.

On that, see pp. 13-14 of this amicus brief, signed by Charles Fried (Harvard Law prof and Solicitor General under Reagan):

https://www.floridasupremecourt.org/content/download/242206/file/00-2346_amicussuppLeg.pdf

So I see this filing as both a way to press the Court to decide by Dec. 13 at latest, and to signal to the Legislature that it has the clear power to step in at that point if necessary, and that it should be preparing that that possibility.

Ken

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Tuesday, December 1, 2020 12:46 PM
To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Stewart Karge <[REDACTED]@gmail.com>
Subject: Re: IMPORTANT

Here was what I wrote up Nov. 28 on timing.

We wisely kept it out of the Memorandum, but I agree there's a need to get the Court to commit to a schedule, as otherwise the circuit court actions, and/or federal court action, must become serious options.

Ken

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Tuesday, December 1, 2020 12:42 PM
To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>;
TROUPIS 009019

1/16/24, 2:07 PM

Stewart Karge <[REDACTED]@gmail.com>

Subject: Re: IMPORTANT

Update -- George just called and updated me.

My understanding is that the idea is to ask the Court to rule by Dec. 10.

That may make sense, to allow for us to petition the U.S. Supreme Court if we lose.

But in my view, we might get effective relief from the U.S. Supreme Court after Dec. 14, if we take care to have the Trump electors meet in the Wisconsin Capitol on Dec. 14 and send their votes to D.C.

If that seems solid, giving the SCOW until Dec. 13 might be better -- more time to think may make them more inclined to go with us.

I will find my 2-page writeup from a few days ago, centering on Dec. 13 as the deadline, and forward it for consideration.

Ken

From: Kenneth Chesebro <[REDACTED]@msn.com>

Sent: Tuesday, December 1, 2020 12:27 PM

To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Stewart Karge <[REDACTED]@gmail.com>

Subject: Re: IMPORTANT

Hi, it would be great if someone can volunteer to call me to quickly catch me up on what happened on the call.

I was on another conference call (case with oral argument coming up).

[REDACTED]

Ken

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From: Kenneth Chesebro <[REDACTED]@msn.com>

Sent: Tuesday, December 1, 2020 12:14:56 PM

To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Stewart Karge <[REDACTED]@gmail.com>

Subject: Re: IMPORTANT

Hi, just saw this.

Conference over?

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From: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>

Sent: Tuesday, December 1, 2020 11:26:34 AM

To: Judge Troupis <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>;

TRROUPIS 009020

1/16/24, 2:07 PM

Kenneth Chesebro <[REDACTED]@msn.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Stewart Karge <[REDACTED]@gmail.com>

Subject: RE: IMPORTANT

Let's jump on the phone now:

Dial In Number: [REDACTED]

Conference Room #: [REDACTED]

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com

Michael Best & Friedrich LLP

-----Original Message-----

From: Judge Troupis <[REDACTED]@gmail.com>

Sent: Tuesday, December 1, 2020 10:17 AM

To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>; Kurt A. Goehre

<[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Boerke, Nicholas J (12767)

<[REDACTED]@michaelbest.com>; Stewart Karge <[REDACTED]@gmail.com>

Subject: IMPORTANT

Joe can you set up a conference call ASAP for all of us. I have news requiring action Jim

Sent from my iPhone

Email Disclaimer

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=====

SUBJECT: Fwd: TRO Safe Harbor Concern

FROM: Judge Troupis <[REDACTED]@gmail.com>

TO: Kenneth Chesebro <[REDACTED]@msn.com>

DATE: 12/02/2020 10:54

ATTACHMENTS (20201202-105406-0001042): ["Evers Tweet.JPG"](#) , ["Safe Harbor Memo.docx"](#)

What are your thoughts on this?

Jim

Sent from my iPhone

Begin forwarded message:

From: [REDACTED] <[REDACTED]@swvalawfirm.com>

Date: December 2, 2020 at 10:44:16 AM CST

To: [REDACTED]@gmail.com, [REDACTED] <[REDACTED]@outlook.com>, Beauty and the Bees <[REDACTED]@gmail.com>, [REDACTED] <[REDACTED]@swvalawfirm.com>, jlolson@michaelbest.com, [REDACTED]@gmail.com, [REDACTED]@gmail.com, [REDACTED]@lcojlaw.com, [REDACTED]@michaelbest.com, [REDACTED]@lcojlaw.com, "Clinton W. Lancaster" <[REDACTED]@thelancasterlawfirm.com>

Subject: TRO Safe Harbor Concern

I'm concerned about the Safe Harbor Provision under 3 U.S. Code § 5. To me, it says that if the state has certified their electors by December 8th, then those electors are the ones that will be accepted by Congress. I feel as though the Governor has unlawfully certified the WI electors for Biden, but there has been no ruling or motion for injunctive relief to say otherwise. I'm fearful that if we do not address it, then we may waive said argument and Congress will accept the unlawful certification of the Governor (see his Tweet claiming he CERTIFIED), making our entire case moot.

Please see memo attached.

--

Sincerely,

[REDACTED]



Physical Address:

125 Slusher Street
Stuart, Virginia 24171

Mailing Address:

P.O. Box 396
Stuart, Virginia 24171

Tel: [REDACTED]

Fax: [REDACTED]

TROUPIS 009022

www.swvalawfirm.com

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Governor Tony Evers 

@GovEvers



Today I carried out my duty to certify the November 3rd election, and as required by state and federal law, I've signed the Certificate of Ascertainment for the slate of electors for President-elect Joe Biden and Vice President-elect Kamala Harris.

TROUPIS 009024

6:10 PM · Nov 30, 2020 · Twitter Web App

Question:

Should we file a TRO for injunctive relief in order to bar the Governor’s unlawful “certification of the electors” or “determination of the electors” from being considered the accepted results of the election under the safe harbor clause in 3 U.S. Code § 5? If we don’t, would the Governor’s unlawful edict be considered by Congress to be WI’s final decision?

Argument:

It appears from the language used by both the Chairperson and the Governor that each have violated the law by acting upon and/or certifying the results of the election prematurely. Wis. Stat. § 7.70(5)(a) states as follows:

The commission shall record in its office each certified statement and determination made by the commission chairperson or the chairperson's designee. Immediately after the expiration of the time allowed to file a petition for recount, the commission shall make and transmit to each person declared elected a certificate of election under the seal of the commission, except that the commission need not wait until expiration of the time allowed to file a petition for recount if there is no aggrieved party, as defined in s. 9.01 (1) (a) 5. *When a valid petition for recount is filed, the commission chairperson or the chairperson's designee may not certify a nomination, and the governor or commission may **not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed, or if appealed until the appeal is decided.***

Wis. Stat. § 9.01(6)(a) (emphasis added).

Pursuant to Wis. Stat. § 9.01(6)(a), an aggrieved party has five business days following the conclusion of the requested recount to file an appeal to the Circuit Court. At the earliest, Petitioners have until Friday, December 4, 2020, to file an appeal pursuant to Wis. Stat. § 9.01(6)(a). Any actions taken prior to the five day deadline and any further appeals asserted by the Petitioner is barred and therefore null and void.

Further, it appears that the Chairperson wrongfully relied upon Wis. Stat. § 7.70(5)(a) in taking action upon the state canvass results without a full hearing by the WEC. Compare the previously stated language in Wis. Stat. § 7.70(5)(a) with Wis. Stat. § 7.70(5)(b):

(b) *For presidential electors*, the **commission** shall prepare a certificate showing the determination of the results of the canvass and the names of the persons elected, and the governor shall sign, affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services. The governor shall also prepare 6 duplicate originals of such certificate and deliver them to one of the presidential electors on or before the first Monday after the 2nd Wednesday in December.

Wis. Stat. § 9.01(6)(a) (emphasis added).

The Chairperson lacks the authority to unilaterally certify the results of the state canvas for the presidential electors without first holding a public hearing of the full commission after having given appropriate and timely notice to the public. Wis. Stat. § 7.70(5)(b).

Further, the Governor of Wisconsin does not have the statutory authority to certify presidential electors without certification delivered from the WEC pursuant to Wis. Stat. § 7.70(5)(b). The Supreme Court of Wisconsin has previously held that the governor exceeds his statutory authority when he acts unilaterally without explicit authorization under the law. Panzer v. Doyle, 2004 WI 52, P1, 271 Wis. 2d 295, 302, 680 N.W.2d 666, 669. Further, the Supreme Court of Wisconsin has previously ruled that any such actions taken are presumed to be contrary to the public policy embodied in state law. *Id.* Finally, the Supreme Court of Wisconsin concluded that the governor exceeded his authority by completing such actions which he had no inherent or delegated power to undertake. *Id.*

Safe Harbor Provision:

3 U.S. Code § 5. Determination of controversy as to appointment of electors

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, **and such determination shall have been made at least six days before** the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, **shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.**

(June 25, 1948, ch. 644, 62 Stat. 673.)

Relevant Facts:

Pursuant to Wis. Stat. § 9.01(1)(a), Petitioners filed the appropriate petition as an “aggrieved party” defined in Wis. Stat. § 9.01(1)(a)(5). A recount began on November 20th, 2020, in Milwaukee and Dane Counties, Wisconsin. On Friday, November 27, 2020, the Milwaukee County Board of Canvassers certified their results on Friday, November 27, 2020, and the Dane County Board of Canvassers certified their results on Sunday, November 30, 2020.

On Sunday, November 30, 2020, the Chairperson of the Wisconsin Election Commissions (“WEC”), Ms. Ann S. Jacobs, alone, canvassed the results of the presidential election and signed a statement of determination of the canvass results and then forwarded it to the Governor of Wisconsin, Tony Evers. See WEC Press Release, 11/30/2020. It is unknown at this time whether this statement of determination is purported to be the Chairperson’s certification of the results as this document has not currently been made public.

At 6:10 PM on November 30, 2020, Governor Tony Evers tweeted, “**Today I carried out my duty to certify** the November 3rd election, and as required by state and federal law, I’ve signed the Certificate of Ascertainment for the slate of elections of President-elect Joe Biden and Vice President-elect Kamala Harris.” See Evers Tweet, 11/30/2020, 6:10 PM.

1/16/24, 2:11 PM

SUBJECT: FW: TRO Safe Harbor Concern

FROM: "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>

TO: Kenneth Chesebro <[REDACTED]@msn.com>

CC: Judge Troupis <[REDACTED]@gmail.com>, George Burnett <[REDACTED]@lcojlaw.com>, "Joe Olson ([REDACTED]@michaelbest.com)" <[REDACTED]@michaelbest.com>, Nick Boerke <[REDACTED]@gmail.com>

DATE: 12/02/2020 17:12

ATTACHMENTS (20201202-171243-0001040): ["image001.jpg"](#) , ["image002.jpg"](#) , ["Safe Harbor Memo.docx"](#)

TROUPIS 009027

Ken,

I noticed you weren't on the e-mail below, and may not have seen this memo sent by the individual below. But we were interested in hearing your thoughts on this take.

Kindest regards,

KURT A. GOEHRE

Partner/Attorney

Law Firm of Conway, Olejniczak & Jerry, S.C.

231 S. Adams Street | P.O. Box 23200

Green Bay, WI 54305

P: [REDACTED] F: [REDACTED]

E: [REDACTED]@lcojlaw.com | lcojlaw.com

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From: [REDACTED] <[REDACTED]@swvalawfirm.com>

Sent: Wednesday, December 2, 2020 10:44 AM

To: [REDACTED]@gmail.com; [REDACTED] <[REDACTED]@outlook.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; [REDACTED]@michaelbest.com; [REDACTED]@gmail.com; [REDACTED]@gmail.com; George Burnett <[REDACTED]@lcojlaw.com>; [REDACTED]@michaelbest.com; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>

Subject: TRO Safe Harbor Concern

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Please see memo attached.



--

Sincerely,

[REDACTED]

Error! Filename not specified. Error! Filename not specified. _____

Physical Address:
125 Slusher Street
Stuart, Virginia 24171

Mailing Address:
P.O. Box 396
Stuart, Virginia 24171

Tel: [REDACTED]
Fax: [REDACTED]
www.swvalawfirm.com

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Governor Tony Evers 

@GovEvers

⋮

Today I carried out my duty to certify the November 3rd election, and as required by state and federal law, I've signed the Certificate of Ascertainment for the slate of electors for President-elect Joe Biden and Vice President-elect Kamala Harris. **TRROUPIS 009031**

6:10 PM · Nov 30, 2020 · Twitter Web App

Question:

Should we file a TRO for injunctive relief in order to bar the Governor's unlawful "certification of the electors" or "determination of the electors" from being considered the accepted results of the election under the safe harbor clause in 3 U.S. Code § 5? If we don't, would the Governor's unlawful edict be considered by Congress to be WI's final decision?

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1/16/24, 2:12 PM

SUBJECT: Read after brief filed tomorrow -- should this memo on Dec. 14 voting of electors be sent to Justin Clark?

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: Judge Troupis <[REDACTED]@gmail.com>

DATE: 12/07/2020 00:15

ATTACHMENTS (20201207-001551-0000207): ["2020-12-06 Chesebro memo on Trump electors voting on Dec 14.pdf"](#)

Jim, memo is attached.

Ken

TROUPIS 009034

Privileged and Confidential

M E M O R A N D U M

TO: James R. Troupis
FROM: Kenneth Chesebro
DATE: December 6, 2020
RE: **Important That All Trump-Pence Electors Vote on December 14**

This follows up on my November 18 memo (copy [here](#)) advocating that unless the President and Vice President plan to concede the race if they fail to reach 270 electoral votes by December 14, the Trump-Pence electors all should meet in their respective States, and cast their votes and send them to Washington, so that the votes will be physically present at the joint session of Congress on January 6.

This memo briefly covers three points: (1) importance of all the electors in all six contested States voting; (2) messaging about this being a routine measure; and (3) logistics.

1. The Trump-Pence electors in all six contested States must vote

I'd be happy to follow up on the subject with a separate memo, if the national legal strategists are interested, but I've mulled over how January might play out, and it seems feasible that the Trump campaign can prevent Biden from amassing 270 electoral votes on January 6, and force the Members of Congress, the media, and the American people to focus on the substantive evidence of illegal election and counting activities in the six contested States, provided three things happen:

(a) All the Trump-Pence electors meet and vote, in all six contested States, and send in the certificates containing their votes, in compliance with federal and state statutes, on December 14;

(b) There is pending, on January 6, in each of the six States, at least one lawsuit, in either federal or state court, which might plausibly, if allowed to proceed to completion, lead to either Trump winning the State or at least Biden being denied the State (of course, ideally by then Trump will have been awarded one or more of the States); and

(c) On January 6, in a solemn and constitutionally defensible manner, consistent with clear indications that this what the Framers of the Constitution intended and expected, and consistent with precedent from the first 70 years of our nation's history, Vice President Pence, presiding over the joint session, takes the position that it is his constitutional power and duty, alone, as President of the Senate, to both open and count the votes, and that anything in the Electoral Count Act to the contrary is unconstitutional.

I'm not necessarily advising this course of action, and the Vice President need not make a decision on how to proceed until January 6, and obviously there are many factors that will come to bear on how he proceeds, assuming the race has not been conceded before January 6. My point here is that it is important that the alternate slates of electors meet and vote on December 14 if we are to create a scenario under which Biden can be prevented from reaching 270 electoral votes, even if Trump has not managed by then to obtain court decisions (or state legislative resolutions) invalidating enough results to push Biden below 270.

Again, I'd be happy to elaborate further on the January 6 scenario I have in mind, but provided the three conditions above are met, unless I am missing something, I believe that what can be achieved on January 6 is not simply to keep Biden below 270 electoral votes. It seems feasible that the vote count can be conducted so that at no point will Trump be behind in the electoral vote count unless and until Biden can obtain a favorable decision from the Supreme Court upholding the Electoral Count Act as constitutional, or otherwise recognizing the power of Congress (and not the President of the Senate) to count the votes.

Specifically – but only if all six States are still contested, and all six slates of Trump-Pence electors had voted on December 14 – I think the count could be managed so that Biden would have to seek Supreme Court review either when he is behind 12-0 in the electoral count or, at latest, when he is behind 232-227.

Even if, in the end, the Supreme Court would likely end up ruling that the power to count the votes (in the sense of resolving controversies concerning them) does not lie with the President of the Senate, but instead lies with Congress (either voting jointly, or in separate Houses), letting matters play out this way would guarantee that public attention would be riveted on the evidence of electoral abuses by the Democrats, and would also buy the Trump campaign more time to win litigation that would deprive Biden of electoral votes and/or add to Trump's column.

I recognize that what I suggest is a bold, controversial strategy, and that there are many reasons why it might not end up being executed on January 6. But as long as it is one possible option, to preserve it as a possibility it is important that the Trump-Pence electors cast their electoral votes on December 14.

2. Messaging about the December 14 vote as routine

If the Trump campaign ends up deciding to have all of its electors vote on December 14, even in States in which Trump has not been declared the winner, presumably word of this will leak out prior to December 14. So perhaps before then there should be messaging that presents this as a routine measure that is necessary to ensure that in the event the courts (or state legislatures) were to later conclude

that Trump actually won the state, the correct electoral slate can be counted in Congress in January – just as the Democrats did in Hawaii in 1960, which ended up with Hawaii’s electoral votes being awarded to Kennedy, even though the litigation was not resolved until after the electors voted (see [my Nov. 18 memorandum](#)).

Two points might be made to support this as being a routine, sensible measure. First, our key adversary in Wisconsin, the Wisconsin Elections Commission (WEC), has recognized that there is plenty of time for litigation to play out, and no need to rush unduly, because the real deadline is January 6. See pages 6-10 of its Wisconsin Supreme Court brief, [here](#).

Similarly, Justice Ginsburg noted that the date which has “ultimate significance” under federal law is “the sixth day of January,” the date set by 3 U.S.C. § 15 on which the Senate and House determine “the validity of electoral votes.” Bush v. Gore, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting) (opinion [here](#)).

Professor Tribe, a key Biden supporter and fervent Trump critic (e.g., [here](#), [here](#), and [here](#)), has likewise noted 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.” 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) (copy [here](#)).

Further, respected voices in the minority community are recently on record that January 6 is the important date. Consider, for example, [this article](#) in Roll Call on October 26 (emphasis added):

Some people believe the GOP’s reluctance to support efforts in the battleground states of Michigan and Pennsylvania to begin processing mail-in votes before Election Day is tied to the fact that they have Democratic governors and Republican-controlled legislatures. If disputes over mail-in votes are dragging on in court when it comes time for the Electoral College to meet on Dec. 14, it’s possible legislators could put up their own slates.

Those disputes would land in the lap of Congress, and don’t expect objections to come only from Republicans.

Sherrilyn Ifill, president and director of the NAACP Legal Defense and Education Fund, noted during a [webinar hosted by the Aspen Institute](#) on Oct. 2 that just as the Black Caucus objected to the Florida vote in 2001, the same could happen in January if voters are intimidated from casting ballots or election officials are stopped by

armed groups or court orders from counting absentee or provisional ballots.

“We are a nonpartisan organization, but we believe it’s critical that every vote is counted,” she said. “And so I would just draw your attention to the fact that **we really have to take this all the way to Jan. 6**, and that potential statutory challenge may be received quite differently in 2021 than it was received in 2001.”

Second, prominent liberal figures urged, just before election day, that given that post-election litigation might drag on for some time, each campaign should have its slate of electors vote on December 14.

Consider [this essay](#), published on CNN.com by Van Jones and Larry Lessig on Nov. 4, when they thought Trump might be ahead in the count in Pennsylvania after election day, and that Democrats then would have to contest the State. Jones and Lessig wanted to make clear in advance that Democrats would have until January 6 to pull out a win (having learned Gore's painful lesson from 2000 that you need to give yourself as much time as possible to come from behind). After considering the key insight that can be gleaned from the 1960 Hawaii electoral count, they advised (emphasis added):

That insight shows what should happen this year on December 14, 2020, when the electors are to meet to cast their ballots. **On that day**, assuming the final count of the popular votes has not yet been certified, **both slates** of Pennsylvania presidential electors should meet in Harrisburg. **Both slates should cast their votes** by ballot. And Pennsylvania Gov. Tom Wolf should await the final resolution of the popular vote count before he certifies which slate should represent the state. **So long as that certification happens before January 6, there is nothing that should stop it from being counted by Congress.**

Given such prior statements by these and other prominent liberal figures, it would be the height of hypocrisy for Democrats to resist January 6 as the real deadline, or to suggest that Trump and Pence would be doing anything particularly controversial in asking the electors pledged to them to please assemble in their respective States and cast their votes, and transmit them to Washington, on December 14, so that they might be counted in Congress if their slates are later declared the valid ones, by a court and/or state legislature.

3. Logistics for casting/transmitting electoral votes on December 14

The federal-law requirements for the December 14 electors' meeting are set out in 3 U.S.C. §§ 6-11 (copy [here](#)).

The state-law requirements are set out in Wis. Stats. § 7.75 ([here](#)).

Obviously, there are party leaders and/or officials in each State who are familiar with the relevant details who would deal with the logistics, most of whom have handled such details in past elections. But here is a brief summary, in chronological order, of the requirements, which I set out to make clear that the electors in the contested States should be able to take the essential steps needed to validly cast and transmit their votes without any involvement by the governor or any other state official.

The electors here function, in effect, as agents of the federal government, under powers delegated to them by the federal Constitution and statutes (assuming that they end up being recognized as the validly appointed electors, following final judicial and/or state legislative action).

- Under federal law, the ten Trump-Pence electors must all meet, together, on December 14, “at such place in each State as the legislature of such State shall direct.” 3 U.S.C. § 7.
- Under Wisconsin law, they “shall meet at the state capitol,” i.e., in the Capitol Building, “at 12:00 noon.” Wis. Stat. § 7.75(1).
- There is no requirement that they meet in public. It might be preferable for them to meet in private, to thwart the ability of protesters to disrupt the event – witness, via [this video](#), what happened when the Trump-Pence electors met in public in 2016, even though the Trump-Pence victory in Wisconsin had not been contested. Even if held in private, perhaps print and even TV journalists would be invited to attend to cover the event.
- Preferably all ten electors who were on the ballot would be in attendance. But if some are unwilling (due to intimidation) or unable to make it, it is sufficient that three electors who were on the ballot make it, provided that other party stalwarts (not constitutionally disqualified from serving) are available to step in. Wis. Stat. § 7.75(1) (“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.”).

Privileged and Confidential
Trump Electors Voting on December 14

6

- The ten electors would then all vote for Trump for President, and Pence for Vice President, separately. 3 U.S.C. § 8; Wis. Stat. § 7.75(2).

- The electors would then prepare six identical sets of papers – “certificates” – listing under separate headings their votes, indicating that each of them has voted for Trump for President, and Pence for Vice President. Apparently each page is signed by each elector. 3 U.S.C. § 9.

- The only thing ordinarily contemplated by Sect. 9 that the Trump-Pence electors would not be able to do (unless Trump wins by December 14) is staple to each of their certificates the certificate of ascertainment that the governor is directed to give the winning electors pursuant to 3 U.S.C. § 6. But, as the Hawaii 1960 example shows, this is hardly fatal; proof that the Trump-Pence electors are the validly appointed ones can be furnished to Congress before it meets on January 6.

- Next, the electors would place each certificate in a separate envelope, seal up the envelopes, and indicate on the outside of the envelopes that they contain the votes of the State of Wisconsin for President and Vice President. 3 U.S.C. § 10.

- Finally, the electors would transmit the six envelopes containing identical originals of their votes as follows:

- 1 to the President of the Senate, by registered mail, on the same day (“forthwith”).

- 2 to Wisconsin’s Secretary of State (apparently by hand), one to be held in reserve for the President of the Senate, and the other to be preserved as a public record.

- 2 to the National Archives, one to be held in reserve for the President of the Senate, and the other to be preserved as a public record, also by registered mail (“[o]n the day thereafter”).

- 1 to the U.S. District Court for the Western District of Wisconsin (apparently by hand).

* * *

Given the possible upside of having the Trump-Pence electors meet to vote on December 14, it seems advisable for the campaign to seriously consider this course of action and, if adopted, to carefully plan related messaging.

K.C.

TROUPIS 009040

SUBJECT: Fw: Read after brief filed tomorrow -- should this memo on Dec. 14 voting of electors be sent to Justin Clark?
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/07/2020 11:30
ATTACHMENTS (20201207-113004-0000206): "[2020-12-06 Chesebro memo on Trump electors voting on Dec 14.pdf](#)"

Jim

I feel this memo -- on why it's important all electors vote in all 6 contested states should vote on Dec. 14 -- should get to Justin Clark and others involved with national strategy ASAP.

We're only 7 days away now.

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Clear messaging is especially important given the new white paper by the Amistad Project, which mucks up a rather simple case for having the electors vote, and continuing litigation through Jan. 6, when Congress has to meet to count the votes, under clear constitutional language:

<https://www.washingtonexaminer.com/washington-secrets/new-claim-constitution-does-not-require-hasty-electoral-college-vote-check-fraud-first>

Hope you can take a quick look at this.

If desired, I can elaborate in a further memo on my view that if all six states remain in play on January 6 -- i.e., if litigation is pending, at least on appeal, in them -- it might be possible to prevent Biden from being elected (or even being ahead in the electoral count) unless and until the Supreme Court resolves constitutional ambiguities regarding the procedure for counting electoral votes.

Best,

Ken

From: Kenneth Chesebro
Sent: Monday, December 7, 2020 1:15 AM
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Read after brief filed tomorrow -- should this memo on Dec. 14 voting of electors be sent to Justin Clark?

Jim, memo is attached.

Ken

Privileged and Confidential

M E M O R A N D U M

TO: James R. Troupis
FROM: Kenneth Chesebro
DATE: December 6, 2020
RE: **Important That All Trump-Pence Electors Vote on December 14**

This follows up on my November 18 memo (copy [here](#)) advocating that unless the President and Vice President plan to concede the race if they fail to reach 270 electoral votes by December 14, the Trump-Pence electors all should meet in their respective States, and cast their votes and send them to Washington, so that the votes will be physically present at the joint session of Congress on January 6.

This memo briefly covers three points: (1) importance of all the electors in all six contested States voting; (2) messaging about this being a routine measure; and (3) logistics.

1. The Trump-Pence electors in all six contested States must vote

I'd be happy to follow up on the subject with a separate memo, if the national legal strategists are interested, but I've mulled over how January might play out, and it seems feasible that the Trump campaign can prevent Biden from amassing 270 electoral votes on January 6, and force the Members of Congress, the media, and the American people to focus on the substantive evidence of illegal election and counting activities in the six contested States, provided three things happen:

(a) All the Trump-Pence electors meet and vote, in all six contested States, and send in the certificates containing their votes, in compliance with federal and state statutes, on December 14;

(b) There is pending, on January 6, in each of the six States, at least one lawsuit, in either federal or state court, which might plausibly, if allowed to proceed to completion, lead to either Trump winning the State or at least Biden being denied the State (of course, ideally by then Trump will have been awarded one or more of the States); and

(c) On January 6, in a solemn and constitutionally defensible manner, consistent with clear indications that this what the Framers of the Constitution intended and expected, and consistent with precedent from the first 70 years of our nation's history, Vice President Pence, presiding over the joint session, takes the position that it is his constitutional power and duty, alone, as President of the Senate, to both open and count the votes, and that anything in the Electoral Count Act to the contrary is unconstitutional.

I'm not necessarily advising this course of action, and the Vice President need not make a decision on how to proceed until January 6, and obviously there are many factors that will come to bear on how he proceeds, assuming the race has not been conceded before January 6. My point here is that it is important that the alternate slates of electors meet and vote on December 14 if we are to create a scenario under which Biden can be prevented from reaching 270 electoral votes, even if Trump has not managed by then to obtain court decisions (or state legislative resolutions) invalidating enough results to push Biden below 270.

Again, I'd be happy to elaborate further on the January 6 scenario I have in mind, but provided the three conditions above are met, unless I am missing something, I believe that what can be achieved on January 6 is not simply to keep Biden below 270 electoral votes. It seems feasible that the vote count can be conducted so that at no point will Trump be behind in the electoral vote count unless and until Biden can obtain a favorable decision from the Supreme Court upholding the Electoral Count Act as constitutional, or otherwise recognizing the power of Congress (and not the President of the Senate) to count the votes.

Specifically – but only if all six States are still contested, and all six slates of Trump-Pence electors had voted on December 14 – I think the count could be managed so that Biden would have to seek Supreme Court review either when he is behind 12-0 in the electoral count or, at latest, when he is behind 232-227.

Even if, in the end, the Supreme Court would likely end up ruling that the power to count the votes (in the sense of resolving controversies concerning them) does not lie with the President of the Senate, but instead lies with Congress (either voting jointly, or in separate Houses), letting matters play out this way would guarantee that public attention would be riveted on the evidence of electoral abuses by the Democrats, and would also buy the Trump campaign more time to win litigation that would deprive Biden of electoral votes and/or add to Trump's column.

I recognize that what I suggest is a bold, controversial strategy, and that there are many reasons why it might not end up being executed on January 6. But as long as it is one possible option, to preserve it as a possibility it is important that the Trump-Pence electors cast their electoral votes on December 14.

2. Messaging about the December 14 vote as routine

If the Trump campaign ends up deciding to have all of its electors vote on December 14, even in States in which Trump has not been declared the winner, presumably word of this will leak out prior to December 14. So perhaps before then there should be messaging that presents this as a routine measure that is necessary to ensure that in the event the courts (or state legislatures) were to later conclude

that Trump actually won the state, the correct electoral slate can be counted in Congress in January – just as the Democrats did in Hawaii in 1960, which ended up with Hawaii’s electoral votes being awarded to Kennedy, even though the litigation was not resolved until after the electors voted (see [my Nov. 18 memorandum](#)).

Two points might be made to support this as being a routine, sensible measure. First, our key adversary in Wisconsin, the Wisconsin Elections Commission (WEC), has recognized that there is plenty of time for litigation to play out, and no need to rush unduly, because the real deadline is January 6. See pages 6-10 of its Wisconsin Supreme Court brief, [here](#).

Similarly, Justice Ginsburg noted that the date which has “ultimate significance” under federal law is “the sixth day of January,” the date set by 3 U.S.C. § 15 on which the Senate and House determine “the validity of electoral votes.” Bush v. Gore, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting) (opinion [here](#)).

Professor Tribe, a key Biden supporter and fervent Trump critic (e.g., [here](#), [here](#), and [here](#)), has likewise noted 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.” 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) (copy [here](#)).

Further, respected voices in the minority community are recently on record that January 6 is the important date. Consider, for example, [this article](#) in Roll Call on October 26 (emphasis added):

Some people believe the GOP’s reluctance to support efforts in the battleground states of Michigan and Pennsylvania to begin processing mail-in votes before Election Day is tied to the fact that they have Democratic governors and Republican-controlled legislatures. If disputes over mail-in votes are dragging on in court when it comes time for the Electoral College to meet on Dec. 14, it’s possible legislators could put up their own slates.

Those disputes would land in the lap of Congress, and don’t expect objections to come only from Republicans.

Sherrilyn Ifill, president and director of the NAACP Legal Defense and Education Fund, noted during a [webinar hosted by the Aspen Institute](#) on Oct. 2 that just as the Black Caucus objected to the Florida vote in 2001, the same could happen in January if voters are intimidated from casting ballots or election officials are stopped by

armed groups or court orders from counting absentee or provisional ballots.

“We are a nonpartisan organization, but we believe it’s critical that every vote is counted,” she said. “And so I would just draw your attention to the fact that **we really have to take this all the way to Jan. 6**, and that potential statutory challenge may be received quite differently in 2021 than it was received in 2001.”

Second, prominent liberal figures urged, just before election day, that given that post-election litigation might drag on for some time, each campaign should have its slate of electors vote on December 14.

Consider [this essay](#), published on CNN.com by Van Jones and Larry Lessig on Nov. 4, when they thought Trump might be ahead in the count in Pennsylvania after election day, and that Democrats then would have to contest the State. Jones and Lessig wanted to make clear in advance that Democrats would have until January 6 to pull out a win (having learned Gore's painful lesson from 2000 that you need to give yourself as much time as possible to come from behind). After considering the key insight that can be gleaned from the 1960 Hawaii electoral count, they advised (emphasis added):

That insight shows what should happen this year on December 14, 2020, when the electors are to meet to cast their ballots. **On that day**, assuming the final count of the popular votes has not yet been certified, **both slates** of Pennsylvania presidential electors should meet in Harrisburg. **Both slates should cast their votes** by ballot. And Pennsylvania Gov. Tom Wolf should await the final resolution of the popular vote count before he certifies which slate should represent the state. **So long as that certification happens before January 6, there is nothing that should stop it from being counted by Congress.**

Given such prior statements by these and other prominent liberal figures, it would be the height of hypocrisy for Democrats to resist January 6 as the real deadline, or to suggest that Trump and Pence would be doing anything particularly controversial in asking the electors pledged to them to please assemble in their respective States and cast their votes, and transmit them to Washington, on December 14, so that they might be counted in Congress if their slates are later declared the valid ones, by a court and/or state legislature.

3. Logistics for casting/transmitting electoral votes on December 14

The federal-law requirements for the December 14 electors' meeting are set out in 3 U.S.C. §§ 6-11 (copy [here](#)).

The state-law requirements are set out in Wis. Stats. § 7.75 ([here](#)).

Obviously, there are party leaders and/or officials in each State who are familiar with the relevant details who would deal with the logistics, most of whom have handled such details in past elections. But here is a brief summary, in chronological order, of the requirements, which I set out to make clear that the electors in the contested States should be able to take the essential steps needed to validly cast and transmit their votes without any involvement by the governor or any other state official.

The electors here function, in effect, as agents of the federal government, under powers delegated to them by the federal Constitution and statutes (assuming that they end up being recognized as the validly appointed electors, following final judicial and/or state legislative action).

- Under federal law, the ten Trump-Pence electors must all meet, together, on December 14, “at such place in each State as the legislature of such State shall direct.” 3 U.S.C. § 7.
- Under Wisconsin law, they “shall meet at the state capitol,” i.e., in the Capitol Building, “at 12:00 noon.” Wis. Stat. § 7.75(1).
- There is no requirement that they meet in public. It might be preferable for them to meet in private, to thwart the ability of protesters to disrupt the event – witness, via [this video](#), what happened when the Trump-Pence electors met in public in 2016, even though the Trump-Pence victory in Wisconsin had not been contested. Even if held in private, perhaps print and even TV journalists would be invited to attend to cover the event.
- Preferably all ten electors who were on the ballot would be in attendance. But if some are unwilling (due to intimidation) or unable to make it, it is sufficient that three electors who were on the ballot make it, provided that other party stalwarts (not constitutionally disqualified from serving) are available to step in. Wis. Stat. § 7.75(1) (“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.”).

Privileged and Confidential
Trump Electors Voting on December 14

6

- The ten electors would then all vote for Trump for President, and Pence for Vice President, separately. 3 U.S.C. § 8; Wis. Stat. § 7.75(2).

- The electors would then prepare six identical sets of papers – “certificates” – listing under separate headings their votes, indicating that each of them has voted for Trump for President, and Pence for Vice President. Apparently each page is signed by each elector. 3 U.S.C. § 9.

- The only thing ordinarily contemplated by Sect. 9 that the Trump-Pence electors would not be able to do (unless Trump wins by December 14) is staple to each of their certificates the certificate of ascertainment that the governor is directed to give the winning electors pursuant to 3 U.S.C. § 6. But, as the Hawaii 1960 example shows, this is hardly fatal; proof that the Trump-Pence electors are the validly appointed ones can be furnished to Congress before it meets on January 6.

- Next, the electors would place each certificate in a separate envelope, seal up the envelopes, and indicate on the outside of the envelopes that they contain the votes of the State of Wisconsin for President and Vice President. 3 U.S.C. § 10.

- Finally, the electors would transmit the six envelopes containing identical originals of their votes as follows:

- 1 to the President of the Senate, by registered mail, on the same day (“forthwith”).

- 2 to Wisconsin’s Secretary of State (apparently by hand), one to be held in reserve for the President of the Senate, and the other to be preserved as a public record.

- 2 to the National Archives, one to be held in reserve for the President of the Senate, and the other to be preserved as a public record, also by registered mail (“[o]n the day thereafter”).

- 1 to the U.S. District Court for the Western District of Wisconsin (apparently by hand).

* * *

Given the possible upside of having the Trump-Pence electors meet to vote on December 14, it seems advisable for the campaign to seriously consider this course of action and, if adopted, to carefully plan related messaging.

K.C.

TROUPIS 009047

SUBJECT: Fwd: Read after brief filed tomorrow -- should this memo on Dec. 14 voting of electors be sent to Justin Clark?
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/07/2020 15:50
ATTACHMENTS (20201207-155004-0000205): "[2020-12-06 Chesebro memo on Trump electors voting on Dec 14.pdf](#)"

Reminder.

Get [Outlook for iOS](#)

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Monday, December 7, 2020 12:30:04 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Fw: Read after brief filed tomorrow -- should this memo on Dec. 14 voting of electors be sent to Justin Clark?

Jim

I feel this memo -- on why it's important all electors vote in all 6 contested states should vote on Dec. 14 -- should get to Justin Clark and others involved with national strategy ASAP.

We're only 7 days away now.

Also, one point I mention in the memo is **the need for clear messaging** on why this is a routine step, one previously advocated by prominent Democrats.

Clear messaging is especially important given the new white paper by the Amistad Project, which mucks up a rather simple case for having the electors vote, and continuing litigation through Jan. 6, when Congress has to meet to count the votes, under clear constitutional language:

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TROUPIS 009048

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FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/07/2020 18:06

Okay, that makes sense.

Thx for forwarding memo. Can follow up with another if needed.

Get [Outlook for iOS](#)

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Monday, December 7, 2020 5:42:32 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Re: Read after brief filed tomorrow -- should this memo on Dec. 14 voting of electors be sent to Justin Clark?

Ken,
I have bypassed Justin and am tryouts no to get it circulated at the White House.
I need you to do a brief section for the Motion to Bypass on how the real date for a decision is before Jan 6. We need to take a clear position at S Crt later this week.
Thanks.
Jim

Sent from my iPhone

On Dec 7, 2020, at 3:50 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Reminder.

Get [Outlook for iOS](#)

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To: Judge Troupis <[REDACTED]@gmail.com>
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Ken
<2020-12-06 Chesebro memo on Trump electors voting on Dec 14.pdf>

SUBJECT: Privileged and confidential -- additional thoughts re electors voting on Dec. 14
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/08/2020 00:15

Hi, Jim, nice of you to call me. And I'm glad you like my idea regarding how leverage might be exerted in January to force serious review in Congress of election fraud in various States.

Several more notes, staying away from the specifics of how it might play out in January:

1. Court challenges pending on Jan. 6 really not necessary.

In my memo I mentioned that a key element of the strategy I've sketched would depend on litigation (either in state or federal court) pending in the six contested states on January 6.

I'm glad you pressed me on that, for example, could abuses in Georgia be examined even if no litigation were pending. On reflection, I think having the electors send in alternate slates of votes on Dec. 14 can pay huge dividends **even if there is no litigation pending on Jan. 6**, and based on final litigation in the States, Biden is still above 270 electoral votes (or, at minimum, is still ahead of Trump, with perhaps one or more States up in the air).

The reason is that constitutionally speaking, there is no barrier to Congress (here, we're talking the Senate, assuming it's still controlled by Republicans) deliberating on which electoral slate to count, even if one electoral slate is endorsed by the governor, after all litigation is final -- indeed, even if that slate met the Dec. 8 "safe harbor" deadline.

The reason is that the Constitution doesn't specify what it means to "count" the electoral votes, and everyone agrees there is some level of judgment in counting -- here, at minimum, judgment about whether the election was conducted in the "Manner" directed by the state legislature.

Thus, as Professor Tribe has put it ([here](#)), Congress has the "ability, under the Twelfth Amendment, to determine which set of [a state's] electoral votes to count." 115 Harv. L. Rev. at 277.

This can involve looking at what actually happened in the election, not just at what the governors or courts said happened. Going **behind** the governors' certificates is exactly what the Democrats sought to do in the Hayes-Tilden contest of 1876-77, when the Republican governors of three States certified, somewhat dubiously in at least one instance, that Hayes had won the States. The Democrats naturally preferred the electoral slates that had been certified by Democrats in the States.

There's nothing in the Constitution (setting aside legislation; see next point) to prevent the Senate now, if it wishes, from holding hearings, with testimony, to decide if the election was stolen in one or more States, before voting on which slate of electors should be counted -- again, even if Trump lost all the legal cases, and none are still pending. The Senate could decide if it wished that the court proceedings were too cursory, and/or the judges involved used procedural tactics to avoid the merits, so that independent examination is required.

2. Democrats' main weapon is the Electoral Count Act.

Democrats' playbook for January 6 depends entirely on the script set out in the Electoral Count Act, under which, after the certificates are opened, the tellers are supposed to tally up the votes and, as to any contested

States, the two Houses may deliberate for only two hours before definitively voting on whether to accept as valid, and count, a slate.

Under this scheme, Trump and Pence would be denied the opportunity for the presentation of any evidence (for example, live testimony) regarding the fraud in the election -- only limited debate would be allowed. Of course, preventing any sustained public inquiry into the election is key for the Democrats.

If the Electoral Count Act could be pushed aside, the Democrats would have to contend with unlimited debate in the Senate, which would be ended only with 60 votes for cloture -- giving Senators who support Trump plenty of leverage to insist on sustained inquiry into the evidence of fraud in both the election and in the canvassing. I mean, what would happen to 10 Republican senators who refused to allow an examination of what happened in the election?

3. The Electoral Count Act is not binding

The vulnerability for Democrats is that the Electoral Count Act is **not legally binding**. The scholarly consensus is that, for multiple reasons, it is difficult to imagine the Supreme Court ruling that in counting electoral votes, Congress must limit itself to debating for only 2 hours per contested State, or that Congress must accept as valid a particular State's electoral votes just because the State's governor certified them. See sources in footnote 4 of my Nov. 18 memo, [here](#); [see also](#) Prof. Tribe's argument ([here](#)) that how to count electoral votes is inherently a "political question," on which the Supreme Court should not intrude. 115 Harv. L. Rev. 276-87.

4. Procedural leverage: a practical way around the Electoral College Act

The problem for Republicans, however, is that the Electoral Count Act is, in ordinary circumstances, **politically** binding. Many of the legislators who enacted it assumed it wasn't constitutional, but they hoped that it would set ground rules for counting electoral votes that would prevent another crisis such as the one that occurred in 1876-77, in which the two Houses of Congress were controlled by different parties, and there was no clear way of resolving the partisan conflict.

At minimum, politically the Act is viewed as setting up a special rule for each House governing the counting of electoral votes, which would take a majority vote to displace.

Conventional wisdom would say that we are stuck with the Electoral College Act, and the Democrats' script, because:

(1) there is no way that all Senate Republicans would vote in lockstep to jettison the Electoral Count Act -- some obviously despise Trump, and others appear to believe that the election was fair; and

(2) there is no way that pro-Trump Republicans could convince the Supreme Court to invalidate the Electoral Count Act (in part because of the "political question" doctrine discussed by Tribe).

That's where the tactic we discussed might come into play. It would create leverage that could turn the tables on Democrats, by holding up the count unless and until they either got an order from the Supreme Court blocking the tactic (unlikely) or else agreed to extended debate. It would be impossible for the count to continue with the ordinary procedure under the Electoral Count Act.

5. Objection to extended delay

Any effort to extend scrutiny of the election returns past January 6 would be met with the objection that the process of electing the President might not be complete before January 20. But that is no reason to avoid

taking the time necessary to ensure that the electoral votes of particular states are not tainted by fraud. The Constitution provides an orderly means of ensuring that there is no gap in the executive branch. If Democrats refused to agree to a reasonable amount of time for Congress to investigate and vote on the six States being contested, and the dispute dragged on, on January 20 Nancy Pelosi (upon resigning as Speaker) would become Acting President -- unless, of course, before then the Senate decided to resolve the impasse by electing Pence as Vice President, so that on January 20 he would become Acting President.

The above is more extensive than I had intended, but I hope that despite the excess verbiage, some of it is helpful.

Ken

Kenneth Chesebro
25 Northern Avenue, # 1509
Boston, MA 02210

@msn.com

(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

SUBJECT: Re: Privileged and confidential -- additional thoughts re electors voting on Dec. 14
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/08/2020 08:49

Kenneth Chesebro has shared a OneDrive file with you. To view it, click the link below.

 [487348469-TX-v-State-Motion-2020-12-07-FINAL.pdf](#)

Jim,

Substantively this filing by Texas is great, in targeting abuses in 4 states, but . . .

. . . asking the Supreme Court to change the Dec. 14 statutory date??

Extend the "deadline" for a state certifying electors?

Wanted you to make sure you know about this asap.

There needs to be clarity that all that need happen, as the Dems were saying before the election, is that the Trump electors vote on Dec. 14, which they can do on their own, without help from the Supreme Court.

Ken

From: Kenneth Chesebro
Sent: Tuesday, December 8, 2020 1:15 AM
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Privileged and confidential -- additional thoughts re electors voting on Dec. 14

Hi, Jim, nice of you to call me. And I'm glad you like my idea regarding how leverage might be exerted in January to force serious review in Congress of election fraud in various States.

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Thus, as Professor Tribe has put it ([here](#)), Congress has the "ability, under the Twelfth Amendment, to determine which set of [a state's] electoral votes to count." 115 Harv. L. Rev. at 277.

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There's nothing in the Constitution (setting aside legislation; see next point) to prevent the Senate now, if it wishes, from holding hearings, with testimony, to decide if the election was stolen in one or more States, before voting on which slate of electors should be counted -- again, even if Trump lost all the legal cases, and none are still pending. The Senate could decide if it wished that the court proceedings were too cursory, and/or the judges involved used procedural tactics to avoid the merits, so that independent examination is required.

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Under this scheme, Trump and Pence would be denied the opportunity for the presentation of any evidence (for example, live testimony) regarding the fraud in the election -- only limited debate would be allowed. Of course, preventing any sustained public inquiry into the election is key for the Democrats.

If the Electoral Count Act could be pushed aside, the Democrats would have to contend with unlimited debate in the Senate, which would be ended only with 60 votes for cloture -- giving Senators who support Trump plenty of leverage to insist on sustained inquiry into the evidence of fraud in both the election and in the canvassing. I mean, what would happen to 10 Republican senators who refused to allow an examination of what happened in the election?

3. The Electoral Count Act is not binding

The vulnerability for Democrats is that the Electoral Count Act is **not legally binding**. The scholarly consensus is that, for multiple reasons, it is difficult to imagine the Supreme Court ruling that in counting electoral votes, Congress must limit itself to debating for only 2 hours per contested State, or that Congress must accept as valid a particular State's electoral votes just because the State's governor certified them. See sources in footnote 4 of my Nov. 18 memo, [here](#); [see also](#) Prof. Tribe's argument ([here](#)) that how to count electoral votes is inherently a "political question," on which the Supreme Court should not intrude. 115 Harv. L. Rev. 276-87.

4. Procedural leverage: a practical way around the Electoral College Act

The problem for Republicans, however, is that the Electoral Count Act is, in ordinary circumstances, **politically** binding. Many of the legislators who enacted it assumed it wasn't constitutional, but they hoped that it would set ground rules for counting electoral votes that would prevent another crisis such as the one that occurred in

1876-77, in which the two Houses of Congress were controlled by different parties, and there was no clear way of resolving the partisan conflict.

At minimum, politically the Act is viewed as setting up a special rule for each House governing the counting of electoral votes, which would take a majority vote to displace.

Conventional wisdom would say that we are stuck with the Electoral College Act, and the Democrats' script, because:

(1) there is no way that all Senate Republicans would vote in lockstep to jettison the Electoral Count Act -- some obviously despise Trump, and others appear to believe that the election was fair; and

(2) there is no way that pro-Trump Republicans could convince the Supreme Court to invalidate the Electoral Count Act (in part because of the "political question" doctrine discussed by Tribe).

That's where the tactic we discussed might come into play. It would create leverage that could turn the tables on Democrats, by holding up the count unless and until they either got an order from the Supreme Court blocking the tactic (unlikely) or else agreed to extended debate. It would be impossible for the count to continue with the ordinary procedure under the Electoral Count Act.

5. Objection to extended delay

Any effort to extend scrutiny of the election returns past January 6 would be met with the objection that the process of electing the President might not be complete before January 20. But that is no reason to avoid taking the time necessary to ensure that the electoral votes of particular states are not tainted by fraud. The Constitution provides an orderly means of ensuring that there is no gap in the executive branch. If Democrats refused to agree to a reasonable amount of time for Congress to investigate and vote on the six States being contested, and the dispute dragged on, on January 20 Nancy Pelosi (upon resigning as Speaker) would become Acting President -- unless, of course, before then the Senate decided to resolve the impasse by electing Pence as Vice President, so that on January 20 he would become Acting President.

The above is more extensive than I had intended, but I hope that despite the excess verbiage, some of it is helpful.

Ken

Kenneth Chesebro
25 Northern Avenue, # 1509
Boston, MA 02210

@msn.com

(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

SUBJECT: Re: Privileged and confidential -- additional thoughts re electors voting on Dec. 14
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>
DATE: 12/08/2020 08:58

Oops you were typing this as I was asking the same question.
Jim

Sent from my iPhone

On Dec 8, 2020, at 8:49 AM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Kenneth Chesebro has shared a OneDrive file with you. To view it, click the link below.

 [487348469-TX-v-State-Motion-2020-12-07-FINAL.pdf](#)

Jim,

Substantively this filing by Texas is great, in targeting abuses in 4 states, but . . .

. . . asking the Supreme Court to change the Dec. 14 statutory date??

Extend the "deadline" for a state certifying electors?

Wanted you to make sure you know about this asap.

There needs to be clarity that all that need happen, as the Dems were saying before the election, is that the Trump electors vote on Dec. 14, which they can do on their own, without help from the Supreme Court.

Ken

From: Kenneth Chesebro
Sent: Tuesday, December 8, 2020 1:15 AM
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Privileged and confidential -- additional thoughts re electors voting on Dec. 14

Hi, Jim, nice of you to call me. And I'm glad you like my idea regarding how leverage might be exerted in January to force serious review in Congress of election fraud in various States.

Several more notes, staying away from the specifics of how it might play out in January:

1. Court challenges pending on Jan. 6 really not necessary.

In my memo I mentioned that a key element of the strategy I've sketched would depend on litigation (either in state or federal court) pending in the six contested states on January 6.

I'm glad you pressed me on that, for example, could abuses in Georgia be examined even if no litigation were pending. On reflection, I think having the electors send in alternate slates of votes on Dec. 14 can pay huge dividends **even if there is no litigation pending on Jan. 6**, and based on final litigation in the States, Biden is still above 270 electoral votes (or, at minimum, is still ahead of Trump, with perhaps one or more States up in the air).

The reason is that constitutionally speaking, there is no barrier to Congress (here, we're talking the Senate, assuming it's still controlled by Republicans) deliberating on which electoral slate to count, even if one electoral slate is endorsed by the governor, after all litigation is final -- indeed, even if that slate met the Dec. 8 "safe harbor" deadline.

The reason is that the Constitution doesn't specify what it means to "count" the electoral votes, and everyone agrees there is some level of judgment in counting -- here, at minimum, judgment about whether the election was conducted in the "Manner" directed by the state legislature.

Thus, as Professor Tribe has put it ([here](#)), Congress has the "ability, under the Twelfth Amendment, to determine which set of [a state's] electoral votes to count." 115 Harv. L. Rev. at 277.

This can involve looking at what actually happened in the election, not just at what the governors or courts said happened. Going **behind** the governors' certificates is exactly what the Democrats sought to do in the Hayes-Tilden contest of 1876-77, when the Republican governors of three States certified, somewhat dubiously in at least one instance, that Hayes had won the States. The Democrats naturally preferred the electoral slates that had been certified by Democrats in the States.

There's nothing in the Constitution (setting aside legislation; see next point) to prevent the Senate now, if it wishes, from holding hearings, with testimony, to decide if the election was stolen in one or more States, before voting on which slate of electors should be counted -- again, even if Trump lost all the legal cases, and none are still pending. The Senate could decide if it wished that the court proceedings were too cursory, and/or the judges involved used procedural tactics to avoid the merits, so that independent examination is required.

2. Democrats' main weapon is the Electoral Count Act.

Democrats' playbook for January 6 depends entirely on the script set out in the Electoral Count Act, under which, after the certificates are opened, the tellers are supposed to tally up the votes and, as to any contested States, the two Houses may deliberate for only two hours before definitively voting on whether to accept as valid, and count, a slate.

Under this scheme, Trump and Pence would be denied the opportunity for the presentation of any evidence (for example, live testimony) regarding the fraud in the election -- only limited debate would be allowed. Of course, preventing any sustained public inquiry into the election is key for the Democrats.

If the Electoral Count Act could be pushed aside, the Democrats would have to contend with unlimited debate in the Senate, which would be ended only with 60 votes for cloture -- giving Senators who support Trump plenty of leverage to insist on sustained inquiry into the evidence of fraud in both the election and in the canvassing. I mean, what would happen to 10 Republican senators who refused to allow an examination of what happened in the election?

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(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

1/16/24, 2:16 PM

SUBJECT: Re: Draft Notice of Appeal, Docketing Statement and Statement of Transcript

FROM: Beauty and the Bees <[REDACTED]@gmail.com>

TO: Judge Troupis <[REDACTED]@gmail.com>

CC: [REDACTED] <[REDACTED]@outlook.com>, [REDACTED]@gmail.com, [REDACTED]
<[REDACTED]@swvalawfirm.com>, Clint Lancaster <[REDACTED]@thelancasterlawfirm.com>, [REDACTED]@gmail.com,
[REDACTED]@gmail.com

DATE: 12/08/2020 09:03

[REDACTED] is analyzing this case. He has completed the first full opinion and can brief you verbally on this when you arrive this morning. He is now analyzing the second opinion in SEIU as I type.

[REDACTED]

Sent from my iPhone

On Dec 8, 2020, at 8:48 AM, Judge Troupis <[REDACTED]@gmail.com> wrote:

Thank you.

Is someone doing a dive into the SEIU v Vos case? I believe it does not apply because there the claim was a statute is invalid while here we argue the reverse—the statute is valid. Let me know as I do not have time to read it carefully.

Jim

Sent from my iPhone

On Dec 7, 2020, at 9:04 PM, [REDACTED] <[REDACTED]@outlook.com> wrote:

Jim

Megan and I have drafted the very beginnings of:

- Notice of Appeal
- Docketing Statement
- Statement of Transcript

The documents need further development, but we wanted to make sure we were heading in the right direction.

Talk with you tomorrow.



<Notice of Appeal - 4th Circuit WI.docx>
<Docketing Statement - 4th Circuit WI.docx>
<Statement of Transcript - 4th Circuit WI.docx>

SUBJECT: Re: Privileged and confidential -- additional thoughts re electors voting on Dec. 14
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/08/2020 12:10

I wouldn't be surprised if Senator Johnson and others have been focusing for awhile on how Pence might be able to help slow things down and create pressure to allow a debate. There are a lot of smart people in the Senate

Anything Pence can do unilaterally to slow things down will obviously be of enormous benefit to senators who support Trump but who, standing alone, would find it difficult to resist pressure for closure.

If the count were conducted piecemeal, with 2 hours of debate on each state, during each debate at least one Senator would filibuster, but I don't see how you'd get 41 Republican senators to vote against cloture after a few hours (maybe only 2 hours) of debate -- enough Trump critics and politically vulnerable senators would presumably quickly give in, given how the mass media would portray them as incorrigible obstructionists peddling "baseless" claims.

By contrast, if he has the will to do it, Pence could stand as Horatius at the Bridge, and help ensure adequate time for debate, shielding the Republican senators from a politically dicey cloture vote.

Main point of my focus on getting all electors to vote on Dec. 14 is it would make Pence's exercise of his power to set the pace of the count look much more reasonable.

Because, if on Jan. 6 none of the six states in question had an alternative slate of electors, what would be the point of Pence insisting on extended debate to probe election irregularities? Even if Congress rejected the electoral votes of 5 of the 6 contested states, Biden would still win, because there would be no vehicle for awarding those electoral votes to Trump (his electors not having voted on Dec. 14), and Democrats in the House would claim that all Biden needed was a majority of the electoral votes actually cast.

By contrast, if all six of the contested states on Jan. 6 have alternative slates of electors, it totally makes sense for Pence to insist that those states be treated separately, and with great deliberation, because there is no way the electoral votes of those states could be counted without first deciding which slate was validly elected, which would require debate that Pence would insist on.

Glad you followed up with Senator Johnson. The prospect of extending the fight into January is exciting!

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Tuesday, December 8, 2020 9:57 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Re: Privileged and confidential -- additional thoughts re electors voting on Dec. 14

I spoke with Senator Johnson late last night about the Pence angle at the end. Just wanted to take his temperature.

This is an excellent summary of the end game. Thank you.

Just read about Texas action at SCOTUS arguing for legislative appointment of Electors. Can you pull the briefs etc and let me know your thoughts. (Might be helpful on timing issues as well for us per WEC?)

Jim

Sent from my iPhone

On Dec 8, 2020, at 12:15 AM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Hi, Jim, nice of you to call me. And I'm glad you like my idea regarding how leverage might be exerted in January to force serious review in Congress of election fraud in various States.

Several more notes, staying away from the specifics of how it might play out in January:

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<https://www.linkedin.com/in/ken-chesebro>

SUBJECT: Re: Brief and Petition

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: Judge Troupis <[REDACTED]@gmail.com>

CC: George Burnett <[REDACTED]@lcojlaw.com>, Joe Olson <[REDACTED]@michaelbest.com>, "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>, "Boerke, Nicholas J (12767)" <[REDACTED]@michaelbest.com>

DATE: 12/09/2020 01:06

ATTACHMENTS (20201209-010646-0003891): "[BRIEF IN CHIEF -- BLACK LINE -- showing changes by Chesebro, Dec 9, 1 am.docx](#)", "[BRIEF IN CHIEF.Draft 12-9 -- 1 am with Chesebro edits.docx](#)"

Okay, my changes on the BRIEF IN CHIEF were much lighter -- new version, with all my changes, attached, along with a blackline version.

Papers are in great shape. Look forward to the conference call!

Ken

From: Kenneth Chesebro <[REDACTED]@msn.com>

Sent: Wednesday, December 9, 2020 12:47 AM

To: Judge Troupis <[REDACTED]@gmail.com>

Cc: George Burnett <[REDACTED]@lcojlaw.com>; Joe Olson <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>

Subject: Re: Brief and Petition

Okay, on the Petition, I made a ton of small changes -- attached are a blackline version and a clean version.

Ken

From: Kenneth Chesebro <[REDACTED]@msn.com>

Sent: Tuesday, December 8, 2020 11:53 PM

To: Judge Troupis <[REDACTED]@gmail.com>

Cc: George Burnett <[REDACTED]@lcojlaw.com>; Joe Olson <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>

Subject: Re: Brief and Petition

Okay, if I can figure out how to do that in Word, I will.

I googled it, and think I can do it.

I hate Word. I'm a dinosaur -- still use WordPerfect. Best wordprocessing program ever!!!

From: Judge Troupis <[REDACTED]@gmail.com>

Sent: Tuesday, December 8, 2020 11:51 PM

To: Kenneth Chesebro <[REDACTED]@msn.com>

Cc: George Burnett <[REDACTED]@lcojlaw.com>; Joe Olson <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>

Subject: Re: Brief and Petition

Please do in black line Ken. Much easier for me to see.

Jim

Sent from my iPhone

TROUPIS 009069

On Dec 8, 2020, at 10:27 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Unless Joe and/or George is working on this, I'll edit both documents for like an hour, and send them around.

Easier than entering a bunch of small handwritten edits from me.

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Tuesday, December 8, 2020 11:07 PM
To: George Burnett <[REDACTED]@lcojlaw.com>; Joe Olson <[REDACTED]@michaelbest.com>; Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>
Subject: Brief and Petition

George, Joe, Ken

Attached are the latest drafts of the Petition and the Brief to S. Ct.

Please provide either handwritten or blackline suggestions if you have any.

Jim

SUBJECT: Re: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
CC: Joe Olson <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>
DATE: 12/09/2020 12:02

Oh, you mean the actual papers the electors sign. I see.

I will do a memo on specifics of each state.

But we need an attorney to be our main contact who is in touch with the lead elector and whatever legislators or party operatives who did the paperwork 4 years ago.

What I need ASAP is a list of our electors in each state and copies of the certificates sent in 4 years ago. Pence as president of senate has the latter.

Get [Outlook for iOS](#)

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Wednesday, December 9, 2020 12:48:27 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Joe Olson <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf

Ken,
I think what they want is us to draft the ballot for them to vote with, the mailing instructions, words for the meeting, timing of meeting, where the meeting must take place etc. So that they each do it exactly right under the Federal law or state law if it is different.
Jim

On Wed, Dec 9, 2020 at 11:40 AM Kenneth Chesebro <[REDACTED]@msn.com> wrote:
Oh, absolutely!!!

Just have Rudy or someone tell the other states to send me a draft of either the next thing they plan to file, and where they want to insert a paragraph and footnote on timing, and I can adapt our material to suit!

Or, if they want to file some sort of notice just updating the court, that's fine too.

Bottom line is to get across that Trump and pence concur with Wisconsin wec, and Ginsburg, and Tribe, that Jan 6 is real deadline. Will force other side to take a position.

Tribe is crowing about safe harbor. It'd be nice if Trump or at least Ellis would retweet this:
<https://twitter.com/badgerpundit/status/1336387791383638018?s=21>

Get [Outlook for iOS](#)

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Wednesday, December 9, 2020 12:20:15 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>; Joe Olson <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Fwd: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf

Ken and All,

For reasons that may be obvious--we do not want this screwed up as that could doom our S. Crt. case--KEN-- would you be able to do this for the other States? Joe--or you?

Jim T.

----- Forwarded message -----

From: **Boris Epshteyn** <[REDACTED]@donaldtrump.com>

Date: Wed, Dec 9, 2020 at 11:17 AM

Subject: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf

To: Judge Troupis <[REDACTED]@gmail.com>, Christina Bobb <[REDACTED]@cgbstrategies.com>

Judge, hope all is well! Question per Mayor - do you think you could prepare a sample elector ballot for Wisconsin?

If the answer is yes, how would you feel about preparing same sample ballots for PA, Georgia, Michigan, AZ, Nevada and New Mexico?

If that's difficult, we can have counsels in those states do it.

Thank you!

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

--
Please Note: The information in this email is confidential and may be legally privileged. If you are not the intended recipient, you must not read, use or disseminate the information; please advise the sender immediately by reply email and delete this message and any attachments without retaining a copy. Although this email and any attachments are believed to be free of any virus or other defect that may affect any computer system into which it is received and opened, it is the responsibility of the recipient to ensure that it is virus free and no responsibility is accepted by the sender for any loss or damage arising in any way from its use.

On Dec 7, 2020, at 8:52 PM, Judge Troupis <[REDACTED]@gmail.com> wrote:

Boris,

Here are two memo's I had prepared for me on appointing a second slate of electors in Wisconsin.

There is no need for the legislators to act. The second slate just shows up at noon on Monday and votes and then transmits the results. It is up to Pence on Jan 6 to open them.

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TROUPIS 009072

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Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

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<2020-11-18 Chesebro memo on real deadline.pdf>

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1/16/24, 2:20 PM

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FROM: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>
CC: Judge Troupis <[REDACTED]@gmail.com>, George Burnett <[REDACTED]@lcojlaw.com>
DATE: 12/09/2020 12:16

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Ken and All,
For reasons that may be obvious--we do not want this screwed up as that could doom our S. Crt. case--KEN--would you be able to do this for the other States? Joe--or you?
Jim T.

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TROUPIS 009075

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Cell: [REDACTED] <tel:[REDACTED] % [REDACTED] % [REDACTED]>

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CC: Judge Troupis <[REDACTED]@gmail.com>, George Burnett <[REDACTED]@lcojlaw.com>
DATE: 12/09/2020 12:58

I know there's a lot going on, but someone in the White House, Pence's Senate office (he's the President of the Senate, where there's a copy of everything) needs to supply PDFs asap of the electoral votes submitted in 2016 from all 6 States.

That's all we need as to form.

Also, someone from White House or campaign should give us lists of all electors (including any alternates) from the election in all 6 states -- the actual electors we claim were elected.

Ken

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TROUPIS 009078

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SUBJECT: Re: Reply Brief on Behalf of the President in Wisconsin Federal Lawsuit

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: "William Bock, III" <[REDACTED]@kgrlaw.com>, Judge Troupis <[REDACTED]@gmail.com>, "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>

DATE: 12/09/2020 15:08

ATTACHMENTS (20201209-150839-0001318): "[image001.jpg](#)", "[image002.png](#)"

Bill,

Amazing job on this brief, especially under such time pressure!

Some quick notes as I read it.

--Nice, tight, powerful intro.

--Discussion of justiciability, esp. standing, is really good.

--Pages 15-16 are critical, and well done, in sticking WEC with its view that Jan. 6 is the real deadline, and endorsing it. Very firm, but avoided excessive detail. **A key aspect of Thursday's hearing that might impact Jim's presentation is what reaction the defendants have to your analysis of the Jan. 6 deadline.**

--Love how you focus on pp. 18-19, for laches, on the WEC guidance not being binding, and also on laches being irrelevant to an Art. II argument that the election's void.

--Really nice discussion of abstention on pp. 20-25.

--On 11th Amendment, at pp.27-28 you're exactly right that your core Art. II claim is federal, even though its gist is that the election was held in violation of state law.

--Very smart, at top of p. 29, to acknowledge that occasional lapses in carrying out an election would not violate Art. II -- it's the concerted undermining of the statutes by WEC that violates Art. II.

This is a key distinction between the state and federal court cases. In the state-court case, we can win without ever mentioning WEC. We say: "look at the ballots, judge; they violate state statutes and therefore cannot be counted." The reason they violate it -- that WEC told clerks to do this -- is irrelevant. WEC only comes into the conversation b/c it's their excuse for having violated state statutes.

By contrast, WEC is front and center in your case, because you are trying to show a systematic scheme by bureaucrats to run the election in a "Manner" not directed by the legislature.

--Page 30: **IS THIS TRUE????** President Trump could not have sued WEC, because he's not a Wisconsin voter???? If so, cool!!!

Jim, is there someone in WI who could figure out if this is correct, and if there's any good answer to it???

--Page 31: NICE attack on the clerks as "flippant" about regarding compliance with the statutes as optional.

--Wonderful dropbox discussion at pages 32-35. These facts are really disturbing. Awesome job!

--Pages 40-42: nice summary of how Wisconsin had to meet 3 conditions for the Nov. 3 election to count, and it didn't; so the Court has to void the election; but the Legislature has an opportunity to appoint electors; and

we have until Jan. 6 to get this all done. You portray this as something the court really can get done, if it just musters the will to do it.

I really like how things are looking in your case.

Best,

Ken

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Subject: Reply Brief on Behalf of the President in Wisconsin Federal Lawsuit

Jim, Ken, Joe,

Hope all is going well on your end.

Attached is our reply brief filed in support of our position and against the briefs filed by 11 other parties (and totaling some 300+ pages) last night at 6 pm eastern. Our reply was due today at 1 pm eastern and was timely filed. We have a status conference in a little less than 2 hours and the hearing begins tomorrow morning at 10 am central.

We are very grateful for Ken's guidance and assistance.

Hope to talk soon,

Bill
William Bock, III | Partner



111 Monument Circle Suite 900
Indianapolis, IN 46204-5125
Phone: [REDACTED]
Fax: [REDACTED]
Mobile: [REDACTED]

[\[REDACTED\]@kgrlaw.com](mailto:[REDACTED]@kgrlaw.com) www.kgrlaw.com

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DATE: 12/09/2020 17:24

Not sure what to make of this, but given Jim's comment that word of the plan to have electors vote on Dec. 14 is circulating, **I'm thinking that the liberals who run the "Take Care" blog which I've cited in my memos, on the Hawaii 1960 incident, may have taken down their blog for now, hoping to keep their analysis from being used against Biden!**

Or it could be an unrelated glitch.

Here's the url, which doesn't seem to work:

<https://takecareblog.com/blog/how-to-decide-a-very-close-election-for-presidential-electors-part-2>

But fortunately, Google cache has a copy (as of Dec. 3):

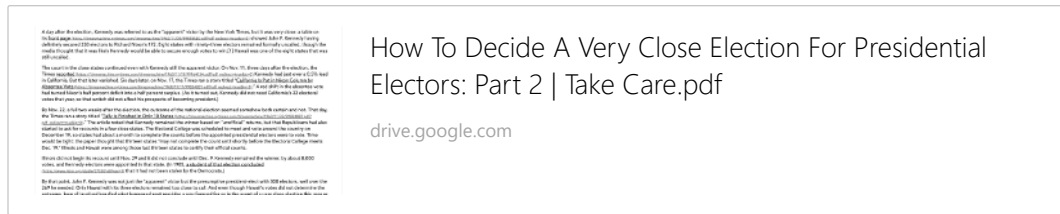
https://webcache.googleusercontent.com/search?q=cache:_So5dwrfgVsJ:https://takecareblog.com/blog/how-to-decide-a-very-close-election-for-presidential-electors-part-2+&cd=1&hl=en&ct=clnk&gl=us

Google Cache will probably disappear in a few days, so in the event this isn't a temporary glitch with the website, and they actually are trying to "memory hole" this, I've permanently archived the cache here:

<https://archive.is/v2Q6d>

Also here (PDF):

https://drive.google.com/file/d/1Kt5RUjVFKmbB_01IFiJcVctryKMZ5zp/view?usp=sharing



Ken

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Wednesday, December 9, 2020 1:58 PM
To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>
Cc: Judge Troupis <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf

I know there's a lot going on, but someone in the White House, Pence's Senate office (he's the President of the Senate, where there's a copy of everything) needs to supply PDFs of the electoral votes submitted in 2016 from all 6 States.

That's all we need as to form.

Also, someone from White House or campaign should give us lists of all electors (including any alternates) from the election in all 6 states -- the actual electors we claim were elected.

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Sent: Wednesday, December 9, 2020 1:16 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Judge Troupis <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf

Chaz and Mark Jefferson already mocked one up. I'll send to this group.

Sent from my iPhone

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Oh, you mean the actual papers the electors sign. I see.

I will do a memo on specifics of each state.

But we need an attorney to be our main contact who is in touch with the lead elector and whatever legislators or party operatives who did the paperwork 4 years ago.

What I need ASAP is a list of our electors in each state and copies of the certificates sent in 4 years ago. Pence as president of senate has the latter.

TROUPIS 009083

1/16/24, 2:22 PM

Get Outlook for iOS<<https://eur04.safelinks.protection.outlook.com/?url=https%3A%2F%2Faka.ms%2Fo0ukef&data=04%7C01%7C%7C60d2cdf1ece424fcfae08d89c6e813c%7C84df9e7fe9f640afb435aaaaaaaaaaaa%7C1%7C0%7C6374313457097>>

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To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Joe Olson <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf

Ken,
I think what they want is us to draft the ballot for them to vote with, the mailing instructions, words for the meeting, timing of meeting, where the meeting must take place etc. So that they each do it exactly right under the Federal law or state law if it is different.
Jim

On Wed, Dec 9, 2020 at 11:40 AM Kenneth Chesebro <kenchesebro@msn.com<mailto:kenchesebro@msn.com>> wrote:
Oh, absolutely!!!

Just have Rudy or someone tell the other states to send me a draft of either the next thing they plan to file, and where they want to insert a paragraph and footnote on timing, and I can adapt our material to suit!

Or, if they want to file some sort of notice just updating the court, that's fine too.

Bottom line is to get across that Trump and Pence concur with Wisconsin, and Ginsburg, and Tribe, that Jan 6 is real deadline. Will force other side to take a position.

Tribe is crowing about safe harbor. It'd be nice if Trump or at least Ellis would retweet this: <https://eur04.safelinks.protection.outlook.com/?url=https%3A%2F%2Ftwitter.com%2Fbadgerpundit%2Fstatus%2F1336387791383638018%3Fs%3D21&data=04%7C01%7C%7C60d2cdf1ece424fcfae08d89c6e813c%7C84df9e7fe9f640afb435aaaaaaaaaaaa%7C1%7C0%7C6374313457097>

Get Outlook for iOS<<https://eur04.safelinks.protection.outlook.com/?url=https%3A%2F%2Faka.ms%2Fo0ukef&data=04%7C01%7C%7C60d2cdf1ece424fcfae08d89c6e813c%7C84df9e7fe9f640afb435aaaaaaaaaaaa%7C1%7C0%7C6374313457097>>

From: Judge Troupis <[REDACTED]@gmail.com<mailto:[REDACTED]@gmail.com>>
Sent: Wednesday, December 9, 2020 12:20:15 PM
To: Kenneth Chesebro <[REDACTED]@msn.com<mailto:[REDACTED]@msn.com>>; Joe Olson <[REDACTED]@michaelbest.com<mailto:[REDACTED]@michaelbest.com>>; George Burnett <[REDACTED]@lcojlaw.com<mailto:[REDACTED]@lcojlaw.com>>
Subject: Fwd: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf

Ken and All,
For reasons that may be obvious--we do not want this screwed up as that could doom our S. Ct. case--KEN--would you be able to do this for the other States? Joe--or you?
Jim T.

----- Forwarded message -----

From: Boris Epshteyn <[REDACTED]@donaldtrump.com<mailto:[REDACTED]@donaldtrump.com>>
Date: Wed, Dec 9, 2020 at 11:17 AM
Subject: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf
To: Judge Troupis <[REDACTED]@gmail.com<mailto:[REDACTED]@gmail.com>>, Christina Bobb <[REDACTED]@cgbstrategies.com<mailto:[REDACTED]@cgbstrategies.com>>

Judge, hope all is well! Question per Mayor - do you think you could prepare a sample elector ballot for Wisconsin?

If the answer is yes, how would you feel about preparing same sample ballots for PA, Georgia, Michigan, AZ, Nevada and New Mexico?

If that's difficult, we can have counsels in those states do it.

Thank you!

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED] <tel:[REDACTED]>

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On Dec 7, 2020, at 8:52 PM, Judge Troupis <[REDACTED]@gmail.com<mailto:[REDACTED]@gmail.com>> wrote:

Boris,
Here are two memo's I had prepared for me on appointing a second slate of electors in Wisconsin.
There is no need for the legislators to act. The second slate just shows up at noon on Monday and votes and then transmits the results. It is up to Pence on Jan 6 to open them.

TROUPIS 009084

1/16/24, 2:22 PM

'Our strategy, which we believe is replicable in all 6 contested states, is for the electors to meet and vote so that an interim decision by a Court to certify Trump the winner can be executed on by the Court ordering the Governor to issue whatever is required to name the electors. The key nationally would be for all six states to do it so the election remains in doubt until January. But, if you let the 14th pass without Trump electors meeting and voting and transmitting, no Court can change the outcome. You must have electors meet and vote and transmit on the 14th.

Important: NOTE that Van Jones at CNN agrees with this because he intended to have the Democrats do exactly what we are talking about had they not been certified in PA. (There is a link to the article.) This is not just a Republican fantasy. Van Jones and I believe Larry Tribe at Harvard have both opined and come to the same conclusion.

Of course, before you get out a limb with this I would ask you make sure to have other attorneys or friendly professors review our work here and confirm that what we are planning to do is not without support.

If you take it further, you will want to have a discussion with, or have others review this, with Ken Chesebro on our team.

I hope Rudy is ok. Give him my best.

Jim

On Mon, Dec 7, 2020 at 7:24 PM Boris Epshteyn <[REDACTED]@donaldtrump.com<mailto:[REDACTED]@donaldtrump.com>> wrote:

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: ([REDACTED]) <tel:[REDACTED]>

--
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<2020-11-18 Chesebro memo on real deadline.pdf>

<2020-12-06 Chesebro memo on Trump electors voting on Dec 14.pdf>

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=====

1/16/24, 2:22 PM

SUBJECT: Re: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf
FROM: Kenneth Chesebro <[redacted]@msn.com>
TO: "Olson, Joseph L (13465)" <[redacted]@michaelbest.com>
CC: Judge Troupis <[redacted]@gmail.com>, George Burnett <[redacted]@lcojlaw.com>
DATE: 12/09/2020 17:29

In case they delete the CNN.com essay by Van Jones and Larry Lessig.

Archive.is:
<https://archive.is/v2O6d>

Google Drive:
https://drive.google.com/file/d/1areOB1Mi06UAe7Y4zltFeNk_CwUB-lvH/view?usp=sharing



From: Kenneth Chesebro <[redacted]@msn.com>
Sent: Wednesday, December 9, 2020 6:24 PM
To: Olson, Joseph L (13465) <[redacted]@michaelbest.com>
Cc: Judge Troupis <[redacted]@gmail.com>; George Burnett <[redacted]@lcojlaw.com>
Subject: Re: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf

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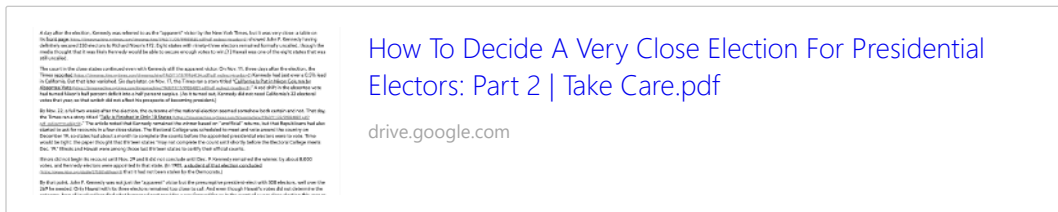
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1/16/24, 2:22 PM

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Date: Wed, Dec 9, 2020 at 11:17 AM
Subject: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf
To: Judge Troupis <[REDACTED]@gmail.com<mailto:[REDACTED]@gmail.com>>, Christina Bobb <[REDACTED]@cgbstrategies.com<mailto:[REDACTED]@cgbstrategies.com>>

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TROUPIS 009087

1/16/24, 2:22 PM

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: (██████████) <tel:(██████████)>

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I hope Rudy is ok. Give him my best.

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Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: (██████████) <tel:(██████████)>

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<2020-11-18 Chesebro memo on real deadline.pdf>

<2020-12-06 Chesebro memo on Trump electors voting on Dec 14.pdf>

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TROUPIS 009088

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=====

1/16/24, 2:23 PM

SUBJECT: Re: Links for Electors.

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: Austin Browning <[REDACTED]@gmail.com>, Judge Troupis <[REDACTED]@gmail.com>, "[REDACTED]@yahoo.com" <[REDACTED]@yahoo.com>

DATE: 12/09/2020 21:36

Thank you, Austin!

I have incorporated in a memo I will now send Jim, on which I will copy you.

Ken

From: Austin Browning <[REDACTED]@gmail.com>

Sent: Wednesday, December 9, 2020 8:11 PM

To: Judge Troupis <[REDACTED]@gmail.com>; [REDACTED]@msn.com <[REDACTED]@msn.com>; [REDACTED]@yahoo.com <[REDACTED]@yahoo.com>

Subject: Links for Electors.

All,

I have done some snooping and the National Archives has the entire checklist, and PDF of past election forms used in the electoral college votes. Below are the links for such. The First being the list that has all 50 states for the 2016 election. It has the Cert of Ascertainment and the Cert of Vote with the names of each elector on the form. The second link is the checklist from the National Archivist to the state election officials of the exact procedures that must take place.

<https://www.archives.gov/electoral-college/2016>

<https://www.archives.gov/electoral-college/state-officials/so-checklist>

Thanks,

Austin

TROUPIS 009090

1/16/24, 2:24 PM

SUBJECT: RE: LISTEN TO WI FED HEARING AT THIS LINK

FROM: [REDACTED] <[REDACTED]@outlook.com>

TO: Kenneth Chesebro <[REDACTED]@msn.com>, Judge Troupis <[REDACTED]@gmail.com>, "Clinton W. Lancaster" <[REDACTED]@thelancasterlawfirm.com>

CC: "[REDACTED]" <[REDACTED]@lcojlaw.com>, [REDACTED] <[REDACTED]@swvalawfirm.com>, Beauty and the Bees <[REDACTED]@gmail.com>, [REDACTED] <[REDACTED]@gmail.com>,

"[REDACTED]@gmail.com" <[REDACTED]@gmail.com>, Joe Olson <[REDACTED]@michaelbest.com>, "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>, George Burnett <[REDACTED]@lcojlaw.com>, Joe Voiland <[REDACTED]@yahoo.com>, Nicholas J Boerke <[REDACTED]@michaelbest.com>, [REDACTED] <[REDACTED]@thelancasterlawfirm.com>

DATE: 12/10/2020 09:06

TROUPIS 009091

The Madison team has it on in the main room with several listening.

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Thursday, December 10, 2020 10:04 AM
To: Judge Troupis <[REDACTED]@gmail.com>; Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>
Cc: [REDACTED] <[REDACTED]@lcojlaw.com>; [REDACTED] <[REDACTED]@outlook.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; Joe Olson <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; George Burnett <[REDACTED]@lcojlaw.com>; Joe Voiland <[REDACTED]@yahoo.com>; Nicholas J Boerke <[REDACTED]@michaelbest.com>; [REDACTED] <[REDACTED]@thelancasterlawfirm.com>
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Partner, Attorney at Law

LANCASTER & LANCASTER

LAW FIRM, PLLC

██████████ [@TheLancasterLawFirm.com](mailto:██████████@TheLancasterLawFirm.com)

Tel: ██████████

Fax: ██████████

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DATE: 12/10/2020 09:07

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TROUPIS 009095

1/16/24, 2:24 PM

<[REDACTED]@gmail.com>; [REDACTED]@gmail.com <[REDACTED]@gmail.com>; Joe Olson
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TROUPIS 009096

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DATE: 12/10/2020 11:06

Hi, I'm not going to end up writing any update -- have to deal with the logistics of the electors voting in various States on Monday.

So maybe someone else can take a crack at doing detailed notes & reactions.

Ken

From: [REDACTED] <[REDACTED]@outlook.com>

Sent: Thursday, December 10, 2020 11:31 AM

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FYI.....Nearly an hour later from Ken's update and the hearing has not started yet while the parties negotiate and draft their stipulations.

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Sent from my iPhone

On Dec 10, 2020, at 9:07 AM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Okay, I'll take notes on a wordprocessor, with reactions, and circulate that at the end, for anyone who couldn't listen live.

Ken

From: [REDACTED] <[REDACTED]@outlook.com>
Sent: Thursday, December 10, 2020 10:06 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>; Judge Troupis <[REDACTED]@gmail.com>; Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>
Cc: [REDACTED] <[REDACTED]@lcojlaw.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; Joe Olson <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; George Burnett <[REDACTED]@lcojlaw.com>; Joe Voiland <[REDACTED]@yahoo.com>; Nicholas J Boerke <[REDACTED]@michaelbest.com>; [REDACTED] <[REDACTED]@thelancasterlawfirm.com>
Subject: RE: LISTEN TO WI FED HEARING AT THIS LINK

The Madison team has it on in the main room with several listening.

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Thursday, December 10, 2020 10:04 AM
To: Judge Troupis <[REDACTED]@gmail.com>; Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>
Cc: [REDACTED] <[REDACTED]@lcojlaw.com>; [REDACTED] <[REDACTED]@outlook.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; Joe Olson <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; George Burnett <[REDACTED]@lcojlaw.com>; Joe Voiland <[REDACTED]@yahoo.com>; Nicholas J Boerke <[REDACTED]@michaelbest.com>; [REDACTED] <[REDACTED]@thelancasterlawfirm.com>
Subject: Re: LISTEN TO WI FED HEARING AT THIS LINK

I'm listening ... I guess I could update this thread with a running summary if people want.

If someone else wants to do that, I'm happy to defer.

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Thursday, December 10, 2020 10:01 AM
To: Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>
Cc: [REDACTED] <[REDACTED]@lcojlaw.com>; [REDACTED] <[REDACTED]@outlook.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; Joe Olson <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; George Burnett <[REDACTED]@lcojlaw.com>; Joe Voiland <[REDACTED]@yahoo.com>; Nicholas J Boerke <[REDACTED]@michaelbest.com>; Kenneth Chesebro <[REDACTED]@msn.com>; [REDACTED] <[REDACTED]@thelancasterlawfirm.com>
Subject: Re: LISTEN TO WI FED HEARING AT THIS LINK

Someone MUST LISTEN. Tell me if witnesses are called as that means we go tomorrow, not today.

Jim

Sent from my iPhone

On Dec 10, 2020, at 8:54 AM, Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com> wrote:

<https://www.youtube.com/channel/UCNFX-Kc5eFiouztHrbznXEg>

--

Clinton W. Lancaster,
Partner, Attorney at Law

LANCASTER & LANCASTER
LAW FIRM, PLLC

[REDACTED]@TheLancasterLawFirm.com

Tel: [REDACTED]

Fax: [REDACTED]

www.TheLancasterLawFirm.com

******IMPORTANT: This communication contains information which may be confidential and privileged attorney-client communications. If it appears that this**

TROUPIS 009104

communication was addressed or sent to you in error, you may not use or copy this communication or any information contained therein, and you may not disclose this communication or the information contained therein to anyone else. If you have received this electronic mail transmission in error, please delete it from your system without copying it, and notify me immediately by reply email or by calling [REDACTED].

SUBJECT: Re: Fw: [EXTERNAL]Re: Electors
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/10/2020 20:17

Sure, I can do that if it happens.

I will try to get to Wisconsin by Saturday, in case that helps with the Sup Ct petition. Have an interest in being there Monday at the Capitol when the electors vote!

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Thursday, December 10, 2020 7:52 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Re: Fw: [EXTERNAL]Re: Electors

Thanks Ken.

Ron Johnson has a hearing next Wednesday. He wants me to come. I told him I would come via zoom but prefer personally if it is a day off in the schedule. (Who knows.)

If I come to Washington can you join me? I would bring other members of the team as well, and I am hoping to take everyone to the White House to meet the President and get a photo.

Of course, all depends on schedule, so no better than 50/50.

Would you be able to join us if it happens?

Jim

On Thu, Dec 10, 2020 at 4:31 PM Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Jim, I'm in contact with several national people on the mechanics for Jan. 14.

We're making a lot of progress -- no need for you to deal with this until you're done tomorrow.

I sent them my redraft of your proposed press release. Could be a good idea for other states to put out something similar?

Ken

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Thursday, December 10, 2020 5:30 PM
To: Justin Clark <[REDACTED]@donaldtrump.com>
Cc: Jason Miller <[REDACTED]@donaldtrump.com>; Nick Trainer <[REDACTED]@donaldtrump.com>; Boris Epshteyn <[REDACTED]@donaldtrump.com>; Matthew Morgan <[REDACTED]@donaldtrump.com>
Subject: Re: [EXTERNAL]Re: Electors

Quick heads up -- Jim Troupis has put together a tentative draft statement he would release only AFTER filing the petition seeking review in the WI Supreme Court, in which he'll be agreeing with the Wisconsin Elections Commission that the real deadline for resolving litigation is January 6.

Here it is, in case there are any concerns about it -- earliest it could go out would be Friday evening.

Perhaps a similar statement could issue in some of the other states.

Proposed Jim Troupis Statement on Electors Meeting

“As the legal proceedings arising from the November 3 presidential election continue to work their way through the Wisconsin court system, I have advised the Republican Party of Wisconsin to convene a separate Republican electors' meeting and have the Trump-Pence electors cast their votes at the Wisconsin State Capitol on December 14.

Of course, there is precedent for such a meeting. Democrat electors pledged to John F. Kennedy convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, the state’s electoral votes were ultimately awarded to President Kennedy, even though he did not win the state until 11 days after his electors cast their votes.

The legitimacy and good sense of two sets of electors meeting on December 14 to cast competing votes for President and Vice President, with the conflict to be later sorted out by the courts and Congress, was pointed out by prominent Democrat activists Larry Lessig and Van Jones in an essay published last month [on CNN.com](https://www.cnn.com).

Given that the results in Wisconsin are still in doubt, with legal arguments that have yet to be decided, just as the Democrat electors met in Hawaii in 1960 while awaiting a final resolution of that State's vote, so too the Republican electors should meet this year on December 14 as we await a final resolution in Wisconsin."

From: Justin Clark <[REDACTED]@donaldtrump.com>
Sent: Thursday, December 10, 2020 5:26 PM
To: Kenneth Chesebro <[REDACTED]@donaldtrump.com>; Nick Trainer <[REDACTED]@donaldtrump.com>; Boris Epshteyn <[REDACTED]@donaldtrump.com>; Matthew Morgan <[REDACTED]@donaldtrump.com>
Subject: Re: [EXTERNAL]Re: Electors

Go get em Ken!

On Dec 10, 2020, at 5:24 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Oh, fantastic. Good to have all this.

From: Jason Miller <[REDACTED]@donaldtrump.com>
Sent: Thursday, December 10, 2020 5:23 PM
To: Nick Trainer <[REDACTED]@donaldtrump.com>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>; Boris Epshteyn <[REDACTED]@donaldtrump.com>; Justin Clark <[REDACTED]@donaldtrump.com>; Matthew Morgan <[REDACTED]@donaldtrump.com>
Subject: Re: Electors

Thank you!

> On Dec 10, 2020, at 5:22 PM, Nick Trainer <[REDACTED]@donaldtrump.com> wrote:

TROUPIS 009107

>
>
> Here are the six w contact
>
> <Elector List-.xlsx>

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SUBJECT: Re: Fw: [EXTERNAL]Re: Electors
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>
DATE: 12/10/2020 20:27

WE will be filing the Petition for Bypass and brief on Friday. The Court will expect it. Who knows what they will do once they realize we are not saying Monday is the last day for a decision (what they probably think now).

I agree it is really important to be here for the Electors meeting Monday.
You should coordinate with Andrew Hitt and Brian Schimming.
It will be so very good to meet.
Jim

On Thu, Dec 10, 2020 at 8:17 PM Kenneth Chesebro <[REDACTED]@msn.com> wrote:
Sure, I can do that if it happens.

I will try to get to Wisconsin by Saturday, in case that helps with the Sup Ct petition. Have an interest in being there Monday at the Capitol when the electors vote!

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Thursday, December 10, 2020 7:52 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Re: Fw: [EXTERNAL]Re: Electors

Thanks Ken.

Ron Johnson has a hearing next Wednesday. He wants me to come. I told him I would come via zoom but prefer personally if it is a day off in the schedule. (Who knows.)
If I come to Washington can you join me? I would bring other members of the team as well, and I am hoping to take everyone to the White House to meet the President and get a photo.
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On Thu, Dec 10, 2020 at 4:31 PM Kenneth Chesebro <[REDACTED]@msn.com> wrote:
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We're making a lot of progress -- no need for you to deal with this until you're done tomorrow.

I sent them my redraft of your proposed press release. Could be a good idea for other states to put out something similar?

Ken

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Sent: Thursday, December 10, 2020 5:30 PM
To: Justin Clark <[REDACTED]@donaldtrump.com>
Cc: Jason Miller <[REDACTED]@donaldtrump.com>; Nick Trainer <[REDACTED]@donaldtrump.com>; Boris Epshteyn

<[REDACTED]@donaldtrump.com>; Matthew Morgan <[REDACTED]@donaldtrump.com>

Subject: Re: [EXTERNAL]Re: Electors

Quick heads up -- Jim Troupis has put together a tentative draft statement he would release only AFTER filing the petition seeking review in the WI Supreme Court, in which he'll be agreeing with the Wisconsin Elections Commission that the real deadline for resolving litigation is January 6.

Here it is, in case there are any concerns about it -- earliest it could go out would be Friday evening.

Perhaps a similar statement could issue in some of the other states.

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"As the legal proceedings arising from the November 3 presidential election continue to work their way through the Wisconsin court system, I have advised the Republican Party of Wisconsin to convene a separate Republican electors' meeting and have the Trump-Pence electors cast their votes at the Wisconsin State Capitol on December 14.

Of course, there is precedent for such a meeting. Democrat electors pledged to John F. Kennedy convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, the state's electoral votes were ultimately awarded to President Kennedy, even though he did not win the state until 11 days after his electors cast their votes.

The legitimacy and good sense of two sets of electors meeting on December 14 to cast competing votes for President and Vice President, with the conflict to be later sorted out by the courts and Congress, was pointed out by prominent Democrat activists Larry Lessig and Van Jones in an essay published last month [on CNN.com](https://www.cnn.com).

Given that the results in Wisconsin are still in doubt, with legal arguments that have yet to be decided, just as the Democrat electors met in Hawaii in 1960 while awaiting a final resolution of that State's vote, so too the Republican electors should meet this year on December 14 as we await a final resolution in Wisconsin."

From: Justin Clark <[REDACTED]@donaldtrump.com>

Sent: Thursday, December 10, 2020 5:26 PM

To: Kenneth Chesebro <[REDACTED]@msn.com>

Cc: Jason Miller <[REDACTED]@donaldtrump.com>; Nick Trainer <[REDACTED]@donaldtrump.com>; Boris Epshteyn <[REDACTED]@donaldtrump.com>; Matthew Morgan <[REDACTED]@donaldtrump.com>

Subject: Re: [EXTERNAL]Re: Electors

Go get em Ken!

On Dec 10, 2020, at 5:24 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Oh, fantastic. Good to have all this.

From: Jason Miller <[REDACTED]@donaldtrump.com>
Sent: Thursday, December 10, 2020 5:23 PM
To: Nick Trainer <[REDACTED]@donaldtrump.com>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>; Boris Epshteyn <[REDACTED]@donaldtrump.com>; Justin Clark <[REDACTED]@donaldtrump.com>; Matthew Morgan <[REDACTED]@donaldtrump.com>
Subject: Re: Electors

Thank you!

> On Dec 10, 2020, at 5:22 PM, Nick Trainer <[REDACTED]@donaldtrump.com> wrote:

>

>

> Here are the six w contact

>

> <Elector List.xlsx>

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1/16/24, 2:26 PM

SUBJECT: Re: Hearing text

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: Judge Troupis <[REDACTED]@gmail.com>, Joe Olson <[REDACTED]@michaelbest.com>, Joe Voiland <[REDACTED]@yahoo.com>, George Burnett <[REDACTED]@lcojlaw.com>, Stewart Karge <[REDACTED]@gmail.com>, Christ Troupis <[REDACTED]@gmail.com>, "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>, Nicholas J Boerke <[REDACTED]@michaelbest.com>, Stewart Karge <[REDACTED]@gmail.com>

DATE: 12/11/2020 08:55

Hi, can someone send me the link to view or listen to the hearing?

I must have missed it (have been tied up on logistics for Dec. 14 vote in other states).

Ken

From: Judge Troupis <[REDACTED]@gmail.com>

Sent: Friday, December 11, 2020 9:33 AM

To: Joe Olson <[REDACTED]@michaelbest.com>; Joe Voiland <[REDACTED]@yahoo.com>; George Burnett <[REDACTED]@lcojlaw.com>; Stewart Karge <[REDACTED]@gmail.com>; Christ Troupis <[REDACTED]@gmail.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Nicholas J Boerke <[REDACTED]@michaelbest.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge <[REDACTED]@gmail.com>

Subject: Hearing text

If you need to reach me during hearing you may text [REDACTED]. Someone is monitoring it for me during hearing and can get me a note if necessary

Jim

Sent from my iPhone

TROUPIS 009112

1/16/24, 2:26 PM

SUBJECT: Draft of press release I'll be supplying other states
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
CC: Austin Browning <[REDACTED]@gmail.com>, Brian Schimming <[REDACTED]@yahoo.com>
DATE: 12/11/2020 12:01
ATTACHMENTS (20201211-120114-0001030): ["Draft press release for state Republican party.docx"](#)

Jim,

Here is my current copy of a draft press release I'm suggesting for the other states -- unless you would prefer other states not so closely copy what you're doing.

Some of my wording changes might be an improvement over the version I sent earlier. So whoever is messaging might want to look at this version.

Ken

Kenneth Chesebro
25 Northern Avenue, # 1509
Boston, MA 02210

[REDACTED]
[\[REDACTED\]@msn.com](#)

(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

TROUPIS 009113

Draft language for state Republican Party re Dec. 14 casting of Electoral votes

As the legal proceedings arising from the November 3 presidential election continue to work their way through our nation's judicial system, we have asked the _____ [NAME OF STATE] Republicans who pledged to vote for President Trump and Vice President Pence in the Electoral College to convene in _____ [CAPITOL CITY] on December 14, to cast their ballots and send them to Congress, where the Electoral votes are to be opened and counted beginning on January 6.

Of course, there is precedent for our Republican Electors meeting on December 14, even as the Democrat Electors for _____ [NAME OF STATE] also meet.

Democrat Electors pledged to John F. Kennedy convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, Hawaii's electoral votes were awarded to President Kennedy, even though he did not win the state until 11 days after his Electors cast their votes.

The legitimacy and good sense of two sets of Electors meeting on December 14 to cast competing votes for President and Vice President, with the conflict to be later sorted out by the courts and Congress, was pointed out by prominent Democrat lawyers, Van Jones and Larry Lessig, in an essay published last month [on CNN.com](#).

Given that the results in _____ [NAME OF STATE] are still in doubt, with legal arguments that have yet to be decided, just as the Democrat Electors met in Hawaii in 1960 while awaiting a final resolution of that State's vote, so too the Republican Electors should meet this year on December 14 as we await a final resolution of _____'s ___ Electoral votes.

SUBJECT: Fw: Draft of press release I'll be supplying other states
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/11/2020 19:13
ATTACHMENTS (20201211-191314-0001029): ["Draft press release for state Republican party.docx"](#)

Jim, just wanted to remind you about this e-mail about press release.

I made some tweaks to the language.

You really framed things very well!

Ken

From: Kenneth Chesebro
Sent: Friday, December 11, 2020 1:01 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Cc: Austin Browning <[REDACTED]@gmail.com>; Brian Schimming <[REDACTED]@yahoo.com>
Subject: Draft of press release I'll be supplying other states

Jim,

Here is my current copy of a draft press release I'm suggesting for the other states -- unless you would prefer other states not so closely copy what you're doing.

Some of my wording changes might be an improvement over the version I sent earlier. So whoever is messaging might want to look at this version.

Ken

Kenneth Chesebro
25 Northern Avenue, # 1509
Boston, MA 02210
[REDACTED]
[\[REDACTED\]@msn.com](mailto:[REDACTED]@msn.com)
(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

Draft language for state Republican Party re Dec. 14 casting of Electoral votes

As the legal proceedings arising from the November 3 presidential election continue to work their way through our nation's judicial system, we have asked the _____ [NAME OF STATE] Republicans who pledged to vote for President Trump and Vice President Pence in the Electoral College to convene in _____ [CAPITOL CITY] on December 14, to cast their ballots and send them to Congress, where the Electoral votes are to be opened and counted beginning on January 6.

Of course, there is precedent for our Republican Electors meeting on December 14, even as the Democrat Electors for _____ [NAME OF STATE] also meet.

Democrat Electors pledged to John F. Kennedy convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, Hawaii's electoral votes were awarded to President Kennedy, even though he did not win the state until 11 days after his Electors cast their votes.

The legitimacy and good sense of two sets of Electors meeting on December 14 to cast competing votes for President and Vice President, with the conflict to be later sorted out by the courts and Congress, was pointed out by prominent Democrat lawyers, Van Jones and Larry Lessig, in an essay published last month [on CNN.com](#).

Given that the results in _____ [NAME OF STATE] are still in doubt, with legal arguments that have yet to be decided, just as the Democrat Electors met in Hawaii in 1960 while awaiting a final resolution of that State's vote, so too the Republican Electors should meet this year on December 14 as we await a final resolution of _____'s ___ Electoral votes.

SUBJECT: Re: Appellants Supplemental Brief
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/12/2020 12:46

Hi, I'm outside at 313 w belt line hwy

Get [Outlook for iOS](#)

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Saturday, December 12, 2020 10:18:54 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Re: Appellants Supplemental Brief

313 W Beltline Hwy

On Fri, Dec 11, 2020 at 11:41 PM Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Wow!

What a powerful, powerful brief.

If Hagedorn is serious about following plain language, he has to rule for Trump.

FYI, I expect to be in Madison by 11 a.m.

If it would be worth me being where Jim is doing the argument, someone please let me know the address.

But I'm fine just watching remotely.

Ken

From: [REDACTED] <[REDACTED]@outlook.com>
Sent: Friday, December 11, 2020 11:23 PM
To: George Burnett <[REDACTED]@lcojlaw.com>; Christ Troupis <[REDACTED]@gmail.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>
Cc: [REDACTED] <[REDACTED]@gmail.com>; Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>; Beauty and the Bees <[REDACTED]@gmail.com>
Subject: FW: Appellants Supplemental Brief

All

Attached is Appellants' Supplemental Brief filed this evening at 10pm.

[REDACTED]

1/16/24, 2:38 PM

SUBJECT: Re: Testimony Draft--JRT
FROM: Ron Johnson <[REDACTED]@gmail.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/13/2020 14:23

Would you mind if we suggested a few edits ?

Sent from my iPad

> On Dec 13, 2020, at 12:56 PM, Judge Troupis <[REDACTED]@gmail.com> wrote:
>
>
>
> <Testimony DRAFT 12-13.docx>

1/16/24, 2:38 PM

SUBJECT: Re: Testimony Draft--JRT
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Ron Johnson <[REDACTED]@gmail.com>
DATE: 12/13/2020 14:30

Please do.

Sent from my iPhone

> On Dec 13, 2020, at 2:23 PM, Ron Johnson <[REDACTED]@gmail.com> wrote:

>

> Would you mind if we suggested a few edits ?

>

> Sent from my iPad

>

>> On Dec 13, 2020, at 12:56 PM, Judge Troupis <[REDACTED]@gmail.com> wrote:

>>

>>

>>

>> <Testimony DRAFT 12-13.docx>

TROUPIS 009119

1/16/24, 2:39 PM

SUBJECT: Press release for after electoral vote

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: Judge Troupis <[REDACTED]@gmail.com>

CC: Brian Schimming <[REDACTED]@yahoo.com>

DATE: 12/14/2020 00:54

ATTACHMENTS (20201214-005442-0000099): ["Draft press release for state Republican parties for after electors vote.docx"](#)

Hi, I sent the following to the national people coordinating this -- updated version of what I cribbed from you!

Ken

TROUPIS 009120

Draft language for state Republican parties

re Dec. 14 casting of Electoral votes

(ONLY RELEASE A STATEMENT AFTER THE ELECTORS VOTE)

As the legal proceedings arising from the November 3 presidential election continue to work their way through our nation's judicial system, we requested that the _____ [state] Republicans who pledged to vote for President Trump and Vice President Pence in the Electoral College, which was required to cast its votes on December 14, cast their ballots and send them to Congress, where the Electoral votes are to be opened and counted beginning on January 6.

They did so as a precautionary measure, to ensure that if, as a result of a later court order or other proceeding prescribed by law, they are ultimately recognized as being the duly elected and qualified Electors, the State's electoral votes will be properly counted in Congress.

Of course, there is precedent for our Republican Electors meeting on December 14, even as the Democrat Electors for _____ [state] also met.

Democrat Electors pledged to John F. Kennedy convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, Hawaii's electoral votes were awarded to President Kennedy, even though he did not win the state until 11 days after his Electors cast their votes.

The legitimacy and good sense of two sets of Electors meeting on December 14 to cast competing votes for President and Vice President, with the conflict to be later sorted out by the courts and Congress, was pointed out by prominent Democrat lawyers, Van Jones and Larry Lessig, in an essay published last month [on CNN.com](#).

To the extent that the final results in our state remain in doubt, just as the Democrat Electors met in Hawaii in 1960 while awaiting a final resolution of that State's vote, so too the Republican Electors met this year on December 14 as we await a final resolution of the ____ [number] electoral votes of _____ [state].

1/16/24, 2:40 PM

SUBJECT: Fwd: Testimony Draft--JRT

FROM: Judge Troupis <[REDACTED]@gmail.com>

TO: Austin Browning <[REDACTED]@gmail.com>

DATE: 12/14/2020 08:50

ATTACHMENTS (20201214-085036-0003886): "[Testimony_DRAFT 12-13.docx](#)"

----- Forwarded message -----

From: **Judge Troupis** <[REDACTED]@gmail.com>

Date: Sun, Dec 13, 2020 at 12:56 PM

Subject: Testimony Draft--JRT

To: <[REDACTED]@gmail.com>

TROUPIS 009122

Testimony

Draft 12/13/20 For discussion purpose only

James R. Troupis

Senator Johnson and members of the Committee, thank you for this opportunity to present testimony regarding the November 3, 2020 Election in Wisconsin. Wisconsin has specific laws related both to elections and to recounts that have been tested both in Court and in the legislative process.

Given the narrow margins between candidates at every level in Wisconsin in recent years, recounts are not uncommon in our State. In 2011 I represented Mr. Justice David Prosser in a tense Statewide recount, and in 2016 there was a recount, as well, of the Presidential race. There have been literally dozens of recounts of Assembly and Senate races over the past twenty years in Wisconsin. As a practical matter this means there are experienced counsel and experienced boards of canvassers who can conduct a recount with transparency and civility. The laws of Wisconsin provide a unique opportunity for this Committee because, in part, all the materials related to the election are, by law, on open display.

Candidly, I do not believe, the facts about the manipulation of the absentee voting process in Wisconsin are disputed. Nor do I believe there is any dispute about the laws that were violated during the period prior to November 3 election.

While others may differ on whether those violations were justified, the fact those actions were contrary to the explicit laws of Wisconsin seems obvious.

To begin, it is important to understand that Wisconsin treats absentee voting as a “privilege”, not a right. Our legislature explicitly wrote in the law that because absentee voting occurs without the normal election-day protections, it was far more likely to result in, in the laws words: “fraud or abuse”; “overzealous solicitation of absent electors who may prefer not to participate in an election”, and “undue influence on an absent elector to vote for or against a candidate.” Wisconsin statutes are explicit and the enforcement of them: “shall be . . . mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.”

The absentee voting laws were violated in at least four separate ways, calling into question no fewer than 220,000 votes in Wisconsin. Again, given Wisconsin’s transparent process and the full recount at which more than 2500 volunteers participated, we were able to identify virtually all of those 220,000 voters by name, address and ward. This is not speculation. Except as to one small

group of votes, the canvassing boards and the Biden campaign agree we have, in fact, named each and every person involved. This is not speculation.

The largest category of improperly cast ballots, 170,140, are what we refer to as In-person Absentee Voters. Our statutes explicitly require that every absentee voter complete an application before they may receive a ballot. This application process, distinct from the actual casting of the ballot, is essential to assure a chain of custody, which in turn provides a critical assurance that there is not fraud, abuse or undue influence, from registration through the actual casting of a vote. What we now know is that the chain of custody was broken and the law was violated in Dane County and Milwaukee County where, contrary to the law, the clerks allowed individuals to vote without an application. To be specific, so there is no doubt, the law states expressly, “[T]he municipal clerk ***shall not issue an absentee ballot unless the clerk receives a written application therefor*** from a qualified elector of the municipality.” No separate written application as required by law was ever received for those ballots.

In Wisconsin, absentee balloting must be witnessed, and the certification on the outside of the envelope containing the ballot provides a place where the witness must sign and provide his or her address and the clerk initials the envelope to verify identification was received. If the certification lacks the

witness's address, it cannot be counted. As the statute states, "*If a certificate is missing the address of a witness, the ballot may not be counted.*" This provision is mandatory and by law must be strictly construed. Despite that explicit directive, the clerks in Dane and Milwaukee counties actually altered these legally binding documents after they arrived in their offices. Addresses were added. In addition, those certified documents require a clerk's initials or they can not be counted. More than 2000 had no initials and thus there is no to know they were properly received and identification was presented.

Given the pandemic, municipal clerks laudably incorporated safety protocols into election day voting, including plexiglass barriers, social distancing, enforcement of mask mandates and the like. However, in absentee voting those clerks, unfortunately, went far beyond what the law allows. For absentee voters in Dane and Milwaukee Counties the county clerks told voters they could vote without Identification (an obvious requirement for all voters) so long as they claimed to be indefinitely confined due to covid under a statute meant for nursing homes, assisted living facilities and homebound disabled persons. 28,395 persons claimed that status after the clerks posted their notices. By law, the clerks are required to take action to remove those persons who for whom they had "reliable information that [the] . . . elector no longer qualifies for the service." No action

was taken, and those persons, without any identification whatsoever, were allowed to cast votes.

It is important to recognize, unlike other states, Wisconsin does not allow advance voting. Instead, any vote cast prior to November 3 was an absentee vote, subject to the mandatory strict regulation of the statutes. Rather than follow the law, the City of Madison conducted advance voting on September 26 and October 3 at 206 separate locations in Madison. Ballots were received, witnesses were provided for envelopes, signage advertised the locations as if it were election day. The law expressly prohibits any clerk from having more than one clerk's offices and here Madison created 206. Then, in a rather obvious attempt to avoid later scrutiny, the City took those ballots and mixed them in with all the other absentee ballots otherwise legally cast so that it would be nearly impossible to identify all the illegal votes. Still, even without the names, there is no dispute that 17,271 votes were received through these improper and illegal events as the city actually counted them before they intermingled them with legally cast absentee votes.

All in all, more than 3 million of Wisconsin's citizens cast their votes legally and without taint. As I have detailed, more than 220,000 votes were received that were not legally cast. The law presumes those votes were fraudulent or are the result of undue influence and the law mandates explicitly that they not be

counted. The 3 million legal voters who cast their ballots ought not have their votes diluted and cancelled out by votes which, by law, are not to be counted.

#####

1/16/24, 2:41 PM

SUBJECT: Jefferson

FROM: George Burnett <[REDACTED]@lcojlaw.com>

TO: Joseph L Olson <[REDACTED]@michaelbest.com>, Judge Troupis <[REDACTED]@gmail.com>, "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>, "Kenneth Chesebro" <[REDACTED]@msn.com>, Stewart Karge <[REDACTED]@gmail.com>, "Joe Voiland" <[REDACTED]@yahoo.com>

DATE: 12/14/2020 10:03

ATTACHMENTS (20201214-100343-0001332): ["text.txt"](#)

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Sent from my iPhone

1/16/24, 2:41 PM

SUBJECT: RE: Jefferson
FROM: "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>
TO: George Burnett <[REDACTED]@lcojlaw.com>, Joseph L Olson <[REDACTED]@michaelbest.com>, Judge Troupis <[REDACTED]@gmail.com>, Kenneth Chesebro <[REDACTED]@msn.com>, Stewart Karge <[REDACTED]@gmail.com>, Joe Voiland <[REDACTED]@yahoo.com>
DATE: 12/14/2020 10:06

<https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=315283>

Kindest regards,

KURT A. GOEHRE
Partner/Attorney
Law Firm of Conway, Olejniczak & Jerry, S.C.
231 S. Adams Street | P.O. Box 23200
Green Bay, WI 54305
P: [REDACTED] F: [REDACTED]
E: [REDACTED]@lcojlaw.com | lcojlaw.com

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-----Original Message-----

From: George Burnett <[REDACTED]@lcojlaw.com>
Sent: Monday, December 14, 2020 10:04 AM
To: Joseph L Olson <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>
Subject: Jefferson

Court just released decision in this case

Sent from my iPhone

TROUPIS 009130

SUBJECT: Fwd: Jefferson
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Brian Schimming <[REDACTED]@yahoo.com>
DATE: 12/14/2020 10:20

----- Forwarded message -----

From: Kurt A. Goehre <[REDACTED]@lcojlaw.com>
Date: Mon, Dec 14, 2020 at 10:07 AM
Subject: RE: Jefferson
To: George Burnett <[REDACTED]@lcojlaw.com>, Joseph L Olson <[REDACTED]@michaelbest.com>, Judge Troupis <[REDACTED]@gmail.com>, Kenneth Chesebro <[REDACTED]@msn.com>, Stewart Karge <[REDACTED]@gmail.com>, Joe Voiland <[REDACTED]@yahoo.com>

<https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=315283>

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KURT A. GOEHRE
Partner/Attorney
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Green Bay, WI 54305
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Subject: Jefferson

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Sent from my iPhone

1/16/24, 2:42 PM

SUBJECT: RE: Jefferson

FROM: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>

TO: "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>, George Burnett <[REDACTED]@lcojlaw.com>, Judge Troupis <[REDACTED]@gmail.com>, Kenneth Chesebro <[REDACTED]@msn.com>, Stewart Karge <[REDACTED]@gmail.com>, Joe Voiland <[REDACTED]@yahoo.com>

DATE: 12/14/2020 10:24

ATTACHMENTS (20201214-102413-0001329): ["image001.png"](#)

Well, the got this one right – although they managed to avoid saying anything about the elector’s and/or the clerk’s duty to take themselves off the list ...

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com



From: Kurt A. Goehre <[REDACTED]@lcojlaw.com>
Sent: Monday, December 14, 2020 10:07 AM
To: George Burnett <[REDACTED]@lcojlaw.com>; Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>
Subject: RE: Jefferson

<https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=315283>

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Subject: Jefferson

Court just released decision in this case

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SUBJECT: Re: Jefferson
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>
DATE: 12/14/2020 10:24
ATTACHMENTS (20201214-102452-0001328): "[image001.png](#)"

yes

On Mon, Dec 14, 2020 at 10:24 AM Olson, Joseph L (13465) <[REDACTED]@michaelbest.com> wrote:

Well, the got this one right – although they managed to avoid saying anything about the elector’s and/or the clerk’s duty to take themselves off the list ...

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com



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Sent: Monday, December 14, 2020 10:07 AM
To: George Burnett <[REDACTED]@lcojlaw.com>; Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>
Subject: RE: Jefferson

<https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=315283>

Kindest regards,

KURT A. GOEHRE

Partner/Attorney

Law Firm of Conway, Olejniczak & Jerry, S.C.

231 S. Adams Street | P.O. Box 23200

Green Bay, WI 54305

P: [REDACTED] F: [REDACTED]
E: [REDACTED]@lcojlaw.com | lcojlaw.com

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-----Original Message-----

From: George Burnett <[REDACTED]@lcojlaw.com>

Sent: Monday, December 14, 2020 10:04 AM

To: Joseph L Olson <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; Kurt A.

Goehre <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge

<[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>

Subject: Jefferson

Court just released decision in this case

Sent from my iPhone

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SUBJECT: Fwd: [EXTERNAL]Redrafted press release language for after electors vote
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
CC: Brian Schimming <[REDACTED]@yahoo.com>
DATE: 12/14/2020 10:28

FYI — no press comments

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From: Mike Roman <[REDACTED]@donaldtrump.com>
Sent: Monday, December 14, 2020 10:20:29 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>; Boris Epshteyn <[REDACTED]@donaldtrump.com>
Cc: Joshua Findlay <[REDACTED]@donaldtrump.com>
Subject: Re: [EXTERNAL]Redrafted press release language for after electors vote

DJT staff in state were instructed not to do any media advisory or post-event press release. Any inquiries will be forwarded to HQ Press. No one is authorized to comment or provide background.

MR

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Monday, December 14, 2020 10:51
To: Boris Epshteyn
Cc: Mike Roman; Joshua Findlay
Subject: Re: [EXTERNAL]Redrafted press release language for after electors vote

Exactly

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From: Boris Epshteyn <[REDACTED]@donaldtrump.com>
Sent: Monday, December 14, 2020 9:49:12 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Mike Roman <[REDACTED]@donaldtrump.com>; Joshua Findlay <[REDACTED]@donaldtrump.com>
Subject: Re: [EXTERNAL]Redrafted press release language for after electors vote

Thanks! Let's let the process work itself through, get done and then we can take it from there on Comms.

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

--

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On Dec 14, 2020, at 10:46 AM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Idea of a press release originated from Troupis in Wi — he did a draft last wed only for Wi, which he had planned to release once the trial court ruled against us.

Idea was to alert Wisconsin Supreme Court that it did not have to rush the case.

In case other states wanted to do it, I adapted the language for each state and included it on the packets.

On sat, RG decided there should be no advance notice (the PA electors were nervous about publicity) and I passed that on to Josh and the regional staffers.

So yesterday I offered this latest draft as a replacement, unilaterally — there has been no higher level decision to do anything. Simply trying to avoid anyone using the old draft, which has outdated wording (uses future tense).

Probably RG and comms will want to consider just one statement going out on this, nationally. Like a tweeted statement by Ellis, and follow up on-camera explanation by RG, and or follow up tweet by the President? Much wiser heads on that sort of thing than me!

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Cc: Mike Roman <[REDACTED]@donaldtrump.com>; Joshua Findlay <[REDACTED]@donaldtrump.com>
Subject: Re: [EXTERNAL]Redrafted press release language for after electors vote

Thank you. What's the reasoning to do a press release?

Either way, nothing should go out until after 4pm ET.

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

--

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On Dec 14, 2020, at 2:02 AM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Adapted from earlier draft -- attached.

<Draft press release for state Republican parties for after electors vote.docx>

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SUBJECT: Re: Fwd: [EXTERNAL]Redrafted press release language for after electors vote
FROM: Brian Schimming <[REDACTED]@yahoo.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>, Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/14/2020 10:46

Confirmed

Brian

[Sent from Yahoo Mail for iPhone](#)

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TROUPIS 009141

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

--

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TROUPIS 009142

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Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

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SUPREME COURT OF WISCONSIN

CASE No. : 2020AP2038

COMPLETE TITLE: Donald J. Trump, Michael R. Pence and Donald J. Trump for President, Inc.,
Plaintiffs-Appellants,
v.
Joseph R. Biden, Kamala D. Harris, Milwaukee County Clerk c/o George L. Christenson, Milwaukee County Board of Canvassers c/o Tim Posnanski, Wisconsin Elections Commission, Ann S. Jacobs, Dane County Clerk c/o Scott McDonell and Dane County Board of Canvassers c/o Alan Arnsten,
Defendants-Respondents.

ON PETITION TO BYPASS COURT OF APPEALS, REVIEW
OF DECISION OF THE CIRCUIT COURT

OPINION FILED: December 14, 2020
SUBMITTED ON BRIEFS:
ORAL ARGUMENT: December 12, 2020

SOURCE OF APPEAL:
COURT: Circuit Court
COUNTY: Milwaukee
JUDGE: Stephen A. Simanek

JUSTICES:
HAGEDORN, J., delivered the majority opinion of the Court, in which ANN WALSH BRADLEY, DALLET, and KAROFISKY, JJ., joined. DALLET and KAROFISKY, JJ., filed a concurring opinion. HAGEDORN, J., filed a concurring opinion, in which ANN WALSH BRADLEY, J., joined. ROGGENSACK, C.J., filed a dissenting opinion, in which ZIEGLER and REBECCA GRASSL BRADLEY, JJ., joined. ZIEGLER, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and REBECCA GRASSL BRADLEY, J., joined. REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and ZIEGLER, J., joined.
NOT PARTICIPATING:

ATTORNEYS:

For the plaintiffs-appellants, a brief was filed by *James R. Troupis* and *Troupis Law Office*, Cross Plains, and *R. George Burnett and Conway, Olejniczak & Jerry S.C.*, Green Bay. Oral argument presented by *James R. Troupis*.

For the defendants-respondents *Joseph R. Biden* and *Kamala D. Harris*, a brief was filed by *Matthew W. O'Neill* and *Fox, O'Neill & Shannon, S.C.*, Milwaukee, *Charles G. Curtis, Jr.*, *Michelle M. Umberger*, *Will M. Conley* and *Perkins Coie LLP*, Madison, and *John M. Devaney* (pro hac vice) and *Perkins Coie LLP*, Washington, D.C. Oral argument was presented by *John M. Devaney*.

For the defendants-respondents *Wisconsin Elections Commission* and *Ann S. Jacobs*, oral argument was presented by assistant attorney general *Colin T. Roth*.

2020 WI 91

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2020AP2038
(L.C. No. 2020CV2514 & 2020CV7092)

STATE OF WISCONSIN : IN SUPREME COURT

Donald J. Trump, Michael R. Pence and Donald J. Trump for President, Inc.,

Plaintiffs-Appellants,

v.

FILED

Joseph R. Biden, Kamala D. Harris, Milwaukee County Clerk c/o George L. Christenson, Milwaukee County Board of Canvassers c/o Tim Posnanski, Wisconsin Elections Commission, Ann S. Jacobs, Dane County Clerk c/o Scott McDonell and Dane County Board of Canvassers c/o Alan Arnsten,

DEC 14, 2020

Sheila T. Reiff
Clerk of Supreme Court

Defendants-Respondents.

HAGEDORN, J., delivered the majority opinion of the Court, in which ANN WALSH BRADLEY, DALLET, and KAROFSKY, JJ., joined. DALLET and KAROFSKY, JJ., filed a concurring opinion. HAGEDORN, J., filed a concurring opinion, which ANN WALSH BRADLEY, J., joined. ROGGENSACK, C.J., filed a dissenting opinion, in which ZIEGLER and REBECCA GRASSL BRADLEY, JJ., joined. ZIEGLER, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and REBECCA GRASSL BRADLEY, J., joined. REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and ZIEGLER, J., joined.

APPEAL from a judgment and an order of the Circuit Court for Milwaukee County, Stephen A. Simanek, Reserve Judge. *Affirmed.*

TROUPIS 009148

¶1 BRIAN HAGEDORN, J. In the 2020 presidential election, the initial Wisconsin county canvasses showed that Wisconsin voters selected Joseph R. Biden and Kamala D. Harris as the recipients of Wisconsin's electoral college votes. The petitioners¹ (collectively, the "Campaign") bring an action under Wis. Stat. § 9.01 (2017-18)² seeking to invalidate a sufficient number of Wisconsin ballots to change Wisconsin's certified election results. Specifically, the Campaign seeks to invalidate the ballots—either directly or through a drawdown—of more than 220,000 Wisconsin voters in Dane and Milwaukee Counties.

¶2 The Campaign focuses its objections on four different categories of ballots—each applying only to voters in Dane County and Milwaukee County. First, it seeks to strike all ballots cast by voters who claimed indefinitely confined status since March 25, 2020. Second, it argues that a form used for in-person absentee voting is not a "written application" and therefore all in-person absentee ballots should be struck. Third, it maintains that municipal officials improperly added witness information on absentee ballot certifications, and that these ballots are therefore invalid. Finally, the Campaign asserts that all ballots collected at "Democracy in the Park," two City of Madison events in late September and early October, were illegally cast.

¹ The petitioners are Donald J. Trump, Michael R. Pence, and Donald J. Trump for President, Inc.

² All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

¶3 We conclude the Campaign is not entitled to the relief it seeks. The challenge to the indefinitely confined voter ballots is meritless on its face, and the other three categories of ballots challenged fail under the doctrine of laches.

I. BACKGROUND

¶4 After all votes were counted and canvassing was completed for the 2020 presidential election contest, the results showed that Vice President Biden and Senator Harris won Wisconsin by 20,427 votes. The Campaign sought a recount in two of Wisconsin's 72 counties—Milwaukee and Dane. The Milwaukee County Elections Commission and the Dane County Board of Canvassers conducted the recount and certified the results. The recount increased the margin of victory for Vice President Biden and Senator Harris to 20,682 votes.

¶5 The Campaign appealed those decisions in a consolidated appeal to the circuit court under Wis. Stat. § 9.01(6)(a), naming Vice President Biden, Senator Harris, the Wisconsin Elections Commission (WEC), and several election officials as respondents.³ The circuit court⁴ affirmed the determinations of the Dane County Board of Canvassers and the Milwaukee County Elections Commission

³ Also named were Milwaukee County Clerk c/o George L. Christenson, Milwaukee County Board of Canvassers c/o Tim Posnanski, Ann S. Jacobs, Dane County Clerk c/o Scott McDonell, and Dane County Board of Canvassers c/o Alan Arnsten.

⁴ The consolidated appeals were assigned to Reserve Judge Stephen A. Simanek.

in full. The Campaign appealed and filed a petition for bypass, which we granted.

II. DISCUSSION

¶6 The Campaign asks this court to reverse the determinations of the Dane County Board of Canvassers and the Milwaukee County Elections Commission with respect to four categories of ballots it argues were unlawfully cast.⁵ The respondents argue that all ballots were cast in compliance with the law, or at least that the Campaign has not shown otherwise. They further maintain that a multitude of legal doctrines—including laches, equitable estoppel, unclean hands, due process, and equal protection—bar the Campaign from receiving its requested relief. We agree that the challenge to the indefinitely confined voter ballots is without merit, and that laches bars the relief the Campaign seeks on the three remaining categories of challenged ballots.

A. Indefinitely Confined Voters

¶7 Wisconsin allows voters to declare themselves indefinitely confined, provided they meet the statutory requirements. See Wis. Stat. § 6.86(2)(a).⁶ These individuals

⁵ We may set aside or modify the determination if "a provision of law" is "erroneously interpreted" and "a correct interpretation compels a particular action." Wis. Stat. § 9.01(8). We accept the findings of fact unless a factual finding "is not supported by substantial evidence." Id.

⁶ Wisconsin Stat. § 6.86(2)(a) provides:

are not required to provide photo identification to obtain an absentee ballot. Id. On March 25, 2020, the Dane and Milwaukee County Clerks issued guidance on Facebook suggesting all voters could declare themselves indefinitely confined because of the pandemic and the governor's then-existing Safer-at-Home Order. This court unanimously deemed that advice incorrect on March 31, 2020, and we noted that "the WEC guidance . . . provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." The county clerks immediately updated their advice in accordance with our decision.

¶8 The Campaign does not challenge the ballots of individual voters. Rather, the Campaign argues that all voters claiming indefinitely confined status since the date of the erroneous Facebook advice should have their votes invalidated, whether they are actually indefinitely confined or not. Although the number of individuals claiming indefinitely confined status has increased throughout the state, the Campaign asks us to apply this blanket invalidation of indefinitely confined voters only to ballots cast in Dane and Milwaukee Counties, a total exceeding

An elector who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period may by signing a statement to that effect require that an absentee ballot be sent to the elector automatically for every election. The application form and instructions shall be prescribed by the commission, and furnished upon request to any elector by each municipality. The envelope containing the absentee ballot shall be clearly marked as not forwardable. If any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.

28,000 votes. The Campaign's request to strike indefinitely confined voters in Dane and Milwaukee Counties as a class without regard to whether any individual voter was in fact indefinitely confined has no basis in reason or law; it is wholly without merit.

B. Laches

¶9 Three additional categories of ballots are challenged by the Campaign. In Milwaukee and Dane Counties, the Campaign asserts all in-person absentee votes were cast unlawfully without an application, and that all absentee ballots with certifications containing witness address information added by the municipal clerks were improperly counted. Additionally, the Campaign challenges all ballots returned at the City of Madison's "Democracy in the Park" events.

¶10 All three of these challenges fail under the longstanding and well-settled doctrine of laches. "Laches is founded on the notion that equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party." State ex rel. Wren v. Richardson, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587. Application of laches is within the court's discretion upon a showing by the party raising the claim of unreasonable delay, lack of knowledge the claim would be raised, and prejudice. Id., ¶15.

¶11 For obvious reasons, laches has particular import in the election context. As one noted treatise explains:

Extreme diligence and promptness are required in election-related matters, particularly where actionable

election practices are discovered prior to the election. Therefore, laches is available in election challenges. In fact, in election contests, a court especially considers the application of laches. Such doctrine is applied because the efficient use of public resources demands that a court not allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process. Thus if a party seeking extraordinary relief in an election-related matter fails to exercise the requisite diligence, laches will bar the action.

29 C.J.S. Elections § 459 (2020) (footnotes omitted).

¶12 Although it disagrees the elements were satisfied here, the Campaign does not dispute the proposition that laches may bar an untimely election challenge. This principle appears to be recognized and applied universally. See, e.g., Jones v. Markiewicz-Qualkinbush, 842 F.3d 1053, 1060-61 (7th Cir. 2016) ("The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept.").⁷ This case may

⁷ See also Fulani v. Hogsett, 917 F.2d 1028, 1031 (7th Cir. 1990), cert. denied, 501 U.S. 1206 (1991) ("The candidate's and party's claims to be respectively a serious candidate and a serious party with a serious injury become less credible by their having slept on their rights."); Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176, 1180 (9th Cir. 1988) ("Although adequate explanation for failure to seek preelection relief has been held to exist where, for example, the party challenging the election had no opportunity to seek such relief, if aggrieved parties, without adequate explanation, do not come forward before the election, they will be barred from the equitable relief of overturning the results of the election." (citation omitted)); Hendon v. North Carolina State Bd. of Elections, 710 F.2d 177, 182 (4th Cir. 1983) ("[F]ailure to require pre-election adjudication would 'permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action.'"); Perry v. Judd, 471 Fed. App'x 219, 220 (4th Cir. 2012) ("Movant had every opportunity to challenge the various

Virginia ballot requirements at a time when the challenge would not have created the disruption that this last-minute lawsuit has."); McClung v. Bennett, 235 P.3d 1037, 1040 (Ariz. 2010) ("McClung's belated prosecution of this appeal . . . would warrant dismissal on the grounds of laches, because his dilatory conduct left Sweeney with only one day to file his response brief, jeopardized election officials' timely compliance with statutory deadlines, and required the Court to decide this matter on an unnecessarily accelerated basis." (citations omitted)); Smith v. Scioto Cnty. Bd. of Elections, 918 N.E.2d 131, 133-34 (Ohio 2009) ("Appellees could have raised their claims in a timely pre-election protest to the petition. 'Election contests may not be used as a vehicle for asserting an untimely protest.'" (citations omitted)); Clark v. Pawlenty, 755 N.W.2d 293, 301 (Minn. 2008) (applying laches to bar election challenge where "[t]he processes about which petitioners complain are not new"); State ex rel. SuperAmerica Grp. v. Licking Cnty. Bd. of Elections, 685 N.E.2d 507, 510 (Ohio 1997) ("In election-related matters, extreme diligence and promptness are required. Extraordinary relief has been routinely denied in election-related cases based on laches."); Tully v. State, 574 N.E.2d 659, 663 (Ill. 1991) (applying laches to bar challenge to an automatic retirement statute where a retired judge "was at least constructively aware of the fact that his seat was declared vacant" and an election had already taken place to replace him); Lewis v. Cayetano, 823 P.2d 738, 741 (Haw. 1991) ("We apply the doctrine of laches . . . because efficient use of public resources demand that we not allow persons to gamble on the outcome of the election contest then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process."); Evans v. State Election Bd. of State of Okla., 804 P.2d 1125, 1127 (Okla. 1990) ("It is well settled that one who seeks to challenge or correct an error of the State Election Board will be barred by laches if he does not act with diligence."); Thirty Voters of Kauai Cnty. v. Doi, 599 P.2d 286, 288 (Haw. 1979) ("The general rule is that if there has been opportunity to correct any irregularities in the election process or in the ballot prior to the election itself, plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterward."); Harding v. State Election Board, 170 P.2d 208, 209 (Okla. 1946) (per curiam) ("[I]t is manifest that time is of the essence and that it was the duty of the petitioner to proceed with utmost diligence in asserting in a proper forum his claimed rights. The law favors the diligent rather than the slothful."); Mehling v. Moorehead, 14 N.E.2d 15, 20 (Ohio 1938) ("So in this case, the election, having been held,

be a paradigmatic example of why. The relevant election officials, as well as Vice President Biden and Senator Harris, had no knowledge a claim to these broad categories of challenges would occur. The Campaign's delay in raising these issues was unreasonable in the extreme, and the resulting prejudice to the election officials, other candidates, voters of the affected counties, and to voters statewide, is obvious and immense. Laches is more than appropriate here; the Campaign is not entitled to the relief it seeks.

should not be disturbed when there was full opportunity to correct any irregularities before the vote was cast."); Kewaygoshkum v. Grand Traverse Band Election Bd., 2008-1199-CV-CV, 2008-1200-CV-CV, 2008 WL 6196207, at *7 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary 2008) (en banc) ("In the instant case, nearly all of the allegations by both Plaintiffs against the Election Board relate to actions taken (or not taken) by the Election Board prior to the general election [T]hey are not timely raised at this point and should be barred under the doctrine of laches."); Moore v. City of Pacific, 534 S.W.2d 486, 498 (Mo. Ct. App. 1976) ("Where actionable election practices are discovered prior to the election, injured persons must be diligent in seeking relief."); Kelly v. Commonwealth, No. 68 MAP 2020, 2020 WL 7018314, at *1 (Penn. Nov. 28, 2020) (applying laches to bar a challenge to a mail-in voting law where challengers could have brought their claim anytime after the law's enactment more than a year prior but instead waited until after the 2020 General Election); Bowyer v. Ducey, CV-20-02321-PHX-DJH, 2020 WL 7238261, at *10 (D. Ariz. Dec. 9, 2020) (applying laches to bar claims where "affidavits or declarations upon which Plaintiffs rely clearly shows that the basis for each of these claims was either known well before Election Day or soon thereafter"); King v. Witmer, Civ. No. 20-13134, 2020 WL 7134198, at *7 (E.D. Mich. Dec. 7, 2020) ("If Plaintiffs had legitimate claims regarding whether the treatment of election challengers complied with state law, they could have brought their claims well in advance of or on Election Day—but they did not.").

1. Unreasonable Delay

¶13 First, the respondents must prove that the Campaign unreasonably delayed in bringing the challenge. What constitutes an unreasonable delay varies and "depends on the facts of a particular case." Wis. Small Bus. United, Inc. v. Brennan, 2020 WI 69, ¶14, 393 Wis. 2d 308, 946 N.W.2d 101. As we have explained:

[U]nreasonable delay in laches is based not on what litigants know, but what they might have known with the exercise of reasonable diligence. This underlying constructive knowledge requirement arises from the general rule that ignorance of one's legal rights is not a reasonable excuse in a laches case. Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put a man of ordinary prudence upon inquiry. To be sure, what we expect will vary from case to case and litigant to litigant. But the expectation of reasonable diligence is firm nonetheless.

Wren, 389 Wis. 2d 516, ¶20 (citations and quotation marks omitted). Here, the Campaign unreasonably delayed with respect to all three categories of challenged ballots.

¶14 Regarding the Campaign's first challenge, Wisconsin law provides that a "written application" is required before a voter can receive an absentee ballot, and that any absentee ballot issued without an application cannot be counted. See Wis. Stat. § 6.86(1)(ar); Wis. Stat. § 6.84(2). The Campaign argues all in-person absentee votes in Dane and Milwaukee Counties were cast without the required application.

¶15 But both counties did use an application form created, approved, and disseminated by the chief Wisconsin elections agency. This form, now known as EL-122, is entitled "Official

Absentee Ballot Application/Certification." It was created in 2010 in an effort to streamline paperwork following the 2008 election, and has been available and in use ever since.

¶16 The Campaign does not challenge that any individual voters' ballots lacked an application—an otherwise appropriate and timely issue. Rather, the Campaign argues this "application" is not an application, or that municipal clerks do not give this form to voters before distributing the ballot, in contravention of the statutes.⁸ Regardless of the practice used, the Campaign would like to apply its challenge to the sufficiency of EL-122 to strike 170,140 votes in just two counties—despite the form's use in municipalities throughout the state.⁹ Waiting until after an election to challenge the sufficiency of a form application in use statewide for at least a decade is plainly unreasonable.

¶17 The second category of ballots challenged are those with certificates containing witness address information added by a municipal clerk. Absentee ballots must be witnessed, and the witness must provide their name, signature, and address on the certification (printed on the back side of the envelope in which the absentee ballot is ultimately sealed). Wis. Stat. § 6.87(2), (4)(b)1., (6d). While a witness address must be provided on the

⁸ According to the findings of fact, the practice in Dane and Milwaukee Counties is that the application portion of the envelope is completed and shown to an official before the voter receives a ballot.

⁹ In its findings of fact, the circuit court concluded that 651,422 voters throughout the state used Form EL-122 in the 2020 presidential election.

certification for the corresponding ballot to be counted, the statute is silent as to what portion of an address the witness must provide. § 6.87(6d).

¶18 The process of handling missing witness information is not new; election officials followed guidance that WEC created, approved, and disseminated to counties in October 2016. It has been relied on in 11 statewide elections since, including in the 2016 presidential election when President Trump was victorious in Wisconsin. The Campaign nonetheless now seeks to strike ballots counted in accordance with that guidance in Milwaukee and Dane Counties, but not those counted in other counties that followed the same guidance. The Campaign offers no reason for waiting years to challenge this approach, much less after this election. None exists.

¶19 Finally, the City of Madison held events on September 27, 2020, and October 3, 2020, dubbed "Democracy in the Park." At these events, sworn city election inspectors collected completed absentee ballots. The city election inspectors also served as witnesses if an elector brought an unsealed, blank ballot. No absentee ballots were distributed, and no absentee ballot applications were accepted or distributed at these events.

¶20 The Campaign characterizes these events as illegal early in-person absentee voting. When the events were announced, an attorney for the Wisconsin Legislature sent a warning letter to the City of Madison suggesting the events were illegal. The City of Madison responded that the events were legally compliant, offering reasons why. Although these events and the legislature's

concerns were widely publicized, the Campaign never challenged these events, nor did any other tribunal determine they were unlawful.

¶21 The Campaign now asks us to determine that all 17,271 absentee ballots collected during the "Democracy in the Park" events were illegally cast. Once again, when the events were announced, the Campaign could have challenged its legality. It did not. Instead, the Campaign waited until after the election—after municipal officials, the other candidates, and thousands of voters relied on the representations of their election officials that these events complied with the law. The Campaign offers no justification for this delay; it is patently unreasonable.

¶22 The time to challenge election policies such as these is not after all ballots have been cast and the votes tallied. Election officials in Dane and Milwaukee Counties reasonably relied on the advice of Wisconsin's statewide elections agency and acted upon it. Voters reasonably conformed their conduct to the voting policies communicated by their election officials. Rather than raise its challenges in the weeks, months, or even years prior, the Campaign waited until after the votes were cast. Such delay in light of these specific challenges is unreasonable.

2. Lack of Knowledge

¶23 The second element of laches requires that the respondents lacked knowledge that the Campaign would bring these

claims.¹⁰ The respondents all assert they were unaware that the Campaign would challenge various election procedures after the election, and nothing in the record suggests otherwise. On the record before us, this is sufficient to satisfy this element. See Brennan, 393 Wis. 2d 308, ¶18.

3. Prejudice

¶24 Finally, the respondents must also prove that prejudice results from the Campaign's unreasonable delay. "What amounts to prejudice . . . depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position." Wren, 389 Wis. 2d 516, ¶32.

¶25 With respect to in-person absentee ballot applications, local election officials used form EL-122 in reliance on longstanding guidance from WEC. Penalizing the voters election officials serve and the other candidates who relied on this longstanding guidance is beyond unfair. The Campaign sat on its hands, waiting until after the election, despite the fact that this "application" form was in place for over a decade. To strike

¹⁰ While our cases have identified this element as a general requirement for laches, it does not always appear to be applicable. To some extent, this requirement focuses on the ability of the asserting party to mitigate any resulting prejudice when notice is provided. But this may not be possible in all types of claims. Most jurisdictions do not identify lack of knowledge as a separate, required element in every laches defense. See, e.g., Hart v. King, 470 F. Supp. 1195, 1198 (D. Haw. 1979) (holding that laches barred relief in federal court notwithstanding plaintiffs' unsuccessful pre-election suit in state court). In any event, we have no difficulty finding this element satisfied here.

ballots cast in reliance on the guidance now, and to do so only in two counties, would violate every notion of equity that undergirds our electoral system.

¶26 As for the ballots to which witness address information was added, the election officials relied on this statewide advice and had no reason to question it. Waiting until after the election to raise the issue is highly prejudicial. Applying any new processes to two counties, and not statewide, is also unfair to nearly everyone involved in the election process, especially the voters of Dane and Milwaukee Counties.

¶27 Finally, the respondents, and indeed all voters, are prejudiced if the ballots collected at the "Democracy in the Park" events are invalidated. Voters were encouraged to utilize the events, and 17,000 voters did so in reliance on representations that the process they were using complied with the law. Striking these ballots would disenfranchise voters who did nothing wrong when they dropped off their ballot where their local election officials told them they could.

¶28 In short, if the relief the Campaign sought was granted, it would invalidate nearly a quarter of a million ballots cast in reliance on interpretations of Wisconsin's election laws that were well-known before election day. It would apply new interpretive guidelines retroactively to only two counties. Prejudice to the respondents is abundantly clear. Brennan, 393 Wis. 2d 308, ¶25.

4. Discretion

¶29 Whether to apply laches remains "within our equitable discretion." Id., ¶26. Doing so here is more than equitable; it is the only just resolution of these claims.

¶30 To the extent we have not made this clear in the past, we do so now. Parties bringing election-related claims have a special duty to bring their claims in a timely manner. Unreasonable delay in the election context poses a particular danger—not just to municipalities, candidates, and voters, but to the entire administration of justice. The issues raised in this case, had they been pressed earlier, could have been resolved long before the election. Failure to do so affects everyone, causing needless litigation and undermining confidence in the election results. It also puts courts in a difficult spot. Interpreting complicated election statutes in days is not consistent with best judicial practices. These issues could have been brought weeks, months, or even years earlier. The resulting emergency we are asked to unravel is one of the Campaign's own making.¹¹

¶31 The claims here are not of improper electoral activity. Rather, they are technical issues that arise in the administration of every election. In each category of ballots challenged, voters

¹¹ Our decision that the Campaign is not entitled to the relief it seeks does not mean the legal issues presented are foreclosed from further judicial scrutiny. Wisconsin law provides sufficient mechanisms for challenging unlawful WEC guidance or unlawful municipal election practices. Nothing in our decision denying relief to the Campaign would affect the right of another party to raise substantive challenges.

followed every procedure and policy communicated to them, and election officials in Dane and Milwaukee Counties followed the advice of WEC where given. Striking these votes now—after the election, and in only two of Wisconsin's 72 counties when the disputed practices were followed by hundreds of thousands of absentee voters statewide—would be an extraordinary step for this court to take.¹² We will not do so.

III. CONCLUSION

¶32 Our laws allow the challenge flag to be thrown regarding various aspects of election administration. The challenges raised by the Campaign in this case, however, come long after the last play or even the last game; the Campaign is challenging the rulebook adopted before the season began. Election claims of this type must be brought expeditiously. The Campaign waited until after the election to raise selective challenges that could have been raised long before the election. We conclude the challenge to indefinitely confined voter ballots is without merit, and that laches bars relief on the remaining three categories of challenged ballots. The Campaign is not entitled to relief, and therefore

¹² Granting the relief requested by the Campaign may even be unconstitutional. See Bush v. Gore, 531 U.S. 98, 104-05 (per curiam) ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

does not succeed in its effort to strike votes and alter the certified winner of the 2020 presidential election.

By the Court.—The judgment of the circuit court is affirmed.

¶33 REBECCA FRANK DALLET and JILL J. KAROFSKY, JJ. (*concurring*). As acknowledged by the President's counsel at oral argument, the President would have the people of this country believe that fraud took place in Wisconsin during the November 3, 2020 election. Nothing could be further from the truth. The President failed to point to even one vote cast in this election by an ineligible voter; yet he asks this court to disenfranchise over 220,000 voters. The circuit court, whose decision we affirm, found no evidence of any fraud.

¶34 The evidence does show that, despite a global pandemic, more than 3.2 million Wisconsinites performed their civic duty. More importantly as it relates to this lawsuit, these voters followed the rules that were in place at the time. To borrow Justice Hagedorn's metaphor, Wisconsin voters complied with the election rulebook. No penalties were committed and the final score was the result of a free and fair election.

¶35 For the foregoing reasons, we concur.

¶36 BRIAN HAGEDORN, J. (*concurring*). I agree, of course, with the majority opinion I authored holding that the petitioners¹ (collectively, the "Campaign") are not entitled to the relief they seek. But I understand the desire for at least some clarity regarding the underlying election administration issues. A comprehensive analysis is not possible or appropriate in light of the abbreviated nature of this review and the limited factual record in an action under Wis. Stat. § 9.01 (2017-18).² However, I do think we can be of some assistance, and will endeavor to address in some measure the categories of ballots the majority opinion properly applies laches to.

¶37 Beyond its challenge to indefinitely confined voters, an issue the court's opinion quickly and appropriately dispenses with, the Campaign raises challenges to three categories of ballots: (1) all in-person absentee ballots in Dane and Milwaukee Counties for want of an absentee ballot application; (2) all absentee ballots in Dane and Milwaukee Counties where municipal officials added witness address information on the certification; and (3) all ballots collected at two City of Madison "Democracy in the Park" events occurring in late September and early October. I begin with some background, and address each while remaining mindful of the limited nature of this review.

¹ The petitioners are Donald J. Trump, Michael R. Pence, and Donald J. Trump for President, Inc.

² All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

I. LEGAL BACKGROUND

¶38 Elections in Wisconsin are governed by Chapters five through 12 of the Wisconsin Statutes. In applying these laws, we have a long history of construing them to give effect to the ascertainable will of the voter, notwithstanding technical noncompliance with the statutes. Roth v. Lafarge Sch. Dist. Bd. of Canvassers, 2004 WI 6, ¶19, 268 Wis.2d 335, 677 N.W.2d 599.³ This longstanding practice is confirmed in statute. Wisconsin Stat. § 5.01(1) says, "Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." So generally, when ballots are challenged, they are counted if the will of the voter can be ascertained.

¶39 Wisconsin looks quite a bit more skeptically, however, at absentee ballots. Wisconsin Stat. § 6.84(2) provides:

Notwithstanding [Wis. Stat. §] 5.01(1), with respect to matters relating to the absentee ballot process, [Wis. Stat. §§] 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in

³ See also State ex rel. Wood v. Baker, 38 Wis. 71, 89 (1875) ("It would be a fraud on the constitution to hold them disfranchised without notice or fault. They went to the election clothed with a constitutional right of which no statute could strip them, without some voluntary failure on their own part to furnish statutory proof of right. And it would be monstrous in us to give such an effect to the registry law, against its own spirit and in violation of the letter and spirit of the constitution."); State ex rel. Blodgett v. Eagan, 115 Wis. 2d 417, 421, 91 N.W. 984 (1902) ("when the intention of the voter is clear, and there is no provision of statute declaring that such votes shall not be counted, such intention shall prevail"); Roth v. Lafarge Sch. Dist. Bd. of Canvassers, 2004 WI 6, ¶¶19-25, 268 Wis. 2d 335, 677 N.W.2d 599 (collecting cases).

contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

This tells us that, to the extent an absentee ballot does not comply with certain statutory requirements, it may not be counted.⁴

¶40 Our review in this case is of the determinations of the board of canvassers and elections commission. The determination shall be "set aside or modif[ied]" if the board of canvassers or elections commission "has erroneously interpreted a provision of law and a correct interpretation compels a particular action." § 9.01(8)(d). We "may not substitute [our] judgment for that of the board of canvassers . . . as to the weight of the evidence on any disputed findings of fact." Id. However, findings of fact "not supported by substantial evidence" shall be set aside. Id. Legal conclusions made by the board of canvassers or elections commission are reviewed independently. Roth, 268 Wis. 2d 335, ¶15.

¶41 With this framework in mind, I turn to the three specific categories of ballots challenged here.

II. IN-PERSON ABSENTEE BALLOT APPLICATIONS

¶42 Wisconsin Stat. § 6.86(1)(ar) says that "the municipal clerk shall not issue an absentee ballot unless the clerk receives

⁴ Wisconsin courts have had few opportunities to opine on this statute. The court appeals noted in a 2001 case: "Section 6.84(2)'s strict construction requirement, applicable to statutes relating to the absentee ballot process, is consistent with the guarded attitude with which the legislature views that process." Lee v. Paulson, 2001 WI App 19, ¶7, 241 Wis. 2d 38, 623 N.W.2d 577.

a written application therefor from a qualified elector of the municipality." The mandatory requirement is that each ballot be matched with an application.

¶43 The Wisconsin Elections Commission (WEC) has designed, approved, and distributed forms for statewide use by local election officials. Among the forms are a separate absentee ballot application (form EL-121) and a combined application and certification (form EL-122). Milwaukee and Dane Counties, like many other communities around the state, use form EL-122 for in-person absentee voters. The Campaign argues that form EL-122 is not an application, and that all 170,140 in-person absentee ballots cast in Dane and Milwaukee Counties therefore lacked the required "written application." This argument is incorrect.

¶44 "Written application" is not specially defined in the election statutes, nor is any particular content prescribed. EL-122 is entitled "Official Absentee Ballot Application/Certification." (Emphasis added). Beyond containing basic voter information also present on EL-121, Form EL-122 requires the elector to sign, stating: "I further certify that I requested this ballot." This would appear to satisfy the ordinary meaning of a written ballot application. See Quick Charge Kiosk LLC v. Kaul, 2020 WI 54, ¶18, 392 Wis. 2d 35, 944 N.W.2d 598 ("When statutory language is not specially defined or technical, it is given its 'common, ordinary, and accepted meaning.'" (quoting State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110)).

¶45 The record further bears out its function as an application. In both Milwaukee and Dane Counties, voters completed the application portion of EL-122 and showed it to an election official before receiving a ballot.⁵ Then, after completing the ballot, the voter signed the certification portion of the form, which the clerk witnessed. Section 6.86(1)(ar) contains no requirement that the application and certification appear on separate documents, and the facts demonstrate that the application was completed before voters received a ballot. As best I can discern from this record, EL-122 is a "written application" within the meaning of § 6.86(1)(ar). That it also serves as a ballot certification form does not change its status as an application.⁶

¶46 Therefore, on the merits and the record before us, in-person absentee voters using form EL-122 in Dane and Milwaukee Counties did so in compliance with Wisconsin law.⁷

⁵ The Campaign appears to suggest a different sequence of events, but that is not what the record before us reflects.

⁶ It is not unusual or inherently problematic for administrative forms to have multiple functions. The MV1, for example, serves as both an application for registration under Wis. Stat. § 341.08 and an application for a certificate of title under Wis. Stat. § 342.06. See <https://wisconsindot.gov/Documents/formdocs/mv1.pdf>.

⁷ It is presently unclear whether the statutes would be better or more clearly effectuated by separating the application and certification, or whether certain retention practices may be problematic. The expedited nature of our review of this case does not permit a full examination of this question. But the mandatory procedure insofar as the voter is concerned—that he or she fill out a written application—is surely satisfied.

III. WITNESS ADDRESSES

¶47 The Campaign also challenges several thousand absentee ballots cast in Milwaukee and Dane Counties where election officials added missing witness address information to the certification. This challenge is oddly postured and seems to miss the statutory requirements.

¶48 Absentee ballots cast in Wisconsin must be witnessed. Wis. Stat. § 6.87(4)(b)1. In order to comply with this requirement, voters place absentee ballots in an unsealed envelope, the back of which includes a certificate. § 6.87(2). The certificate must include a statement for the witness to certify, along with space for the witness's signature, printed name, and "[a]ddress." Id. The law states that the "witness shall execute" the relevant witness information—including, one would presume, the required address. Id. "If a certificate is missing the address of a witness, the ballot may not be counted." § 6.87(6d).

¶49 Although Wis. Stat. § 6.87(6d) requires an address, § 6.87(2) and (6d) are silent on precisely what makes an address sufficient. This is in stark contrast to other provisions of the election statutes that are more specific. For example, Wis. Stat. § 6.34(3)(b)2. requires an identifying document to contain "[a] current and complete residential address, including a numbered street address, if any, and the name of the municipality" for the document to be considered proof of residence. Similarly, Wis. Stat. § 6.18 requires former residents to swear or affirm their Wisconsin address as follows: "formerly residing at . . . in

the . . . ward . . . aldermanic district (city, town, village) of . . . County of"8 While the world has surely faced more pressing questions, the contours of what makes an address an address has real impact. Would a street address be enough, but no municipality? Is the state necessary? Zip code too? Does it matter if the witness uses their mailing address and not the residential address (which can be different)?

¶50 Based on the record before the court, it is not clear what information election officials added to what number of certifications. Wisconsin Stat. § 6.87(6d) would clearly prohibit counting a ballot if the entire address is absent from the certification. However, if the witness provided only part of the address—for example, a street address and municipality, but no state name or zip code—it is at least arguable that this would satisfy § 6.87(6d)'s address requirement. And, to the extent clerks completed addresses that were already sufficient under the

⁸ "And 'absent textual or structural clues to the contrary' a particular word or phrase used more than once in the same act is understood 'to carry the same meaning each time.'" Town of Delafield v. Central Transport Kriewaldt, 2020 WI 61, ¶15 n.6, 392 Wis. 2d 427, 944 N.W.2d 819 (quoting State ex rel. DNR v. Wis. Court of Appeals, Dist. IV, 2018 WI 25, ¶30, 380 Wis. 2d 354, 909 N.W.2d 114).

statute, I am not aware of any authority that would allow such votes to be struck.⁹

¶51 The parties did not present comprehensive arguments regarding which components of an address are necessary under the statute. It would not be wise to fully address that question now. But I do not believe the Campaign has established that all ballots where clerks added witness address information were necessarily insufficient and invalid; the addresses provided directly by the witnesses may very well have satisfied the statutory directive. The circuit court's findings of fact reflect that many of these ballots contained additions of the state name and/or zip code. I conclude the Campaign failed to provide sufficient information to show all the witness certifications in the group identified were improper, or moreover, that any particular number of ballots were improper.

¶52 Although I do not believe the Campaign has offered sufficient proof on this record to strike ballots, this broader issue appears to be a valid election administration concern. WEC, other election officials, the legislature, and others may wish to

⁹ The statute seems to suggest only the witness should fill in the information necessary to comply with the statute. See Wis. Stat. § 6.87(2) ("the witness shall execute . . ."). If a zip code is not required under the statute, for example, I'm not sure clerks would be prohibited from adding the zip code. Then again, I'm not sure why they would want to add anything to an already sufficient ballot, or what their authority would be to do so. It's possible WEC guidance to add witness information is aimed at complying with related WEC guidance that all aspects of a mailing address—including city, state, and zip code—should be included in the witness certification (arguably, information the statute does not always require). Regardless, this case is not well-postured to answer these questions.

examine the requirements of the statute and measure them against the guidance and practice currently in place to avoid future problems.

IV. DEMOCRACY IN THE PARK

¶53 Finally, the Campaign challenges 17,271 ballots the City of Madison collected at "Democracy in the Park" events on September 27, 2020, and October 3, 2020. According to the record, at these events, sworn city election inspectors collected already completed absentee ballots and served as witnesses for absentee voters who brought an unsealed, blank ballot with them. During the events, no absentee ballots were distributed, and no absentee ballot applications were distributed or received.

¶54 Under the law, when a voter requests an absentee ballot, the voter must return the absentee ballot in a sealed envelope by mail or "in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. The phrase "municipal clerk" has a specific meaning in the election statutes. It is defined as "the city clerk, town clerk, village clerk and the executive director of the city election commission and their authorized representatives." Wis. Stat. § 5.02(10) (emphasis added).¹⁰ A sworn city election inspector sent by the clerk to collect ballots would seem to be an authorized representative as provided in the definition. Even if "municipal clerk" were not a specially-defined

¹⁰ When words are "specially-defined" they are given their "special definitional meaning." State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

term, the only reasonable reading of the law would allow those acting on a clerk's behalf to receive absentee ballots, not just the clerk by him or herself. After all, many clerks manage a full office of staff to assist them in carrying out their duties. Accordingly, voters who returned ballots to city election inspectors at the direction of the clerk returned their absentee ballots "in person, to the municipal clerk" as required by § 6.87(4)(b)1.

¶55 The Campaign, however, asserts that the "Democracy in the Park" events were illegal in-person absentee voting sites that failed to meet the statutory requirements under Wis. Stat. § 6.855. Section 6.855(1) provides in relevant part:

The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. . . . If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.

§ 6.855(1) (emphasis added).

¶56 An alternative absentee ballot site, then, must be a location not only where voters may return absentee ballots, but also a location where voters "may request and vote absentee ballots." Id. On the facts before the court, this is not what occurred at "Democracy in the Park" locations. Ballots were not requested or distributed. Therefore, Wis. Stat. § 6.855 is not on point.

¶57 In short, based on the record before the court and the arguments presented, I see no basis to conclude the ballots collected at "Democracy in the Park" events were cast in contravention of Wisconsin law. This challenge fails.

V. CONCLUSION

¶58 The people of Wisconsin deserve confidence that our elections are free and fair and conducted in compliance with the law. Our elected leaders and election officials, including those at WEC, should continue to earn the trust of all Wisconsinites. The claims made by the Campaign in this case are not of widespread fraud or serious election improprieties. These are ordinary sorts of election administration issues—for example, challenging whether an "application" form in use statewide for a decade constitutes a sufficient application (it does). While this does not diminish the importance of the election procedures the legislature has chosen, Wisconsin's electorate should be encouraged that the issues raised in this case are focused on rather technical issues such as whether a witness must include their zip code as part of their address.

¶59 That does not mean there is nothing to improve or clarify or correct. But as explained in the majority opinion, the Campaign waited far too long to challenge guidance and practices established weeks, months, or years earlier. Laches rightly bars the relief the Campaign seeks. Even on the merits, however, the Campaign is either incorrect on the law, or does not provide sufficient proof to identify particular ballots that were improperly cast. At the

end of the day, nothing in this case casts any legitimate doubt that the people of Wisconsin lawfully chose Vice President Biden and Senator Harris to be the next leaders of our great country. While the Campaign has every right to challenge ballots cast out of compliance with the law, its efforts to make that showing in this case do not succeed.

¶60 I am authorized to state that Justice ANN WALSH BRADLEY joins this concurrence.

¶61 PATIENCE DRAKE ROGGENSACK, C.J. (*dissenting*). Elections have consequences. One candidate wins and the other loses, but in every case, it is critical that the public perceive that the election was fairly conducted.

¶62 In the case now before us, a significant portion of the public does not believe that the November 3, 2020, presidential election was fairly conducted. Once again, four justices on this court cannot be bothered with addressing what the statutes require to assure that absentee ballots are lawfully cast. I respectfully dissent from that decision. I write separately to address the merits of the claims presented.¹

¶63 The Milwaukee County Board of Canvassers and the Dane County Board of Canvassers based their decisions on erroneous advice when they concluded that changes clerks made to defective witness addresses were permissible. And, the Dane County Board of Canvassers erred again when it approved the 200 locations for ballot collection that comprised Democracy in the Park. The majority does not bother addressing what the boards of canvassers did or should have done, and instead, four members of this court throw the cloak of laches over numerous problems that will be repeated again and again, until this court has the courage to correct them. The electorate expects more of us, and we are

¹ See Antonin Scalia, The Dissenting Opinion, 1994 J. Sup. Ct. Hist. 33 (1994) ("Legal opinions are important, after all, for the reasons they give, not the results they announce; results can be announced in judgment orders without opinion. An opinion that gets the reasons wrong gets everything wrong which is the function of an opinion to produce.").

capable of providing it.² Because we do not, I respectfully dissent.

I. BACKGROUND

¶64 On November 3, 2020, people across Wisconsin and across the country exercised their constitutional right to vote. When the initial Wisconsin canvass was completed on November 17, 2020, Joseph R. Biden and Kamala D. Harris received 20,427 more votes than Donald J. Trump and Michael R. Pence.

¶65 On November 18, 2020, President Trump, Vice President Pence and the Trump campaign (the Petitioners) filed recount petitions in Milwaukee and Dane Counties. The recount petitions alleged that the following errors occurred during the election in both counties:

- (1) Municipal clerks improperly completed missing information on absentee ballot envelopes related to witness addresses;
- (2) In-person absentee voters did not submit written applications for an absentee ballot; and
- (3) Voters who were not indefinitely confined claimed "indefinitely confined" status for the purposes of obtaining an absentee ballot without having to show a photo identification.

¶66 In addition to the above allegations raised during both recounts, in Dane County, the Petitioners alleged error in counting

² See, e.g., Texas v. Pennsylvania, 592 U.S. ____, ____ (slip op., at 1) (Dec. 11, 2020) (order denying motion to file bill of complaint) (Alito and Thomas, J.J., statement on the denial of Texas's motion to file a bill of complaint) ("In my view we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. . . . I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue") (internal citation omitted).

all ballots received during Democracy in the Park events in Madison on September 26, 2020, and October 3, 2020.

¶67 The recount lasted from November 20, 2020, to November 29, 2020.³ During the recount process, the Petitioners objected to irregularities in how the voting was conducted pursuant to Wis. Stat. § 9.01(5) (2017-18).⁴ Many irregularities were grounded in Wisconsin Elections Commission (WEC) advice on voting process. The boards of canvassers overruled all of the Petitioners' irregularity objections.

¶68 As they relate to each alleged irregularity, the counties rejected the Petitioners' arguments for the following reasons:

(1) Municipal clerks improperly completed missing information on absentee ballot envelopes related to witness addresses.

The Milwaukee County Board of Canvassers moved to accept ballots from envelopes with witness addresses that had been completed by clerks consistent with specific guidance by the WEC, which the Board viewed as consistent with Wis. Stat. § 6.87(6d).

The Dane County Board of Canvassers also declined to "exclude envelopes that had a witness address added by the clerk."

(2) In-person absentee voters did not submit written applications for an absentee ballot.

³ Milwaukee County completed and certified its results on November 27, 2020, and Dane County completed and certified its recount results on November 29, 2020.

⁴ All further references to the Wisconsin Statutes are to the 2017-18 version.

The Milwaukee County Board of Canvassers determined that there are multiple forms of application for an absentee ballot that can be made by absentee in-person voters and that the absentee ballot envelope provided to absentee in-person voters - which has the word "application" stated on it and must be completed by the voter - is an application for an absentee ballot. The Milwaukee Board thus rejected the Trump Campaign's challenge to ballots cast by in-person absentee voters.

The Dane County Board of Canvassers voted not to exclude or draw down any absentee ballots on the basis that they "do not have an attached or identifiable application." . . . The Dane County Board of Canvassers concluded that review of absentee ballot applications is not a part of the statutory recount process under Wis. Stat. § 9.01(1)(b) and therefore the applications were not relevant to the recount.

(3) Voters who were not indefinitely confined claimed "indefinitely confined" status for the purposes of obtaining an absentee ballot without having to show a photo identification.

The Milwaukee County Board of Canvassers found that "a designation of an indefinitely confined status is for each individual voter to make based upon their current circumstances" and that "no evidence of any voter in Milwaukee County [was] offered that has abused this process and voted through this status . . . not even an allegation that there was a single voter who abused this process to vote without providing proof of their ID, but eliminating proof that anyone did so. So there's no allegation . . . no proof . . . no evidence." . . . The Board voted to overrule any challenge to a voter with the status of "indefinitely confined."

The Dane County Board of Canvassers also rejected the Trump Campaign's challenge that would have required invalidating the ballots of all electors in Dane County who declared indefinitely confined status. The Board specifically declined to separate or "draw down" the ballots cast by electors who declared indefinitely confined status.

(4) Ballots received during democracy in the park.

The Dane County Board of Canvassers denied the challenge, ruling that the Democracy in the Park events

were the equivalent of a human drop box and valid under the statute.

¶69 On December 1, 2020, the Petitioners filed a petition for leave to file an original action with us. We denied that petition on December 3, 2020. That same day, the Petitioners filed two notices of appeal of the recount determinations pursuant to Wis. Stat. § 9.01(6)(a). Those cases were consolidated in Milwaukee County and the Honorable Stephen Simanek was assigned to the appeal pursuant to § 9.01(6)(b).

¶70 The circuit court held a hearing on December 11, 2020. At the conclusion of oral argument, the circuit court affirmed the recount determinations and, in so doing, adopted pages one through thirty of the Respondents' Joint Proposed Findings of Fact and Conclusions of Law. After the circuit court entered its final written decision, the Petitioners filed a notice of appeal. The Petitioners also filed a petition for bypass under Wis. Stat. § 809.60(1). Thereafter, we granted the petition for bypass and assumed jurisdiction over this appeal.

II. DISCUSSION

A. Standard of Review

¶71 In a Wis. Stat. § 9.01 proceeding, post election challenges "are permissible provided that they may affect the election results." Logerquist v. Board of Canvassers for Town of Nasewaupee, 150 Wis. 2d 907, 916, 442 N.W.2d 551 (Ct. App. 1989). In such a proceeding, we review the determinations of the board of canvassers, not those of the circuit court. Id. at 917. "On appellate review of a [] § 9.01(1) proceeding, the question is whether the board [of canvasser's] findings are supported by

substantial evidence.⁵ Carlson v. Oconto Bd. of Canvassers, 2001 WI App 20, ¶5, 240 Wis. 2d 438, 623 N.W.2d 195 (citing Logerquist, 150 Wis. 2d at 912).

¶72 This appeal also requires us to interpret and apply Wisconsin statutes. We interpret and apply statutes independently as questions of law, while benefitting from the discussion of the circuit court. Voces De La Frontera, Inc. v. Clarke, 2017 WI 16, ¶12, 373 Wis. 2d 348, 891 N.W.2d 803.

B. Alleged Irregularities

¶73 "If WEC has been giving advice contrary to statute, those acts do not make the advice lawful. WEC must follow the law. We, as the law declaring court, owe it to the public to declare whether WEC's advice is incorrect. However, doing so does not necessarily lead to striking absentee ballots that were cast by following incorrect WEC advice. The remedy Petitioners seek may be out of reach for a number of reasons." Trump v. Evers, No. 2020AP1917-OA, unpublished order (Wis. Dec. 3, 2020) (Roggensack, C.J., dissenting from the denial of the petition for leave to commence an original action).

¶74 This case is guided by Wis. Stat. § 6.84 which provides:

The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent

⁵ In the matter before us, the material facts are not disputed. Rather, it is the legal consequences that follow from these facts that forms the controversy.

electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Notwithstanding s. 5.01, with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

Accordingly, the provisions that relate to obtaining and voting absentee ballots must be carefully examined as a recount proceeds.⁶

C. Witness Addresses

¶75 Wisconsin Stat. § 6.87(2) provides that absentee ballots must be accompanied by a certificate. The certificate may be printed on the envelope in which an absentee ballot is enclosed. Section 6.87(2) provides a model certificate, and directs that certificates must be in "substantially" the same form as the model. The model provides:

The witness shall execute the following:

I, the undersigned witness, subject to the penalties of s. 12.60 (1)(b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

⁶ See also Griffin v. Roupas, 385 F.3d 1128, 1130-31 (7th Cir. 2004) ("Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting. In this respect absentee voting is to voting in person as a take-home exam is to a proctored one." (internal citations omitted)).

....(Printed name)

....(Address)

Signed"[7]

Accordingly, the plain language of § 6.87(2) requires that it is the witness who must affix his or her signature and write in his or her name and address. Section 6.87(2) does not mention an election official taking any action.

¶76 Wisconsin Stat. § 6.87(9) explains what an election official may do if an absentee ballot is received with an improperly completed certificate or no certificate:

[T]he clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).

Section 6.87(9)'s plain language authorizes election officials to return the ballot to "the elector" to correct "the defect." It does not authorize election officials to make corrections, i.e., to write anything on the certificate.

¶77 In addition, Wis. Stat. § 6.87(6d) provides that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." This language is clear. And furthermore, its legislative history confirms its plain meaning. Westmas v. Creekside Tree Serv., Inc., 2018 WI 12, ¶20, 379 Wis. 2d 471, 907 N.W.2d 68 (quoting State v. Grunke, 2008 WI 82, ¶22, 311 Wis. 2d 439, 752 N.W.2d 769) (explaining that courts may consult legislative history to confirm a statute's plain meaning). This subsection was added by 2015 Wis. Act 261. A memorandum prepared

⁷ Asterisks removed.

by the Legislative Council provides that "Act 261 . . . requires an absentee ballot to have a witness address to be counted. An absentee ballot voter must complete the certification and sign the certification in the presence of a witness, and the witness must sign the certificate and provide his or her name and address." Wis. Legis. Council Act Memo, 2015 Wis. Act 261, at 2, <https://docs.legis.wiscinsin.gov/2015/related/lcactmemo/act261.pdf>.

¶78 The contention that ballots with defective addresses cannot be counted is supported by more than the plain meaning of Wis. Stat. § 6.87(6d). The requirement that such ballots not be counted is found in Wis. Stat. § 6.84(2), which provides that the provisions in § 6.87(6d) are "mandatory."

¶79 Notwithstanding the plain, clear requirements of two statutes, WEC's guidance explicitly directs municipal clerks that they "must take corrective actions in an attempt to remedy a witness address error." WEC guidance states, "municipal clerks shall do all that they can reasonably do to obtain any missing part of the witness address." Then in addition, the WEC instructs clerks to add witness address information even though the guidance acknowledges that "some clerks have expressed [concern] about altering information on the certificate envelope, especially in the case of a recount."

¶80 The WEC ignores that the legislature provided only one act an election official may take in regard to a defective witness address: mail the defective ballot back to the elector to correct the error. Wis. Stat. § 6.87(9). That the legislature made one

choice about correcting a defective witness address excludes other methods of correction. "[T]he express mention of one matter excludes other similar matters [that are] not mentioned." FAS, LLC v. Town of Bass Lake, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287 (quoting Perra v. Menomonee Mut. Ins. Co., 2000 WI App 215, ¶12, 239 Wis. 2d 26, 619 N.W.2d 123) (modifications in the original). In addition, and similarly, § 6.87(2) states, "[t]he witness shall execute the following . . . (Address)." It does not state that clerks shall execute anything.

¶81 My conclusion that errors in the certification of absentee ballots require discarding those ballots is consistent with our precedent. In Kaufmann v. La Crosse City Bd. of Canvassers, 8 Wis. 2d 182, 98 N.W.2d 422 (1959), absentee ballots were returned to a municipal clerk without bearing a notary's signature on the accompanying certificate envelope, as required by statute at that time. The clerk added her signature to the certificates. Id. at 183. We explained that the electors' failure to ensure that the certificate complied with the statute invalidated the ballots. Additionally, we stated, "[t]he fact that the . . . clerk further complicated the matter by signing her name to the . . . certificate cannot aid the voter. The two wrongs cannot make a right." Id. at 186. The ballots were not counted. Id. In the case at hand, a defective witness address cannot be corrected by a clerk, just as the signature of the notary could not be completed by the clerk in Kaufmann.

¶82 In Gradinjan v. Boho (In re Chairman in Town of Worchester), 29 Wis. 2d 674, 139 N.W.2d 557 (1966), absentee

ballots were issued without the municipal clerk's initials or signature, as required by statute at that time. We concluded that the ballots "should not have been counted." Id. at 683. Furthermore, we said that the statute that obligated the invalidation of these ballots survived constitutional attack. Id. at 683-84. We emphasized that absentee voting is subject to different statutory requirements than voting at a polling place, i.e., while a ballot cast at a polling place without initials or a signature may be countable, an absentee ballot subject to an analogous defect is not. Id. at 684. As we stated, "[c]learly, the legislature could determine that fraud and violation of the sanctity of the ballot could much more readily be perpetrated by use of an absentee ballot than under the safeguards provided at a regular polling place." Id. In the case at hand, a witness address is a statutory requirement, mandated by law, just as the initials or signature of the municipal clerk was in Gradinjan.

¶83 The canvassing boards deferred to the WEC's guidance about defective signatures and it appears that the circuit court did so as well when interpreting Wis. Stat. § 6.87. The circuit court stated:

Adding, the requisite information by the clerk has been in effect since before the 2016 election. The election which Trump prevailed in Wisconsin, I believe, after a recount. It's longstanding, I believe it's not prohibited by law, and it is therefore a reasonable interpretation to make sure, as the as the Court indicated earlier, that the will of the electors, the voters, are brought to fruition.

It is unfortunate that WEC has such sway, especially when its "guidance" is contrary to the plain meaning of two statutes.

¶84 Furthermore, we do not defer to administrative agencies when interpreting statutes. Wis. Stat. § 227.57(11); see also Lamar Cent. Outdoor, LLC v. Div. of Hearings & Appeals, 2019 WI 109, ¶9, 389 Wis. 2d 486, 936 N.W.2d 573 (quoting Tetra Tech EC, Inc. v. DOR, 2018 WI 75, ¶108, 382 Wis. 2d 496, 914 N.W.2d 21). Accordingly, the issue is not whether the WEC adopted "a reasonable interpretation," as the circuit court seems to have suggested. We follow the plain meaning rule when interpreting statutes, which we do independently. State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "If the meaning of the statute is plain, we ordinarily stop the inquiry." Id., ¶45 (quoting Seider v. O'Connell, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659).

¶85 And finally, guidance documents "are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions." Service Emps. Int'l Union, Local 1 v. Vos, 2020 WI 67, ¶102, 393 Wis. 2d 38, 946 N.W.2d 35. Guidance documents "impose no obligations, set no standards, and bind no one." Id. "Functionally, and as a matter of law, they are entirely inert." Id.

¶86 Administrative agencies, including the WEC, often treat their guidance as if it were law, but that does not make it so. Id., ¶143 (Roggensack, C.J., concurring/dissenting). Such treatment is inappropriate—it confuses people by making them think that they have a legally cognizable reliance interest in WEC's guidance when they do not.

D. Written Applications

¶87 The Petitioners assert that during the two weeks that permit early in-person absentee voting 170,151 electors who did not submit a sufficient "written application" before receiving an absentee ballot cast votes. The crux of the Petitioners' argument is that the written application must be "separate" from the ballot and the certification.

¶88 The statutes provide that in the two weeks leading up to an election, electors may go to the municipal clerk's office and apply for an absentee ballot. Upon proof of identification, the elector receives a ballot, marks the ballot, the clerk witnesses the certification and the elector casts a vote by returning the absentee ballot to the municipal clerk. Wis. Stat. § 6.86(1)(b).

¶89 Pursuant to Wis. Stat. § 6.86(1)(ar), "the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector." Other statutes provide for similar requirements. See, e.g., Wis. Stat. § 6.86(1)(a)1.-6. (stating that "[a]ny elector of a municipality who is registered to vote . . . and who qualifies . . . as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods," which are then listed); Wis. Stat. § 6.86(1)(ac) (stating that electors "may make written application to the municipal clerk for an official ballot by means of facsimile transmission or electronic mail").

¶90 We begin statutory interpretation with the language of the statute. Kalal, 271 Wis. 2d 633, ¶45. "Statutory language is given its common, ordinary, and accepted meaning, except that

technical or specially-defined words or phrases are given their technical or special definitional meaning." Id.

¶91 None of the statutes in question contain the word "separate." Rather, a "written application" is required before the elector's identity is established with a photo identification and the elector receives an absentee ballot. See Wis. Stat. §§ 6.86(1)(a), (ac), (ar), (b), 6.86(2m). Furthermore, § 6.86(2m) provides that "The application form and instructions shall be prescribed by the commission" Here, the statutes do not provide a form application; the statutes do not define what is required on an application, but simply that it be written. Form EL 122 was employed here to apply for a ballot in-person.

¶92 Form EL 122 requires the applicant for an absentee ballot to provide the applicant's name, street address, city, and zip code. It also asks for the date of the election for which the application is being made and the county and municipality in which the applicant votes. The substantive information that the application requests is substantially similar to form EL 121, which is titled "Wisconsin Application for Absentee Ballot." Each of these application forms requires writing prior to being submitted by electors in advance of an elector receiving an absentee ballot.⁸

E. Indefinitely Confined

⁸ This order of operations was confirmed in several affidavits. The affiants asserted that before they received their ballots the clerk's office verified their photo identification and voter registration. The electors were then given an EL-122 envelope and instructed to complete it. Once the application was completed, the voters received their ballots.

¶93 Wisconsin Stat. § 6.86(2)(a) provides a manner by which some electors may obtain an absentee ballot outside of the mode outlined above. Those who are "indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period" may apply for an absentee ballot on that basis. Id. Those electors are then excused from the absentee ballot photo identification requirement. Wis. Stat. § 6.87(4)(b)1.

¶94 The Petitioners contend that all votes cast by electors claiming indefinitely confined status after March 25, 2020 (the date of McDonell's Facebook post)⁹ are invalid. However, we have discussed the indefinitely confined status in Jefferson v. Dane Cnty., 2020 WI 90, ___ Wis. 2d ___, ___ N.W.2d ___, which is released today, December 14, 2020.

¶95 In the pending matter, we do not have sufficient information about the 28,395 absentee voters who claimed this status in Milwaukee and Dane counties to determine whether they lawfully asserted that they were indefinitely confined prior to receiving an absentee ballot. Therefore, I go no further in addressing this contention.

F. Democracy in the Park

¶96 On September 26, 2020 and October 3, 2020, at more than 200 City of Madison parks,¹⁰ the City of Madison held events called, "Democracy in the Park." During those events, poll workers, also

⁹ On March 25, 2020, Dane County Clerk, Scott McDonell, stated on Facebook that community members are encouraged to claim indefinitely confined status due to COVID-19 and Governor Evers' then-active Emergency Order #12.

¹⁰ Affidavit of Maribeth Witzel-Behl, Madison City Clerk.

referred to as "election inspectors," helped in the completion of ballot envelopes, acted as witnesses for voters and collected completed ballots.¹¹ 17,271 absentee ballots were voted and delivered to these poll workers.¹²

¶97 The poll workers who staffed Democracy in the Park were volunteers. They were not employees of the City of Madison Clerk's office.

¶98 Wisconsin Stat. § 6.87(4)(b)1. requires that when voting an absentee ballot "[t]he envelope [containing the ballot] shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." In addition, the plain words of Wis. Stat. § 6.84(2) specifically direct that the provisions of § 6.87(4)(b)1. "shall be construed as mandatory." Notwithstanding the use of "shall" in § 6.87(4)(b)1. and the "mandatory" requirement to comply with the terms of § 6.87(4)(b)1. in § 6.84(2), the 17,271 ballots that were collected in Madison parks did not comply with the statutes. Stated otherwise, they were not "delivered in person, to the municipal clerk."

¶99 It is conceivable that the 200 sites for Democracy in the Park could have become alternate absentee ballot sites. If the Madison Common Council had chosen to designate a site other than the municipal clerk's office as the location from which voters could request and to which they could return absentee ballots, an alternate absentee ballot site could have been established. Wis. Stat. § 6.855(1). The statute also provides that the governing

¹¹ Id.

¹² Id.

body of a municipality may designate more than one alternate site.
§ 6.855(5).¹³

¶100 However, if Democracy in the Park were held to be 200 alternate absentee ballot sites, then "no function related to voting and return of absentee ballots. . . . may be conducted in the office of the municipal clerk." Wis. Stat. § 6.855(1). This requirement does not fit the facts because the Madison clerk's office continued to provide and accept return of absentee ballots. Therefore, these 200 park events do not meet the statutory criteria set out in § 6.855 for alternate absentee ballot sites.

¶101 One wonders, what were they? It is contended that they were "human drop boxes." That gives little comfort because drop boxes are not found anywhere in the absentee voting statutes. Drop boxes are nothing more than another creation of WEC to get around the requirements of Wis. Stat. § 6.87(4)(b)1. The plain, unambiguous words of § 6.87(4)(b)1. require that voted ballots "shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Drop boxes do not meet the legislature's mandatory directive.

¶102 However, because drop boxes are not separately identified as a source of illegal voting in this lawsuit, I will not dwell on the accountability problems they create, but I do not doubt that challenges to drop boxes in general and in specific instances will be seen as problems in future elections. Therefore,

¹³ However, 200 alternate sites does seem a bit much.

we may have the opportunity to examine them in a case arising from a subsequent election.¹⁴

¶103 It is also Respondent's contention that the poll workers who staffed these events were agents¹⁵ of the city clerk; and therefore, delivery of ballots to them was personal delivery to the clerk within the meaning of Wis. Stat. § 6.87(4)(b)1. This is an amazing contention. Without question, delivery to voluntary poll workers is not "delivered in person to the municipal clerk," as § 6.87(4)(b)1. requires.

¶104 The legislature prescribed the absentee voting procedure in Wis. Stat. § 6.87(4)(b)1. and commanded that those procedures are "mandatory" in Wis. Stat. § 6.84(2). Gatherings in 200 city parks did not meet the statutory requirements for lawful absentee voting. They also lack the safety and solemnity that are attached to personally delivering absentee ballots to the municipal clerk.

III. CONCLUSION

¶105 The Milwaukee County Board of Canvassers and the Dane County Board of Canvassers based their decisions on erroneous advice when they concluded that changes clerks made to defective witness addresses were permissible. And, the Dane County Board of

¹⁴ We had the opportunity to examine the use of drop boxes in Mueller v. Jacobs, 2020AP1958-OA, but the court refused to grant review, from which decision Annette Kingsland Ziegler, J., Rebecca Grassl Bradley, J. and I dissented.

¹⁵ I would be amazed if the City of Madison agreed that all the volunteer poll workers who staffed Democracy in the Park were legally agents of the city clerk given the exposure to liability such a determination would bring. Lang v. Lions Club of Cudahy Wis., Inc., 2020 WI 25, ¶25, 390 Wis. 2d 627, 939 N.W.2d 582 (lead opinion).

Canvassers erred again when it approved the 200 locations for ballot collection that comprised Democracy in the Park. The majority does not bother addressing what the boards of canvassers did or should have done, and instead, four members of this court throw the cloak of laches over numerous problems that will be repeated again and again, until this court has the courage to correct them. The electorate expects more of us, and we are capable of providing it. Because we do not, I respectfully dissent.

¶106 I am authorized to state that Justices ANNETTE KINGSLAND ZIEGLER, and REBECCA GRASSL BRADLEY join this dissent.

¶107 ANNETTE KINGSLAND ZIEGLER, J. (*dissenting*). We are called upon to declare what the law is. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Once again, in an all too familiar pattern, four members of this court abdicate their responsibility to do so. They refuse to even consider the uniquely Wisconsin, serious legal issues presented. The issues presented in this case, unlike those in other cases around the United States, are based on Wisconsin statutory election law. Make no mistake, the majority opinion fails to even mention, let alone analyze, the pertinent Wisconsin statutes. Passing reference to other states' decisionmaking is of little relevance given the Wisconsin legal issues at stake. See Roggensack, C.J., dissent, supra; Rebecca Grassl Bradley, J., dissent, infra. The people of Wisconsin deserve an answer—if not for this election, then at least to protect the integrity of elections in the future. Instead of providing clarity, the majority opinion is, once again, dismissive of the pressing legal issues presented.

¶108 The majority author's concurrence is even more dismissive of the need for clarity in Wisconsin election law stating that he "understand[s] the desire for at least some clarity regarding the underlying election administration issues . . . [but] its just not possible." Hagedorn, J., concurrence, ¶36. Indeed, we are presented with a rare opportunity to meaningfully engage in, among other things, a known conflict between guidance, given by an unelected committee, and what the law requires. These are more than mere "election administration

issues." See Rebecca Grassl Bradley, J., dissent, infra. This case presents not just a "desire" for clarity in the law, our constitutional duty requires us to declare what the law is. Quite obviously, defaulting to laches and claiming that it is "just not possible," is directly contradicted by the majority author's own undertaking. If it is important enough to address in his concurrence, then it should also satisfy the discretionary standard which overcomes the application of laches. Instead of undertaking the duty to decide novel legal issues presented, this court shirks its institutional responsibility to the public and instead falls back on a self-prescribed, previously unknown standard it calls laches.

¶109 Stated differently, the majority claims the petitioners were too late, should have acted earlier and therefore, the court is neutered from being able to declare what the law is. The majority basically reiterates respondents' soundbites. In so doing, the majority seems to create a new bright-line rule that the candidates and voters are without recourse and without any notice should the court decide to later conjure up an artificial deadline concluding that it prefers that something would have been done earlier. That has never been the law, and it should not be today. It is a game of "gotcha." I respectfully dissent, because I would decide the issues presented and declare what the law is.

I. ABDICATION OF CONSTITUTIONAL DUTY

¶110 Unfortunately, our court's adoption of laches as a means to avoid judicial decisionmaking has become a pattern of conduct. A majority of this court decided not to address the issues in this

case, when originally presented to us by way of an original action. Trump v. Evers, No. 2020AP1971-OA, unpublished order (Wis. Dec. 3, 2020). In concluding that it is again paralyzed from engaging in pertinent legal analysis, our court unfortunately provides no answer or even any analysis of the relevant statutes, in the most important election issues of our time. See Hawkins v. Wisconsin Elections Comm'n, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877; Trump v. Evers, No. 2020AP1971-OA (Rebecca Grassl Bradley, J., dissenting); Mueller v. Jacobs, No. 2020AP1958-OA, unpublished order (Wis. Dec. 3, 2020) (Roggensack, C.J., Ziegler, and Rebecca Grassl Bradley, JJ. dissenting); Wis. Voters Alliance v. Wisconsin Elections Comm'n, No. 2020AP1930-OA, unpublished order (Wis. Dec. 4, 2020) (Roggensack, C.J., dissenting).

¶111 Instead, the majority relies on what only can be viewed as a result-oriented application of the equitable doctrine of laches to avoid declaring what the law is. To be clear, I am not interested in a particular outcome. I am interested in the court fulfilling its constitutional responsibility. While sometimes it may be difficult to undertake analysis of hot-button legal issues—as a good number of people will be upset no matter what this court does—it is our constitutional duty. We cannot hide from our obligation under the guise of laches. I conclude that the rule of law and the equities demand that we answer these questions for not only this election, but for elections to come. I have concern over this court's pattern of indecision because that leaves no court declaring what Wisconsin election law is. See Roggensack, C.J., dissent, supra; Rebecca Grassl Bradley, J.,

dissent, infra. We can and should do better for the people of Wisconsin and for the nation, which depends on Wisconsin following its election laws.

¶112 Regarding this court's continued pattern of abdicating its responsibility concerning election issues, earlier this term in Hawkins, the same members of the court relied on laches, without any analysis whatsoever of that doctrine, and denied a rightful candidate the opportunity to be placed on the ballot as a presidential candidate. Thus, the court likewise denied the voters the opportunity to choose that candidate's name amongst the others on the ballot. See Hawkins, 393 Wis. 2d 629 (Ziegler, J., dissenting).¹ The court in Hawkins, about two months before the November election, declared that it was unable to act, citing the doctrine of laches, and applied a newly invented and previously unknown, self-imposed, result-oriented, laches-based deadline as an excuse for inaction. Id.

II. LACHES DOES NOT AND SHOULD NOT BAR THIS CASE

¶113 Once again, the majority imposes its definition of laches, which is tailored to its judicial preference rather than based on well-established legal principles. The majority must know that under this court's previous laches jurisprudence, it

¹ In 2016, the Green Party candidates received 31,072 votes. See Certificate of Ascertainment for President, Vice President and Presidential Electors General Election - November 8, 2016, available at <https://www.archives.gov/files/electoral-college/2016/ascertainment-wisconsin.pdf>. In 2020, the Green Party candidates received only 1,089 votes. See WEC Canvass Results for 2020 General Election, available at <https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf>.

should nonetheless address the merits of the issues. As this court has consistently held, "[l]aches is an affirmative, equitable defense designed to bar relief when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim." Wisconsin Small Bus. United, Inc. v. Brennan, 2020 WI 69, ¶11, 393 Wis. 2d 308, 946 N.W.2d 101. In Wisconsin, a defendant must prove three elements for laches to bar a claim: "(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay." Id., ¶12. Even if respondents carry their burden of proving all three elements of laches, "application of laches is left to the sound discretion of the court asked to apply this equitable bar." Id.

¶114 The petitioners raised four allegations regarding election administration: Absentee ballots lacking a separate application; absentee envelopes that are missing or have a defective witness address; indefinitely confined voters/faulty advice from election officials; and ballots cast at Madison's Democracy in the Park/ballot drop boxes. The respondents cannot demonstrate that laches bars a single one of these claims, and, even if they could, the court could still and should exercise its discretion to hear these issues.

A. No Unreasonable Delay

¶115 The first element of a laches defense requires the respondents to prove the petitioners unreasonably delayed in making their allegations. "What constitutes a reasonable time

will vary and depends on the facts of a particular case." Wisconsin Small Bus. United, 393 Wis. 2d 308, ¶14.

¶116 Convenient to its purpose, the majority frames this case to meet its preferred outcome. The majority characterizes this suit as a challenge to general election policies rather than what it is: this lawsuit is a challenge to specific ballots that were cast in this election, contrary to the law. The majority states, "[t]he time to challenge election policies such as these is not after all ballots in the election have been cast and the votes tallied." Majority op., ¶22. According to the majority, "[s]uch delay in light of these specific challenges is unreasonable." Id. The majority misses the mark.

¶117 In other words, contrary to the majority's characterizations, this case is not about general election procedure: it is about challenging specific ballots. In Wisconsin, while voting is a right, absentee voting is a privilege, not a right. Wis. Stat. § 6.84(1). The Wisconsin Legislature has created a set of mandatory rules to which the voters must adhere for their absentee ballots to count.² Consistent with express mandatory rules, the petitioners allege that certain ballots were cast that did not adhere to the law and, therefore, should not be counted. It is a specific question: Were the ballots cast

² See Wis. Stat. § 6.84(2) ("Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.").

according to the law as stated in the statutes and if not, what, if any, remedy, exists?

¶118 With this proper framing of the issue, it is clear that the petitioners did not unreasonably delay in challenging the ballots. To somehow require that challenges must be made and legal relief given before an election, before the ballots are cast and before a recount is absurd. No recount would ever amount to relief if that is the lodestar.

¶119 Thus, the petitioners did not unreasonably delay in filing this suit, and this element of laches has not been demonstrated as to any of the four allegations of election irregularity.

B. Respondents Knew Ballots Would Be Challenged.

¶120 The second element of laches addresses the knowledge of the party asserting laches. See Wis. Small Bus. United, 393 Wis. 2d 308, ¶18. If the party lacks knowledge of claim, the respondents have satisfied this element. Id. The majority summarily accepts, without any analysis, that "[t]he respondents all . . . were unaware that the Campaign would challenge various election procedures after the election" Majority op., ¶23. Virtually nothing is in the record to support this assertion other than the parties' statements. In other words, the majority accepts one side's statements as fact in order to disallow the other side its day in court.

¶121 As explained above, this is a challenge to the ballots cast in this election. The President tweeted numerous times shortly after Wisconsin announced the election results that he

would challenge the results and prove certain ballots were impermissibly cast.³ The majority chose to accept the respondents' assertion that they did not see this lawsuit coming despite the record to the contrary.

¶122 Moreover, the majority is incorrect that "nothing in the record suggests" that the respondents knew what the petitioners would be challenging. Majority op., ¶23. In fact, Wisconsin law mandates that the petitioners expressly declare on what grounds they plan to challenge the ballots in a recount. Wis. Stat. § 9.01(1). In the petitioners' recount petition, the petitioners specifically laid out these claims.

¶123 Thus, the majority's conclusion with respect to this element is particularly lean given the record. It is at least more than plausible that respondents had knowledge that the petitioners would challenge the ballots in a lawsuit.

C. Respondents Lack Prejudice.

¶124 Even if the respondents could prove the first two elements, the respondents themselves are not prejudiced by this delay. "What amounts to prejudice . . . depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position." Wis. Small Bus. United, 393 Wis. 2d 308, ¶19. The party seeking to apply laches must "prove that the unreasonable delay" prejudiced the party, not a third party. State ex rel. Wren v. Richardson, 2019 WI 110, ¶32, 389 Wis. 2d 516, 936 N.W.2d 587. This court

³ See, e.g., Donald J. Trump (@realDonaldTrump), Twitter (Nov. 28, 2020, 2:00 p.m.), <https://twitter.com/realDonaldTrump/status/1332776310196883461>

recognizes two different types of prejudice: evidentiary and economic. Id., ¶33. Evidentiary prejudice is where "the defendant is impaired from successfully defending itself from suit given the passage of time." Id., ¶33 n.26. Economic prejudice occurs when "the costs to the defendant have significantly increased due to the delay." Id.

¶125 The majority abandons these principles of laches and instead focuses on the prejudice to third parties. The majority states that "[t]o strike ballots cast in reliance on the guidance now, and to do so in only in two counties, would violate every notion of equity that undergirds our electoral system." Majority op., ¶25. This is a new manner in which to approach the legal analysis of prejudice. The majority does not explain how this potential remedy prevents us from hearing the merits of this case. The majority does not explain how these notions are either evidentiary or economic prejudice, nor does it consider how it prejudices the actual parties in this case. It is unusual to conclude that overwhelming prejudice exists such that the court is paralyzed from considering whether the law was followed. In other words, the majority seems to be saying that they do not wish to grant relief and therefore they will not analyze the law. This remedy-focused analysis is not typical to laches.

¶126 Neither type of prejudice applies to the respondents in this case. None of the respondents claimed that they were unable to successfully defend themselves. All respondents filed briefs in this court addressing the merits. The circuit court's opinion addresses the merits. Accordingly, evidentiary prejudice does not

apply. Furthermore, no respondents have claimed that the costs of defending this claim have "significantly increased due to the delay." Accordingly, economic prejudice does not apply.

¶127 At a more fundamental level, the respondents must prove each of the elements. The court cannot presume that the elements are met. Similarly, the court cannot assume that a party cannot successfully defend itself nor that a party faces "significantly increased" costs. To do so forces this court to step out of our role as a neutral arbiter. See Service Emp. Int'l Union, Loc. 1 v. Vos, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d.

¶128 Therefore, the respondents cannot prove and did not even allege that they are prejudiced. Accordingly, the majority determination in this regard is flawed.

D. Equitable Discretion

¶129 Even if the majority was correct that the elements of laches are met here, it still has the discretion to reach the merits. See Wis. Small Bus. United, 393 Wis. 2d 308, ¶12. The majority claims that the "only just resolution of these claims" is to use laches to not address the merits of this case. Majority op., ¶29. Not so. Our constitutional responsibility is to analyze the law and determine if it was followed regardless of whether any remedy might be available. In this way future elections benefit from our analysis. Curiously, it is unclear whether there is an actual majority given the fact that the writer does exercise his discretion to address the issues—again, a lack of clarity.

¶130 This court should address the merits because we should declare what the law is. The public has serious concerns about

the election and about our election laws. Recent polls suggest that the American public, regardless of party affiliation, has serious questions about the integrity of the November 2020 election.⁴ Our court has an opportunity to analyze the law and answer the public's concerns, but it unfortunately declines this opportunity for clarification.

¶131 The majority should declare what the law is. Every single voter in this state is harmed when a vote is cast in

⁴ See Rasmussen Reports, 61% Think Trump Should Concede to Biden (Nov. 19, 2020) https://www.rasmussenreports.com/public_content/politics/elections/election_2020/61_think_trump_should_concede_to_biden (finding 47% of those who polled believe that Democrats stole votes or destroy pro-Trump ballots in several states to ensure that Biden would win); Politico, National Tracking Poll, Project 201133 (Nov. 6-9, 2020), <https://www.politico.com/f/?id=00000175-b306-d1da-a775-bb6691050000> (finding 34% of those polled believed the election was not free and fair); Jill Darling et al., USC Dornsife Daybreak Poll Topline at 14 (Nov. 19, 2020), Post-Election Poll UAS318, <https://dornsife-center-for-political-future.usc.edu/past-polls-collection/2020-polling/> (finding that those polled are only 58% confident that all votes in the election were accurately counted); R. Michael Alvarez, et al., Voter Confidence in the 2020 Presidential Election: Nationwide Survey Results (Nov. 19, 2020), The Caltech/MIT Voting Technology Project Monitoring the Election, 2020 Presidential Election Survey Reports & Briefs, <https://monitoringtheelection.us/2020-survey> (finding 39% of those polled are not confident that votes nationally were counted as the voter intended); Yimeng Li, Perceptions of Election or Voter Fraud in the 2020 Presidential Election: Nationwide Survey Results (Nov. 23, 2020), The Caltech/MIT Voting Technology Project Monitoring the Election, 2020 Presidential Election Survey Reports & Briefs, <https://monitoringtheelection.us/2020-survey> (finding between 29% and 34% of those polled believe voter fraud occurs); Sharp Divisions on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct, Pew Research Center, U.S. Politics & Policy (Nov. 20, 2020), <https://www.pewresearch.org/politics/2020/11/20/sharp-divisions-on-vote-counts-as-biden-gets-high-marks-for-his-post-election-conduct/> (finding that 41% of those polled believe the elections were run and administered not well).

contravention of the statutes. See Wis. Stat. § 6.84(1). This court should conduct a rigorous analysis, and determine whether the law was followed.

¶132 To counter these clear equities counseling us to reach the merits, the majority nonetheless seemingly declines the opportunity in favor of a self-divined rule which would make it nearly impossible to know when and how such a claim could be made. The majority asserts that "[f]ailure to [raise these claims earlier] affects everyone, causing needless litigation and undermining confidence in the election results. It also puts courts in a difficult spot. Interpreting complicated election statutes in days is not consistent with best judicial practices." Majority op., ¶30. A claim post-recount is always going to be tight on timing.

¶133 Under the majority's new rule, a candidate will have to monitor all election-related guidance, actions, and decisions of not only the Wisconsin Elections Commission, but of the 1,850 municipal clerks who administer the election at the local level. And that is just in one state! Instead of persuading the people of Wisconsin through campaigning, the candidate must expend precious resources monitoring, challenging, and litigating any potential election-related issue hoping that a court might act on an issue that may very well not be ripe. Moreover, it would be nonsensical for a candidate, or worse, a disenfranchised voter, to challenge an election law. Thus, the majority's new rule does not prevent "needless litigation"; it spawns it in the form of preventative lawsuits to address any possible infraction of our

election laws. We have the opportunity to answer important legal questions now and should do so.

¶134 Similarly, the majority claims by not analyzing the law it is bolstering public confidence. I disagree. As explained, the American public has serious questions about the previous election. See supra, ¶23 n.4. Instead of addressing these serious questions, the majority balks and says some other party can bring a suit at a later date. See majority op., ¶31 n.11. Lawsuits are expensive and time-consuming and require that the person bringing one has a claim. These issues are presented here before us today. If they are important enough to answer at a later date, they are important to answer in this pending lawsuit today. Addressing the merits of this case would bolster confidence in this election and future elections. Even if the court does not conclude that relief should be granted, this lawsuit is the opportunity to declare what the law is—which is our constitutional duty—and will help the public have confidence in the election that just occurred and confidence in future elections. An opinion of this court on the merits would prevent any illegal or impermissible actions of election officials going forward. See Roggensack, C.J., dissent, supra; Rebecca Grassl Bradley, J., dissent, infra. Accordingly, I fail to see how addressing the merits in this case would undermine confidence in the election results. If anything, addressing the merits will reassure the people of Wisconsin and our nation that our elections comport with the law and to the extent that the legislature might need to act, it is clear where

the law might be that needs correction. The court's indecision creates less, not more clarity.

¶135 The majority's decision not to address the merits suffers from an even more insidious flaw—it places the will of this court and the will of the Wisconsin Elections Commission above the express intent of the legislature. The majority uses the potential remedy, striking votes, as an equitable reason to deny this case. Majority op., ¶31. But the majority ignores that the legislature specifically set forth a remedy that absentee ballots cast in contravention of the statute not be counted. See Wis. Stat. § 6.84(2). When the law is not followed, the counting of illegal ballots effectively disenfranchises voters. This past election, absentee voting was at an extraordinarily high level.⁵ Perhaps this is why it mattered more now than ever that the law be followed. Also this might explain why the process has not been objected to before in the form of a lawsuit like this one. The majority gives virtually no consideration to this fact.

¶136 Despite the fact that the majority relies on laches to not declare the law in nearly all respects of the challenges raised, it nonetheless segregates out the indefinitely confined voter claim to analyze. Notably absent is any explanation why this claim is not treated like the other challenges.

¶137 Therefore, the majority's application of laches here is unfortunate and doomed to create chaos, uncertainty, undermine confidence and spawn needless litigation. Instead of declaring

⁵ In 2016, 830,763 electors voted using absentee ballots. In 2020, 1,957,514 electors voted using absentee ballots.

what the law is, the majority is legislating its preferred policy. It disenfranchises those that followed the law in favor of those who acted in contravention to it. This is not the rule of law; it is the rule of judicial activism through inaction.

III. CONCLUSION

¶138 As I would not apply laches in the case at issue and instead would analyze the statutes and available remedies as well as the actions of the Wisconsin Elections Commission, I respectfully dissent.

¶139 I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice REBECCA GRASSL BRADLEY join this dissent.

¶140 REBECCA GRASSL BRADLEY, J. (*dissenting*). Once again, the majority of the Wisconsin Supreme Court wields the discretionary doctrine of laches as a mechanism to avoid answering questions of law the people of Wisconsin elected us to decide. Although nothing in the law compels its application, this majority routinely hides behind laches in election law cases no matter when a party asserts its claims. Whether election officials complied with Wisconsin law in administering the November 3, 2020 election is of fundamental importance to the voters, who should be able to rely on the advice they are given when casting their ballots. Rather than fulfilling its duty to say what the law is, a majority of this court unconstitutionally converts the Wisconsin Elections Commission's mere advice into governing "law," thereby supplanting the actual election laws enacted by the people's elected representatives in the legislature and defying the will of Wisconsin's citizens. When the state's highest court refuses to uphold the law, and stands by while an unelected body of six commissioners rewrites it, our system of representative government is subverted.

I

¶141 In Wisconsin, we have a constitution, and it reigns supreme in this state. "By section 1 of article 4 the power of the state to deal with elections except as limited by the Constitution is vested in the senate and assembly to be exercised under the provisions of the Constitution; therefore the power to prescribe the manner of conducting elections is clearly within the province of the Legislature." *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 906 (1930) (emphasis added). The Wisconsin Elections

Commission (WEC) possesses no authority to prescribe the manner of conducting elections; rather, this legislatively-created body is supposed to administer and enforce Wisconsin's election laws. Wis. Stat. §§ 5.05(1) and (2m). While WEC may not create any law, it may "[p]romulgate rules under ch. 227 . . . for the purpose of interpreting or implementing the laws regulating the conduct of elections" Wis. Stat. § 5.05(1)(f) (emphasis added). It is undisputed that the advice rendered by WEC was not promulgated by rule but took the form of guidance. "A guidance document does not have the force of law." Wis. Stat. § 227.112(3). WEC's guidance documents are merely "communications about the law—they are not the law itself." Serv. Employees Int'l Union, Local 1 v. Vos, 2020 WI 67, ¶102, 393 Wis. 2d 38, 946 N.W.2d 35. The majority casts aside this black letter law, choosing to apply the majority's subjective concept of "equity" in order to reach the outcome it desires.¹ In doing so, the majority commits grave error by according WEC guidance the force of law.

¶142 Chapters 5 through 12 of the Wisconsin Statutes contain the state's enacted election laws. Section 5.01(1) states that "[e]xcept as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." This

¹ During oral arguments in this case, Justice Jill J. Karofsky made the following statement (among others) to the President's attorney: "You want us to overturn this election so that your king can stay in power, and that is so un-American." When a justice displays such overt political bias, the public's confidence in the integrity and impartiality of the judiciary is destroyed.

substantial compliance provision does not apply to absentee balloting procedures, however: "Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election." Wis. Stat. § 6.84(2) (emphasis added).

¶143 "Section 6.84(2)'s strict construction requirement, applicable to statutes relating to the absentee ballot process, is consistent with the guarded attitude with which the legislature views that process." Lee v. Paulson, 2001 WI App 19, ¶¶7-8, 241 Wis. 2d 38, 623 N.W.2d 577. The legislature expressed its "guarded attitude" toward absentee balloting in no uncertain terms, drawing a sharp distinction between ballots cast in person versus those cast absentee: "The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses." Wis. Stat. § 6.84(1) (emphasis added). While the ascertainable will of the election-

day voter may prevail over a "failure to fully comply" with "some of" the provisions governing conventional voting (§ 5.01), any "[b]allots cast in contravention of" the law's absentee balloting procedures "may not be counted." Wis. Stat. § 6.84(2). This court has long recognized that in applying Wisconsin's election laws, "an act done in violation of a mandatory provision is void." Sommerfeld v. Bd. of Canvassers of City of St. Francis, 269 Wis. 299, 303, 69 N.W.2d 235 (1955) (emphasis added) (citation omitted).

¶144 In order "to prevent the potential for fraud or abuse" associated with absentee voting, the legislature requires the laws governing the absentee balloting process to be followed. Wis. Stat. § 6.84(1). If an absentee ballot is cast "in contravention" of the absentee balloting procedures, it "may not be counted." Wis. Stat. § 6.84(2). If an absentee ballot is counted "in contravention" of the absentee balloting procedures, it "may not be included in the certified result of any election." Id. Long ago, this court understood that "we are obliged to conclude that if absentee ballots are improperly delivered in contravention of [Wisconsin's statutes], the Board of Canvassers is under duty to invalidate and not include such ballots in the total count, whether they are challenged at the election, or not." Olson v. Lindberg, 2 Wis. 2d 229, 238, 85 N.W.2d 775 (1957) (emphasis added). Accordingly, if absentee ballots were counted in contravention of the law, the people of Wisconsin, through their elected representatives, have commanded the board(s) of canvassers to exclude those absentee ballots from the total count, independent of any legal challenge an aggrieved candidate may (or may not) bring.

¶145 The majority carelessly accuses the President of asking this court to "disenfranchise" voters. Majority op., ¶27; Justices Rebecca Frank Dallet's and Jill J. Karofsky's concurrence, ¶33. In the election context, "disenfranchise" means to deny a voter the right to vote.² Under Article III, Section 1 of the Wisconsin Constitution, "[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." This court possesses no authority to remove any qualified elector's constitutionally-protected right to vote. But it is not "disenfranchisement" to uphold the law. "It is true that the right of a qualified elector to cast his ballot for the person of his choice cannot be destroyed or substantially impaired. However, the legislature has the constitutional power to say how, when and where his ballot shall be cast" State ex rel. Frederick v. Zimmerman, 254 Wis. 600, 613, 37 N.W.2d 472, 37 N.W.2d 473, 480 (1949). And the judiciary has the constitutional responsibility to say whether a ballot was cast in accordance with the law prescribed by the people's representatives.

¶146 Each of the President's legal claims challenge the counting of certain absentee ballots, which the President argues were cast in contravention of the Wisconsin Statutes. The majority misconstrues Wisconsin law in asserting that "[t]hese issues could have been brought weeks, months, or even years earlier." Majority op., ¶30. Section 9.01(11) of the Wisconsin Statutes provides

² Disenfranchise: "To deprive (someone) of a right, esp. the right to vote; to prevent (a person or group of people) from having the right to vote. – Also termed disfranchise." Disenfranchise, Black's Law Dictionary (11th ed. 2019).

that "[t]his section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process." Only a "candidate voted for at any election who is an aggrieved party" may bring an action under Chapter 9. Wis. Stat. § 9.01(1)(a). Surely the majority understands the absurdity of suggesting that the President should have filed a lawsuit in 2016 or anytime thereafter. Why would he? He was not "an aggrieved party"—he won. Obviously, the President could not have challenged any "irregularity, defect or mistake committed during the voting or canvassing process" related to the November 3, 2020 election until that election occurred.

¶147 The respondents recognize that under Chapter 9, the "purpose of a recount . . . is to ensure that the voters, clerks and boards of canvassers followed the rules in place at the time of the election." Misunderstanding what the governing rules actually are, the respondents argue that having this court declare the law at this point would "retroactively change the rules" after the election. Justice Brian Hagedorn embraces this argument, using a misapplied football metaphor that betrays the majority's contempt for the law: "the [President's] campaign is challenging the rulebook adopted before the season began." Majority op., ¶32. Justices Rebecca Frank Dallet and Jill J. Karofsky endorse the idea that this court should genuflect before "the rules that were in place at the time." Justices Dallet's and Karofsky's concurrence, ¶34. How astonishing that four justices of the Wisconsin Supreme Court must be reminded that it is THE LAW that constitutes "the rulebook" for any election—not WEC guidance—

and election officials are bound to follow the law, if we are to be governed by the rule of law, and not of men.

¶148 As the foundation for one of the President's claims, Wis. Stat. § 6.87(6d) provides that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." The only statutorily-prescribed means to correct that error is for the clerk to "return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized." Wis. Stat. § 6.87(9). Contrary to Wisconsin law, WEC guidance says "the clerk should attempt to resolve any missing witness address information prior to Election Day if possible, and this can be done through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness)."³ WEC's "Election Administration Manual for Wisconsin Municipal Clerks" erroneously provides that "[c]lerks may add a missing witness address using whatever means are available. Clerks should initial next to the added witness address."⁴ Nothing in the election law statutes permits a clerk to alter witness address information. WEC's guidance in this regard does not administer or enforce the law; it flouts it.

³ Memorandum from Meagan Wolfe to Wisconsin County and Municipal Clerks (Oct. 19, 2020), at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Spoiling%20Ballot%20Memo%2010.2020.pdf>.

⁴ Wisconsin Elections Commission, Election Administration Manual for Wisconsin Municipal Clerks (Sept. 2020), at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Election%20Administration%20Manual%20%282020-09%29.pdf>.

II

¶149 Under the Wisconsin Constitution, "all governmental power derives 'from the consent of the governed' and government officials may act only within the confines of the authority the people give them. Wis. Const. art. I, § 1." Wis. Legislature v. Palm, 2020 WI 42, ¶66, 391 Wis. 2d 497, 942 N.W.2d 900 (Rebecca Grassl Bradley, J., concurring). The confines of the authority statutorily conferred on the WEC limit its function to administering and enforcing the law, not making it. The Founders designed our "republic to be a government of laws, and not of men . . . bound by fixed laws, which the people have a voice in making, and a right to defend." John Adams, Novanglus: A History of the Dispute with America, from Its Origin, in 1754, to the Present Time, in Revolutionary Writings of John Adams (C. Bradley Thompson ed. 2000) (emphasis in original). Allowing any person, or unelected commission of six, to be "bound by no law or limitation but his own will" defies the will of the people. Id.

¶150 The judiciary is constitutionally compelled to safeguard the will of the people by interpreting and applying the laws duly enacted by the people's representatives in the legislature. "A democratic state must therefore have the power to . . . prevent all those practices which tend to subvert the electorate and substitute for a government of the people, by the people and for the people, a government guided in the interest of those who seek to pervert it." State v. Kohler, 200 Wis. 518, 228 N.W. 895, 905 (1930). The majority's abdication of its judicial duty to apply the election laws of this state rather than the WEC's "rulebook"

precludes any legislative recourse short of abolishing the WEC altogether.

¶151 While some will either commend or condemn the court's decision in this case based upon its impact on their preferred candidate, the importance of this case transcends the results of this particular election. "A correct solution of the questions presented is of far greater importance than the personal or political fortunes of any candidate, incumbent, group, faction or party. We are dealing here with laws which operate in the political field—a field from which courts are inclined to hold aloof—a field with respect to which the power of the Legislature is primary and is limited only by the Constitution itself." Id. The majority's decision fails to recognize the primacy of the legislative power to prescribe the rules governing the privilege of absentee voting. Instead, the majority empowers the WEC to continue creating "the rulebook" for elections, in derogation of enacted law.

¶152 "The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards." State v. Conness, 106 Wis. 425, 82 N.W. 288, 289 (1900). Instead of determining whether the November 3, 2020 election was conducted in accordance with the legal standards governing it, the majority denies the citizens of Wisconsin any judicial scrutiny of the election whatsoever. "Elections are the foundation of American government and their integrity is of such monumental importance that any threat to their validity should trigger not only our

concern but our prompt action." State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)). The majority instead belittles the President's claims of law violations as merely "technical issues that arise in the administration of every election." Majority op., ¶31. The people of Wisconsin deserve a court that respects the laws that govern us, rather than treating them with such indifference.

¶153 "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). The majority takes a pass on resolving the important questions presented by the petitioners in this case, thereby undermining the public's confidence in the integrity of Wisconsin's electoral processes not only during this election, but in every future election. Alarming, the court's inaction also signals to the WEC that it may continue to administer elections in whatever manner it chooses, knowing that the court has repeatedly declined to scrutinize its conduct. Regardless of whether WEC's actions affect election outcomes, the integrity of every election will be tarnished by the public's mistrust until the Wisconsin Supreme Court accepts its responsibility to declare what the election laws say. "Only . . . the supreme court can provide the necessary clarity to guide all election officials in this state on how to conform their procedures to the law" going forward. State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)).

¶154 This case represents only the majority's latest evasion of a substantive decision on an election law controversy.⁵ While the United States Supreme Court has recognized that "a state indisputably has a compelling interest in preserving the integrity of its election process[,]" Burson v. Freeman, 504 U.S. 191, 199 (1992), the majority of this court repeatedly demonstrates a lack of any interest in doing so, offering purely discretionary excuses like laches, or no reasoning at all. This year, the majority in Hawkins v. WEC declined to hear a claim that the WEC unlawfully kept the Green Party's candidates for President and Vice President off of the ballot, ostensibly because the majority felt the candidates' claims were brought "too late."⁶ But when litigants have filed cases involving voting rights well in advance of Wisconsin elections, the court has "take[n] a pass" on those as well, thereby unflinchingly and "irreparably den[ying] the citizens of Wisconsin a timely resolution of issues that impact voter rights and the integrity of our elections." State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13,

⁵ Hawkins v. WEC, 2020 WI 75, ¶¶84, 86, 393 Wis. 2d 629, 948 N.W.2d 877 (Rebecca Grassl Bradley, J., dissenting) ("The majority upholds the Wisconsin Elections Commission's violation of Wisconsin law, which irrefutably entitles Howie Hawkins and Angela Walker to appear on Wisconsin's November 2020 general election ballot as candidates for President and Vice President of the United States In dodging its responsibility to uphold the rule of law, the majority ratifies a grave threat to our republic, suppresses the votes of Wisconsin citizens, irreparably impairs the integrity of Wisconsin's elections, and undermines the confidence of American citizens in the outcome of a presidential election.").

⁶ Hawkins v. Wis. Elec. Comm'n, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (denying the petition for leave to commence an original action).

2020 (Rebecca Grassl Bradley, J., dissenting)). Having neglected to identify any principles guiding its decisions, the majority leaves Wisconsin's voters and candidates guessing as to when, exactly, they should file their cases in order for the majority to deem them worthy of the court's consideration on the merits.

¶155 The consequence of the majority operating by whim rather than law is to leave the interpretation of multiple election statutes in flux—or worse yet, in the hands of the unelected members of the WEC. "To be free is to live under a government by law Miserable is the condition of individuals, danger is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of the law[.]" Judgment in Rex v. Shipley, 21 St Tr 847 (K.B. 1784) (Lord Mansfield presiding) (emphasis added). The Wisconsin Supreme Court has an institutional responsibility to interpret law—not for the benefit of particular litigants, but for citizens we were elected to serve. Justice for the people of Wisconsin means ensuring the integrity of Wisconsin's elections. A majority of this court disregards its duty to the people of Wisconsin, denying them justice.

* * *

¶156 "This great source of free government, popular election, should be perfectly pure." Alexander Hamilton, Speech at New York Ratifying Convention (June 21, 1788), in Debates on the Federal Constitution 257 (J. Elliot ed. 1876). The majority's failure to act leaves an indelible stain on our most recent election. It will also profoundly and perhaps irreparably impact all local, statewide, and national elections going forward, with grave

consequence to the State of Wisconsin and significant harm to the rule of law. Petitioners assert troubling allegations of noncompliance with Wisconsin's election laws by public officials on whom the voters rely to ensure free and fair elections. It is our solemn judicial duty to say what the law is. The majority's failure to discharge its duty perpetuates violations of the law by those entrusted to administer it. I dissent.

¶157 I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice ANNETTE KINGSLAND ZIEGLER join this dissent.

1/16/24, 2:44 PM

SUBJECT: RE: Decision

FROM: "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>

TO: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>, Judge Troupis <[REDACTED]@gmail.com>, Kenneth Chesebro <[REDACTED]@msn.com>, Stewart Karge <[REDACTED]@gmail.com>, Joe Voiland <[REDACTED]@yahoo.com>

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Kindest regards,

KURT A. GOEHRE

Partner/Attorney

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Subject: RE: Jefferson

Well, the got this one right – although they managed to avoid saying anything about the elector’s and/or the clerk’s duty to take themselves off the list ...

Joseph L. Olson

Partner

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Subject: RE: Jefferson

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Kindest regards,

KURT A. GOEHRE

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DATE: 12/14/2020 16:00

STATEMENT OF JAMES TROUPIS, LEAD COUNSEL
WISCONSIN TRUMP CAMPAIGN
December 14, 2020

We are disappointed in the Wisconsin Supreme Court's decision - as should all people who are concerned about transparency and legal votes being counted in an election.

Regrettably, the Supreme Court majority avoided answering the most critical questions about the integrity of the November 3 election. The Court left unanswered concerns about whether, in this election and in future elections, absentee votes will be counted when they fail to comply with Wisconsin statutes. As the Chief Justice noted, those problems "will be repeated again and again, until this court has the courage to correct them."

It's also a penalty to the millions of our fellow Wisconsinites who followed the rules. Over three million people who voted by the rules will have their votes diluted by 200,000 who did not.

We would also note the court's decision was very narrow, 4-3, and the opinion of the three dissenting justices were very specific and pointed in their analysis of the court's decision to overlook state law.

This court decision should also be a message to the legislature: the current specific, statutory language must be rewritten so unelected bureaucrats and courts cannot twist state law to its will.

We are considering additional legal steps and will make an announcement when appropriate.

- end -

- 30 -

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SUBJECT: Fwd: Mailing the Packages from Monday's Meeting
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>, Brian Schimming <[REDACTED]@yahoo.com>
DATE: 12/15/2020 15:34

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To: Charles Nichols <[REDACTED]@wisgop.org>; Mark Jefferson <[REDACTED]@wisgop.org>
Subject: Re: Mailing the Packages from Monday's Meeting

Perfect!!

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To: Mark Jefferson <[REDACTED]@wisgop.org>; Kenneth Chesebro <[REDACTED]@msn.com>
Subject: RE: Mailing the Packages from Monday's Meeting

Hey Ken,

Attached is the digital copy of materials we are mailing out per your and Terrill's instructions. I have everything packaged up and ready to send once you give the go ahead. If it's easier to chat on the phone, my cell is 608-515-5181.

Thanks,
Chaz

From: Ryan Terrill <[REDACTED]@gop.com>
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To: Andrew Hitt <[REDACTED]@wisgop.org>; Mark Jefferson <[REDACTED]@wisgop.org>; Charles Nichols <[REDACTED]@wisgop.org>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>; Mike Roman <[REDACTED]@donaldtrump.com>; G. Michael Brown <[REDACTED]@donaldtrump.com>; [REDACTED] <[REDACTED]@gop.com>; Andrew Iverson - Political <[REDACTED]@gop.com>; [REDACTED] <[REDACTED]@wisgop.org>
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+ Chaz

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Subject: Mailing the Packages from Monday's Meeting

Team,

The purpose of this email is to finalize the mailing of the documents for President Trump's Wisconsin electors. Along with Kenneth Chesebro's detailed instructions, here are additional instructions for our team in Wisconsin:

TROUPIS 009232

- If possible, please have a staff member scan and send to the a digital copy of the package you will be mailing for Kenneth's brief review
- For the return address, please use an address for the Chairperson of the Electoral College of Wisconsin, i.e. Chairman Andrew Hitt.
- For the 2 packages going to the President of the Senate, it must be two sealed inner envelopes. (For the 2 packages going to the Archivist, this can be the same approach or one sealed inner envelope is fine.)

If the team in WI has any questions for the group (or if Kenneth has any further instructions), I am CC'ing everyone here to keep us in synch.

-
One more thing: Thank you to everyone who has worked on this project, especially Chairman Hitt and Mark Jefferson.

Yours,

Ryan

1/16/24, 2:45 PM

SUBJECT: Memo on Indefinitely Confined

FROM: Judge Troupis <[REDACTED]@gmail.com>

TO: Kenneth Chesebro <[REDACTED]@msn.com>

DATE: 12/18/2020 10:45

ATTACHMENTS (20201218-104505-0003477): ["Document 26.docx"](#)

Ken,

Attached is the brief memo on law and the examples we cited.

jim

TROUPIS 009234

Privileged Attorney Client Memorandum

Indefinitely Confined Abuse in Wisconsin

Indefinitely confined status in Wisconsin is a precise designation intended for a small subset of individuals who are “elderly, infirm or disabled and indefinitely confined” Wis. Stat. § 6.85(2)(a). Once the status is claimed, the individual claiming that status automatically receives an absentee ballot for each election and may return that ballot with providing otherwise required identification. It is a unique and narrowly tailored provision of Wisconsin’s election law as the absence of identification provides an obvious opportunity for fraud and abuse.

Citing the Governor’s Covid rules as a justification, the County Clerk’s for Dane and Milwaukee Counties issued public statements expressly approving the use of this “no identification required” status for virtually everyone. The Wisconsin Supreme Court ultimately held those statements were wrong, but in the meantime 28,395 persons claimed the status in Dane and Milwaukee Counties and voted without providing identification. It is important to recognize, that the clerks of those counties were required by law to remove every person for which there is “reliable information that [the] . . . elector no longer qualifies for the service.” Wis. Stat. § 6.86(2)(b). There is no evidence that a single person was ever removed by the Dane and Milwaukee County Clerks prior to the November 3 Presidential election.

Individuals too are obligated to take action to remove themselves from indefinitely confined status once they no longer qualify. As the statutes notes, “[i]f any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.” Wis. Stat. § 6.86(2)(a). Those who claim the status improperly can face criminal penalties. To date, no action has been taken against any of the Dane and Milwaukee County electors claiming the status in the November 3 election.

The record of the Trump recount includes multiple examples of individuals who claimed to be indefinitely confined, voted without identification and yet certainly did not appear to qualify as photos demonstrated they: attended weddings; went to work and posted “I’m a Nurse, I cannot stay home”; participated in protests and made videos of the protests in downtown Madison; spray painted murals on State Street in Madison; and celebrated a birthday with outside photos at the Capitol.(December 1, 2020 Appendix filed in Wisconsin Supreme Court, pp. 242-258 (Affidavit of Kyle J. Hudson dated 11/25/2020)) Of course there were many other reports of individuals who abused this status. (Dan O’Donnell stories etc.)

#####

1/16/24, 2:47 PM

SUBJECT: Reminder
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>
DATE: 12/18/2020 10:46

Ken,

Just a reminder: Reince was very explicit in his admonition that nothing about our meeting with the President can be shared with anyone. The political cross-currents are deep and fast and neither you or I have any ability to swim through them.

Jim

TROUPIS 009236

SUBJECT: Re: Reminder
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/18/2020 10:49

Yeah, that was crystal clear. I haven't even mentioned that we went to Washington, as I don't know if that is widely known. I don't pretend to know what is really going on!

Get [Outlook for iOS](#)

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Friday, December 18, 2020 11:46:56 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Reminder

Ken,

Just a reminder: Reince was very explicit in his admonition that nothing about our meeting with the President can be shared with anyone. The political cross-currents are deep and fast and neither you or I have any ability to swim through them.

Jim

1/16/24, 2:49 PM

SUBJECT: Copy of Mar. 31 SCOW "indefinitely confined" order
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>, Joe Olson <[REDACTED]@michaelbest.com>
CC: Rod Wittstadt <[REDACTED]@gwwlegal.com>
DATE: 12/20/2020 22:01

Hi, Rod, who's working on a memo for the national campaign staff, urgently needs a copy of the March 31 order.

<https://www.courhousenews.com/wisconsin-supreme-court-orders-county-clerk-to-follow-absentee-voter-id-rules/>



Top Wisconsin Court Sides With Republicans on ID Rules for Absentee Voters - Courthouse News Service

MADISON, Wis. (CN) — A liberal-leaning county must stop advising voters that they need not present photo ID to cast absentee ballots, the Wisconsin Supreme Court ruled Tuesday — a win for state Republicans one week ahead of a primary election thrown into chaos by the Covid-19 pandemic.

www.courhousenews.com

I can't find it online.

Hope you can send it to him.

Ken

SUBJECT: Re: Update
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Bruce Marks <[REDACTED]@mslegal.com>, Judge Troupis <[REDACTED]@gmail.com>
CC: Joe Olson <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>, "[REDACTED]@chapman.edu" <[REDACTED]@chapman.edu>
DATE: 12/26/2020 17:57

Hi,

On **logistics**, I'm doing everything camera ready, in booklet format, so all the printer would have to do is print out the PDF and assemble the documents.

On **Georgia**, I think having that in play on a Supreme Court filing could be critical. Even if the Dec. 4 lawsuit is substantively a stretch, the fact that the courts ignored it and didn't even assign a judge could play powerfully in Congress on January 6, particularly because Georgia is first alphabetically of the 3 key states.

There are a variety of ways Pence could play this on January 6, from very proactive to very deferential, and I don't pretend to be able to guess at all the factors in play, but if no due process was given on the Georgia lawsuit, and if at least arguably the Georgia statutes on post-election challenges gave Trump a right to a hearing on the merits of that lawsuit, then there's an arguable Article II violation, and hopefully there's a procedural way to get that before the Court in the next few days.

If Georgia is pending before the Supreme Court on January 6, a fairly boss move would be for Pence, when he gets to Georgia, to **simply decline to open any of the Georgia envelopes**.

The rationale? Congress shouldn't consider electoral returns currently under review by the Court, to avoid mooted them. Similarly, he could decline to open the envelopes for Pennsylvania and Wisconsin on the same basis. This would effectively force the Court to act on the petitions.

And it wouldn't be a bad excuse for delay. If the Supreme Court wants to refuse to intervene in legal issues relating to the count, fine, but it shouldn't just do nothing while the electoral count proceeds -- it should be forced to rule up or down. And only a delay on resolving the contested states can force its hand.

Another way Pence could achieve delay would be to open the Georgia envelopes, but then, while presiding over the Senate, recognize as the first Senator speaking a senator, perhaps Cruz, who is willing to stage a filibuster -- Pence could take the position that the Electoral Count Act's limit of 5 minutes per Senator isn't constitutionally valid and displacing the normal, standing rules for debate.

Obviously the discussion of such tactical options is highly confidential. But the point is that Trump and Pence have procedural options available to them starting January 6 that might create additional delay, and also might put pressure on the Court to act.

I would love to know more about the Georgia filing that was never acted on.

Ken

From: Bruce Marks <[REDACTED]@mslegal.com>
Sent: Saturday, December 26, 2020 3:50 PM
To: Judge Troupis <[REDACTED]@gmail.com>

TROUPIS 009239

1/16/24, 2:51 PM

Cc: Kenneth Chesebro <[REDACTED]@msn.com>; Joe Olson <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>; [REDACTED]@chapman.edu <[REDACTED]@chapman.edu>
Subject: RE: Update

Judge, that sounds very promising.

Bill bock circulated a memo today with his thoughts on the 7th circuit suit which I thought was very promising. I sent him some comments on the questions.

I've copied Professor Eastman, whose strategic thoughts will be helpful once you have a draft to circulate. Further, professor eastman has a printer who might be quicker than counsel press. He'll circulate those details.

Also, I think bill and you will want to do motions to consolidate and expedite your petitions, and we might want to further consolidate with Pennsylvania. Perhaps Professor Eastman can advise on the procedure.

One other important point: I have suggested that the Trump Georgia campaign file a suit similar to the Wisconsin federal suit alleging the election failed under 3 usc 2 because the Georgia courts have failed to even appoint a judge to hear it, even though it was filed on December 4, and seeking that the legislature appoint the electors – the exact relief that the 7th Circuit held was available. If the injunction is denied, this is an appealable order, and Professor Eastman is checking whether cert can be taken from that. I would like to find a mechanism for the Supreme Court to know that 46 votes are in play – PA, 20; WI, 10; GA, 16; enough to turn the election.

In my mind, some thought should be given if this could change the approach of the Senate, i.e. perhaps to encourage not resolving electors on January 6 if these cases are pending before Scotus. All of this is uphill, but there seems to be some chance.

Let me know your further thoughts, thanks.

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Saturday, December 26, 2020 3:35 PM
To: Bruce Marks <[REDACTED]@mslegal.com>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>; Joe Olson <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Update

Bruce,

We are well on our way to completing the Petition for Cert on the Wi. S. Crt. case. Likely will have something later this evening or early tomorrow morning for you to read.

We are talking with and working with Bill Bock to coordinate a filing of the Federal and State Cert Petitions. In my view, the simultaneous filing of both Cert Petitions would be best for the Court's maximum attention and for any press/campaign/president attention as well.

Our Petition will show Ken, George Burnett and me as the authors. No need for Professor Eastman or others.

TROUPIS 009240

1/16/24, 2:51 PM

We would ask for your help in the printing, filing and service of the Petition if you can. Let us know if we need to make other arrangements.

While we may be ready on Monday, the Federal case may take a bit longer. Given that consideration by the S. Ct. is unlikely before Jan. 6, no matter what day things are filed, for now I am thinking a coordinated filing of both Tuesday/Wednesday may be the best we can do. We'll see as things come through.

Let us know your thoughts.

Jim T.

1/16/24, 2:51 PM

SUBJECT: Re: Donald J. Trump, et al v. Joseph R. Biden et al.

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: Customer Service <[REDACTED]@wilsonepes.com>, "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>

CC: Judge Troupis <[REDACTED]@gmail.com>, George Burnett <[REDACTED]@lcojlaw.com>

DATE: 12/29/2020 12:30

ATTACHMENTS (20201229-123012-0002645): "[image001.png](#)", "[TRUMP v BIDEN -- Appendices -- FINAL.pdf](#)"

Okay, here is the FINAL of the Appendices

Starts with blue page

Then blank page

Then blank pages inserted as needed on even-numbered pages, so each appendix starts on the right

Then final blank page, on last even numbered page.

Might make sense to start running this.

Will send the PDF of the petition itself soon.

Ken

From: Customer Service <[REDACTED]@wilsonepes.com>

Sent: Tuesday, December 29, 2020 1:12 PM

To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Customer Service <[REDACTED]@wilsonepes.com>

Cc: Judge Troupis <[REDACTED]@gmail.com>; Kenneth Chesebro <[REDACTED]@msn.com>; George Burnett <[REDACTED]@lcojlaw.com>

Subject: RE: Donald J. Trump, et al v. Joseph R. Biden et al.

Joe,

In reviewing the service list, there are numerous duplicate address(es). The COS reflects 8 parties at (3) briefs each.

Best,

Irene

Wilson-Epes Printing Co., Inc.

Irene Carr

[REDACTED]@wilsonepes.com

775 H Street N.E.

Washington D.C. 20002

tel: [REDACTED]

fax: [REDACTED]

www.wilsonepes.com

From: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>

Sent: Tuesday, December 29, 2020 12:51 PM

To: Customer Service <[REDACTED]@wilsonepes.com>

Cc: Judge Troupis <[REDACTED]@gmail.com>; Kenneth Chesebro <[REDACTED]@msn.com>; George Burnett

TROUPIS 009242

1/16/24, 2:51 PM

<[REDACTED]@lcojlaw.com>

Subject: RE: Donald J. Trump, et al v. Joseph R. Biden et al.

Thank you. We will discuss and get back to you and provide the final petition shortly

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com



From: Customer Service <[REDACTED]@wilsonepes.com>

Sent: Tuesday, December 29, 2020 11:41 AM

To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Customer Service <[REDACTED]@wilsonepes.com>

Cc: Judge Troupis <[REDACTED]@gmail.com>; Kenneth Chesebro <[REDACTED]@msn.com>; George Burnett <[REDACTED]@lcojlaw.com>

Subject: RE: Donald J. Trump, et al v. Joseph R. Biden et al.

Joe,

In reviewing your file, per Rule 14.1 (a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. **The questions shall be set out on the first page** following the cover, and no other information may appear on that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

Recommend one page QP (versus 2 page).

Also recommend inserting "Appendices blue sheet divider" following Conclusion p. 33 (preceding Table of Appendices). *See attached Blue Sheet.pdf.*

Certificates attached for review, please provide **final word count xxxx**. Our press dept. on on standby for the Final PDF file.

Best,
Irene

Wilson-Epes Printing Co., Inc.

Irene Carr

[REDACTED]@wilsonepes.com

775 H Street N.E.

Washington D.C. 20002

tel: [REDACTED]

fax: [REDACTED]

www.wilsonepes.com

From: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>

Sent: Tuesday, December 29, 2020 11:39 AM

To: Customer Service <[REDACTED]@wilsonepes.com>

Cc: Judge Troupis <[REDACTED]@gmail.com>; Kenneth Chesebro <[REDACTED]@msn.com>; George Burnett

TROUPIS 009243

<[redacted]@lcojlaw.com>

Subject: Donald J. Trump, et al v. Joseph R. Biden et al.

Hello,

I spoke with Robin yesterday about our filing today in the above referenced case. We are asking for booklet format on the petition. We'll need the copies for the court, the copies for service and 50 additional copies. Please let me know if this presents and issue.

Attached are:

1. The final, print ready Motion for Expedited Consideration. You can start printing this now.
2. An affidavit of service from the proceedings below that identifies all of the parties who need to be served. My understanding is that you will handle service on these parties. Please confirm that is correct.
3. A **NOT** final version of the petition that I am asking you to review for any formatting errors. Please let me know if there are any so we can correct them. We will get you the final version shortly.

Please call me with any questions for concerns.

Thanks
Joe

Joseph L. Olson

Partner

E [redacted]@michaelbest.com

T [redacted] | M [redacted] | F [redacted]



[my bio](#) | [our firm](#) | [vC \[redacted\]](#)

Email Disclaimer

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APPENDICES

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Appendix A

2020 WI 91

SUPREME COURT OF WISCONSIN

Case No.: 2020AP2038

Complete Title:

Donald J. Trump, Michael R. Pence
and Donald J. Trump for President, Inc.,

Plaintiffs-Appellants,

v.

Joseph R. Biden, Kamala D. Harris,
Milwaukee County Clerk c/o George L. Christenson,
Milwaukee County Board of Canvassers
c/o Tim Posnanski, Wisconsin Elections Commission,
Ann S. Jacobs, Dane County Clerk
c/o Scott McDonell and Dane County Board of
Canvassers c/o Alan Arnsten,

Defendants-Respondents.

ON PETITION TO BYPASS COURT OF APPEALS,
REVIEW OF DECISION OF THE CIRCUIT COURT

OPINION FILED: December 14, 2020

SUBMITTED ON BRIEFS:

ORAL ARGUMENT: December 12, 2020

SOURCE OF APPEAL:

COURT: Circuit Court

COUNTY: Milwaukee

JUDGE: Stephen A. Simanek

JUSTICES:

HAGEDORN, J., delivered the majority opinion of the Court, in which ANN WALSH BRADLEY, DALLET, and KAROFSKY, JJ., joined. DALLET and KAROFSKY, JJ., filed a concurring opinion. HAGEDORN, J., filed a concurring opinion, in which ANN WALSH BRADLEY, J., joined. ROGGENSACK, C.J., filed a dissenting opinion, in which ZIEGLER and REBECCA GRASSL BRADLEY, JJ., joined. ZIEGLER, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and REBECCA GRASSL BRADLEY, J., joined. REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and ZIEGLER, J., joined.

NOT PARTICIPATING:

ATTORNEYS:

For the plaintiffs-appellants, a brief was filed by James R. Troupis and Troupis Law Office, Cross Plains, and R. George Burnett and Conway, Olejniczak & Jerry S.C., Green Bay. Oral argument presented by James R. Troupis.

For the defendants-respondents Joseph R. Biden and Kamala D. Harris, a brief was filed by Matthew W. O'Neill and Fox, O'Neill & Shannon, S.C., Milwaukee, Charles G. Curtis, Jr., Michelle M. Umberger, Will M. Conley and Perkins Coie LLP, Madison, and John M. Devaney (pro hac vice) and Perkins Coie LLP, Washington, D.C. Oral argument was presented by John M. Devaney.

For the defendants-respondents Wisconsin Elections Commission and Ann S. Jacobs, oral argument was presented by assistant attorney general Colin T. Roth.

2020 WI 91

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2020AP2038
(L.C. No. 2020CV2514 & 2020CV7092)

STATE OF WISCONSIN: IN SUPREME COURT

**Donald J. Trump, Michael R. Pence
and Donald J. Trump for President, Inc.,**

Plaintiffs-Appellants,

v.

**Joseph R. Biden, Kamala D. Harris, Milwaukee
County Clerk c/o George L. Christenson,
Milwaukee County Board of Canvassers c/o
Tim Posnanski, Wisconsin Elections
Commission, Ann S. Jacobs, Dane County
Clerk c/o Scott McDonell and Dane County
Board of Canvassers c/o Alan Arnsten,**

Defendants-Respondents.

FILED

DEC 14, 2020

Sheila T. Reiff
Clerk of Supreme Court

HAGEDORN, J., delivered the majority opinion of the Court, in which ANN WALSH BRADLEY, DALLET, and KAROFSKY, JJ., joined. DALLET and KAROFSKY, JJ., filed a concurring opinion. HAGEDORN, J., filed a concurring opinion, which ANN WALSH BRADLEY, J., joined.

ROGGENSACK, C.J., filed a dissenting opinion, in which ZIEGLER and REBECCA GRASSL BRADLEY, J.J., joined. ZIEGLER, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and REBECCA GRASSL BRADLEY, J., joined. REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ROGGENSACK, C.J., and ZIEGLER, J., joined.

APPEAL from a judgment and an order of the Circuit Court for Milwaukee County, Stephen A. Simanek, Reserve Judge. *Affirmed.*

¶1 BRIAN HAGEDORN, J. In the 2020 presidential election, the initial Wisconsin county canvasses showed that Wisconsin voters selected Joseph R. Biden and Kamala D. Harris as the recipients of Wisconsin’s electoral college votes. The petitioners¹ (collectively, the “Campaign”) bring an action under Wis. Stat. § 9.01 (2017-18)² seeking to invalidate a sufficient number of Wisconsin ballots to change Wisconsin’s certified election results. Specifically, the Campaign seeks to invalidate the ballots – either directly or through a drawdown – of more than 220,000 Wisconsin voters in Dane and Milwaukee Counties.

¶2 The Campaign focuses its objections on four different categories of ballots – each applying only to

¹ The petitioners are Donald J. Trump, Michael R. Pence, and Donald J. Trump for President, Inc.

² All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

voters in Dane County and Milwaukee County. First, it seeks to strike all ballots cast by voters who claimed indefinitely confined status since March 25, 2020. Second, it argues that a form used for in-person absentee voting is not a “written application” and therefore all in-person absentee ballots should be struck. Third, it maintains that municipal officials improperly added witness information on absentee ballot certifications, and that these ballots are therefore invalid. Finally, the Campaign asserts that all ballots collected at “Democracy in the Park,” two City of Madison events in late September and early October, were illegally cast.

¶3 We conclude the Campaign is not entitled to the relief it seeks. The challenge to the indefinitely confined voter ballots is meritless on its face, and the other three categories of ballots challenged fail under the doctrine of laches.

I. BACKGROUND

¶4 After all votes were counted and canvassing was completed for the 2020 presidential election contest, the results showed that Vice President Biden and Senator Harris won Wisconsin by 20,427 votes. The Campaign sought a recount in two of Wisconsin’s 72 counties – Milwaukee and Dane. The Milwaukee County Elections Commission and the Dane County Board of Canvassers conducted the recount and certified the results. The recount increased the margin of victory for Vice President Biden and Senator Harris to 20,682 votes.

¶5 The Campaign appealed those decisions in a consolidated appeal to the circuit court under Wis. Stat. § 9.01(6)(a), naming Vice President Biden,

Senator Harris, the Wisconsin Elections Commission (WEC), and several election officials as respondents.³ The circuit court⁴ affirmed the determinations of the Dane County Board of Canvassers and the Milwaukee County Elections Commission in full. The Campaign appealed and filed a petition for bypass, which we granted.

II. DISCUSSION

¶6 The Campaign asks this court to reverse determinations of the Dane County Board of Canvassers and the Milwaukee County Elections Commission with respect to four categories of ballots it argues were unlawfully cast.⁵ The respondents argue that all ballots were cast in compliance with the law, or at least that the Campaign has not shown otherwise. They further maintain that a multitude of legal doctrines – including laches, equitable estoppel, unclean hands, due process, and equal protection – bar the Campaign from receiving its requested relief. We agree that the challenge to the indefinitely confined voter ballots is without merit, and that laches bars the

³ Also named were Milwaukee County Clerk c/o George L. Christenson, Milwaukee County Board of Canvassers c/o Tim Posnanski, Ann S. Jacobs, Dane County Clerk c/o Scott McDonell, and Dane County Board of Canvassers c/o Alan Arnsten.

⁴ The consolidated appeals were assigned to Reserve Judge Stephen A. Simanek.

⁵ We may set aside or modify the determination if “a provision of law” is “erroneously interpreted” and “a correct interpretation compels a particular action.” Wis. Stat. § 9.01(8). We accept the findings of fact unless a factual finding “is not supported by substantial evidence.” *Id.*

relief the Campaign seeks on the three remaining categories of challenged ballots.

A. Indefinitely Confined Voters

¶7 Wisconsin allows voters to declare themselves indefinitely confined, provided they meet the statutory requirements. *See* Wis. Stat. § 6.86(2)(a).⁶ These individuals are not required to provide photo identification to obtain an absentee ballot. *Id.* On March 25, 2020, the Dane and Milwaukee County Clerks issued guidance on Facebook suggesting all voters could declare themselves indefinitely confined because of the pandemic and the governor’s then-existing Safer-at-Home Order. This court unanimously deemed that advice incorrect on March 31, 2020, and we noted that “the WEC guidance . . . provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time.” The county clerks immediately updated

⁶ 6 Wisconsin Stat. § 6.86(2)(a) provides:

An elector who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period may by signing a statement to that effect require that an absentee ballot be sent to the elector automatically for every election. The application form and instructions shall be prescribed by the commission, and furnished upon request to any elector by each municipality. The envelope containing the absentee ballot shall be clearly marked as not forwardable. If any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.

their advice in accordance with our decision.

¶8 The Campaign does not challenge the ballots of individual voters. Rather, the Campaign argues that *all* voters claiming indefinitely confined status since the date of the erroneous Facebook advice should have their votes invalidated, whether they are actually indefinitely confined or not. Although the number of individuals claiming indefinitely confined status has increased throughout the state, the Campaign asks us to apply this blanket invalidation of indefinitely confined voters only to ballots cast in Dane and Milwaukee Counties, a total exceeding 28,000 votes. The Campaign’s request to strike indefinitely confined voters in Dane and Milwaukee Counties as a class without regard to whether any individual voter was in fact indefinitely confined has no basis in reason or law; it is wholly without merit.

B. Laches

¶9 Three additional categories of ballots are challenged by the Campaign. In Milwaukee and Dane Counties, the Campaign asserts all in-person absentee votes were cast unlawfully without an application, and that all absentee ballots with certifications containing witness address information added by the municipal clerks were improperly counted. Additionally, the Campaign challenges all ballots returned at the City of Madison’s “Democracy in the Park” events.

¶10 All three of these challenges fail under the longstanding and well-settled doctrine of laches. “Laches is founded on the notion that equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party.” *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936

N.W.2d 587. Application of laches is within the court’s discretion upon a showing by the party raising the claim of unreasonable delay, lack of knowledge the claim would be raised, and prejudice. *Id.*, ¶15.

¶11 For obvious reasons, laches has particular import in the election context. As one noted treatise explains:

Extreme diligence and promptness are required in election-related matters, particularly where actionable election practices are discovered prior to the election. Therefore, laches is available in election challenges. In fact, in election contests, a court especially considers the application of laches. Such doctrine is applied because the efficient use of public resources demands that a court not allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process. Thus if a party seeking extraordinary relief in an election-related matter fails to exercise the requisite diligence, laches will bar the action.

29 C.J.S. Elections § 459 (2020) (footnotes omitted).

¶12 Although it disagrees the elements were satisfied here, the Campaign does not dispute the proposition that laches may bar an untimely election challenge. This principle appears to be recognized and applied universally. *See, e.g., Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1060–61 (7th Cir. 2016) (“The obligation to seek injunctive relief in

a timely manner in the election context is hardly a new concept.”).⁷ This case may be a paradigmatic

⁷ See also *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990), *cert. denied*, 501 U.S. 1206 (1991) (“The candidate’s and party’s claims to be respectively a serious candidate and a serious party with a serious injury become less credible by their having slept on their rights.”); *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988) (“Although adequate explanation for failure to seek preelection relief has been held to exist where, for example, the party challenging the election had no opportunity to seek such relief, if aggrieved parties, without adequate explanation, do not come forward before the election, they will be barred from the equitable relief of overturning the results of the election.” (citation omitted)); *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (“[F]ailure to require pre-election adjudication would ‘permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action.’”); *Perry v. Judd*, 471 Fed. App’x 219, 220 (4th Cir. 2012) (“Movant had every opportunity to challenge the various Virginia ballot requirements at a time when the challenge would not have created the disruption that this last-minute lawsuit has.”); *McClung v. Bennett*, 235 P.3d 1037, 1040 (Ariz. 2010) (“McClung’s belated prosecution of this appeal . . . would warrant dismissal on the grounds of laches, because his dilatory conduct left Sweeney with only one day to file his response brief, jeopardized election officials’ timely compliance with statutory deadlines, and required the Court to decide this matter on an unnecessarily accelerated basis.” (citations omitted)); *Smith v. Scioto Cnty. Bd. of Elections*, 918 N.E.2d 131, 133-34 (Ohio 2009) (“Appellees could have raised their claims in a timely pre-election protest to the petition. ‘Election contests may not be used as a vehicle for asserting an untimely protest.’” (citations omitted)); *Clark v. Pawlenty*, 755 N.W.2d 293, 301 (Minn. 2008) (applying laches to bar election challenge where “[t]he processes about which petitioners complain are not new”); *State ex rel. SuperAmerica Grp. v. Licking Cnty. Bd. of Elections*, 685 N.E.2d 507, 510 (Ohio 1997) (“In election-related matters, extreme diligence and promptness are required. Extraordinary relief has been routinely denied in election-related

cases based on laches.”); *Tully v. State*, 574 N.E.2d 659, 663 (Ill. 1991) (applying laches to bar challenge to an automatic retirement statute where a retired judge “was at least constructively aware of the fact that his seat was declared vacant” and an election had already taken place to replace him); *Lewis v. Cayetano*, 823 P.2d 738, 741 (Haw. 1991) (“We apply the doctrine of laches . . . because efficient use of public resources demand that we not allow persons to gamble on the outcome of the election contest then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process.”); *Evans v. State Election Bd. of State of Okla.*, 804 P.2d 1125, 1127 (Okla. 1990) (“It is well settled that one who seeks to challenge or correct an error of the State Election Board will be barred by laches if he does not act with diligence.”); *Thirty Voters of Kauai Cnty. v. Doi*, 599 P.2d 286, 288 (Haw. 1979) (“The general rule is that if there has been opportunity to correct any irregularities in the election process or in the ballot prior to the election itself, plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterward.”); *Harding v. State Election Board*, 170 P.2d 208, 209 (Okla. 1946) (per curiam) (“[I]t is manifest that time is of the essence and that it was the duty of the petitioner to proceed with utmost diligence in asserting in a proper forum his claimed rights. The law favors the diligent rather than the slothful.”); *Mehling v. Moorehead*, 14 N.E.2d 15, 20 (Ohio 1938) (“So in this case, the election, having been held, should not be disturbed when there was full opportunity to correct any irregularities before the vote was cast.”); *Kewaygoshkum v. Grand Traverse Band Election Bd.*, 2008-1199-CV-CV, 2008-1200-CV-CV, 2008 WL 6196207, at *7 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary 2008) (en banc) (“In the instant case, nearly all of the allegations by both Plaintiffs against the Election Board relate to actions taken (or not taken) by the Election Board prior to the general election [T]hey are not timely raised at this point and should be barred under the doctrine of laches.”); *Moore v. City of Pacific*, 534 S.W.2d 486, 498 (Mo. Ct. App. 1976) (“Where actionable election practices are discovered prior to the election, injured persons must be diligent in seeking relief.”); *Kelly v. Commonwealth*, No. 68 MAP 2020, 2020 WL 7018314, at *1 (Penn. Nov. 28, 2020) (applying laches to

example of why. The relevant election officials, as well as Vice President Biden and Senator Harris, had no knowledge a claim to these broad categories of challenges would occur. The Campaign’s delay in raising these issues was unreasonable in the extreme, and the resulting prejudice to the election officials, other candidates, voters of the affected counties, and to voters statewide, is obvious and immense. Laches is more than appropriate here; the Campaign is not entitled to the relief it seeks.

1. Unreasonable Delay

¶13 First, the respondents must prove that the Campaign unreasonably delayed in bringing the challenge. What constitutes an unreasonable delay varies and “depends on the facts of a particular case.” *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶14, 393 Wis. 2d 308, 946 N.W.2d 101. As we have explained:

bar a challenge to a mail-in voting law where challengers could have brought their claim anytime after the law’s enactment more than a year prior but instead waited until after the 2020 General Election); *Bowyer v. Ducey*, CV-20-02321-PHX-DJH, 2020 WL 7238261, at *10 (D. Ariz. Dec. 9, 2020) (applying laches to bar claims where “affidavits or declarations upon which Plaintiffs rely clearly shows that the basis for each of these claims was either known well before Election Day or soon thereafter”); *King v. Witmer*, Civ. No. 20-13134, 2020 WL 7134198, at *7 (E.D. Mich. Dec. 7, 2020) (“If Plaintiffs had legitimate claims regarding whether the treatment of election challengers complied with state law, they could have brought their claims well in advance of or on Election Day – but they did not.”).

[U]nreasonable delay in laches is based not on what litigants know, but what they might have known with the exercise of reasonable diligence. This underlying constructive knowledge requirement arises from the general rule that ignorance of one's legal rights is not a reasonable excuse in a laches case. Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put a man of ordinary prudence upon inquiry. To be sure, what we expect will vary from case to case and litigant to litigant. But the expectation of reasonable diligence is firm nonetheless.

Wren, 389 Wis. 2d 516, ¶20 (citations and quotation marks omitted). Here, the Campaign unreasonably delayed with respect to all three categories of challenged ballots.

¶14 Regarding the Campaign's first challenge, Wisconsin law provides that a "written application" is required before a voter can receive an absentee ballot, and that any absentee ballot issued without an application cannot be counted. *See* Wis. Stat. § 6.86(1)(ar); Wis. Stat. § 6.84(2). The Campaign argues all in-person absentee votes in Dane and Milwaukee Counties were cast without the required application.

¶15 But both counties did use an application form created, approved, and disseminated by the chief Wisconsin elections agency. This form, now known as EL-122, is entitled "Official Absentee Ballot Application/Certification." It was created in 2010 in an effort to streamline paperwork following the 2008

election, and has been available and in use ever since.

¶16 The Campaign does not challenge that any individual voters' ballots lacked an application—an otherwise appropriate and timely issue. Rather, the Campaign argues this “application” is not an application, or that municipal clerks do not give this form to voters before distributing the ballot, in contravention of the statutes.⁸ Regardless of the practice used, the Campaign would like to apply its challenge to the sufficiency of EL-122 to strike 170,140 votes in just two counties – despite the form’s use in municipalities throughout the state.⁹ Waiting until after an election to challenge the sufficiency of a form application in use statewide for at least a decade is plainly unreasonable.

¶17 The second category of ballots challenged are those with certificates containing witness address information added by a municipal clerk. Absentee ballots must be witnessed, and the witness must provide their name, signature, and address on the certification (printed on the back side of the envelope in which the absentee ballot is ultimately sealed). Wis. Stat. § 6.87(2), (4)(b)1., (6d). While a witness address must be provided on the certification for the corresponding ballot to be counted, the statute is silent as to what portion of an address the witness must provide. § 6.87(6d).

⁸ According to the findings of fact, the practice in Dane and Milwaukee Counties is that the application portion of the envelope is completed and shown to an official before the voter receives a ballot.

⁹ In its findings of fact, the circuit court concluded that 651,422 voters throughout the state used Form EL-122 in the 2020 presidential election.

¶18 The process of handling missing witness information is not new; election officials followed guidance that WEC created, approved, and disseminated to counties in October 2016. It has been relied on in 11 statewide elections since, including in the 2016 presidential election when President Trump was victorious in Wisconsin. The Campaign nonetheless now seeks to strike ballots counted in accordance with that guidance in Milwaukee and Dane Counties, but not those counted in other counties that followed the same guidance. The Campaign offers no reason for waiting years to challenge this approach, much less after this election. None exists.

¶19 Finally, the City of Madison held events on September 27, 2020, and October 3, 2020, dubbed “Democracy in the Park.” At these events, sworn city election inspectors collected completed absentee ballots. The city election inspectors also served as witnesses if an elector brought an unsealed, blank ballot. No absentee ballots were distributed, and no absentee ballot applications were accepted or distributed at these events.

¶20 The Campaign characterizes these events as illegal early in-person absentee voting. When the events were announced, an attorney for the Wisconsin Legislature sent a warning letter to the City of Madison suggesting the events were illegal. The City of Madison responded that the events were legally compliant, offering reasons why. Although these events and the legislature’s concerns were widely publicized, the Campaign never challenged these events, nor did any other tribunal determine they were unlawful.

¶21 The Campaign now asks us to determine that all 17,271 absentee ballots collected during the

“Democracy in the Park” events were illegally cast. Once again, when the events were announced, the Campaign could have challenged its legality. It did not. Instead, the Campaign waited until after the election – after municipal officials, the other candidates, and thousands of voters relied on the representations of their election officials that these events complied with the law. The Campaign offers no justification for this delay; it is patently unreasonable.

¶22 The time to challenge election policies such as these is not after all ballots have been cast and the votes tallied. Election officials in Dane and Milwaukee Counties reasonably relied on the advice of Wisconsin’s statewide elections agency and acted upon it. Voters reasonably conformed their conduct to the voting policies communicated by their election officials. Rather than raise its challenges in the weeks, months, or even years prior, the Campaign waited until after the votes were cast. Such delay in light of these specific challenges is unreasonable.

2. Lack of Knowledge

¶23 The second element of laches requires that the respondents lacked knowledge that the Campaign would bring these claims.¹⁰ The respondents all assert

¹⁰ While our cases have identified this element as a general requirement for laches, it does not always appear to be applicable. To some extent, this requirement focuses on the ability of the asserting party to mitigate any resulting prejudice when notice is provided. But this may not be possible in all types of claims. Most jurisdictions do not identify lack of knowledge as a separate, required element in every laches defense. *See, e.g., Hart v. King*, 470 F. Supp. 1195, 1198 (D. Haw. 1979) (holding that laches barred relief in federal court notwithstanding plaintiffs’

they were unaware that the Campaign would challenge various election procedures after the election, and nothing in the record suggests otherwise. On the record before us, this is sufficient to satisfy this element. *See Brennan*, 393 Wis. 2d 308, ¶18.

3. Prejudice

¶24 Finally, the respondents must also prove that prejudice results from the Campaign’s unreasonable delay. “What amounts to prejudice . . . depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position.” *Wren*, 389 Wis. 2d 516, ¶32.

¶25 With respect to in-person absentee ballot applications, local election officials used form EL-122 in reliance on longstanding guidance from WEC. Penalizing the voters election officials serve and the other candidates who relied on this longstanding guidance is beyond unfair. The Campaign sat on its hands, waiting until after the election, despite the fact that this “application” form was in place for over a decade. To strike ballots cast in reliance on the guidance now, and to do so only in two counties, would violate every notion of equity that undergirds our electoral system.

¶26 As for the ballots to which witness address information was added, the election officials relied on this statewide advice and had no reason to question it. Waiting until after the election to raise the issue is highly prejudicial. Applying any new processes to two counties, and not statewide, is also unfair to nearly

unsuccessful pre-election suit in state court). In any event, we have no difficulty finding this element satisfied here.

everyone involved in the election process, especially the voters of Dane and Milwaukee Counties.

¶27 Finally, the respondents, and indeed all voters, are prejudiced if the ballots collected at the “Democracy in the Park” events are invalidated. Voters were encouraged to utilize the events, and 17,000 voters did so in reliance on representations that the process they were using complied with the law. Striking these ballots would disenfranchise voters who did nothing wrong when they dropped off their ballot where their local election officials told them they could.

¶28 In short, if the relief the Campaign sought was granted, it would invalidate nearly a quarter of a million ballots cast in reliance on interpretations of Wisconsin’s election laws that were well-known before election day. It would apply new interpretive guidelines retroactively to only two counties. Prejudice to the respondents is abundantly clear. Brennan, 393 Wis. 2d 308, ¶25.

4. Discretion

¶29 Whether to apply laches remains “within our equitable discretion.” *Id.*, ¶26. Doing so here is more than equitable; it is the only just resolution of these claims.

¶30 To the extent we have not made this clear in the past, we do so now. Parties bringing election-related claims have a special duty to bring their claims in a timely manner. Unreasonable delay in the election context poses a particular danger – not just to municipalities, candidates, and voters, but to the entire administration of justice. The issues raised in this case, had they been pressed earlier, could have been resolved long before the election. Failure to do so

affects everyone, causing needless litigation and undermining confidence in the election results. It also puts courts in a difficult spot. Interpreting complicated election statutes in days is not consistent with best judicial practices. These issues could have been brought weeks, months, or even years earlier. The resulting emergency we are asked to unravel is one of the Campaign's own making.¹¹

¶31 The claims here are not of improper electoral activity. Rather, they are technical issues that arise in the administration of every election. In each category of ballots challenged, voters followed every procedure and policy communicated to them, and election officials in Dane and Milwaukee Counties followed the advice of WEC where given. Striking these votes now – after the election, and in only two of Wisconsin's 72 counties when the disputed practices were followed by hundreds of thousands of absentee voters statewide – would be an extraordinary step for this court to take.¹² We will not do so.

¹¹ Our decision that the Campaign is not entitled to the relief it seeks does not mean the legal issues presented are foreclosed from further judicial scrutiny. Wisconsin law provides sufficient mechanisms for challenging unlawful WEC guidance or unlawful municipal election practices. Nothing in our decision denying relief to the Campaign would affect the right of another party to raise substantive challenges.

¹² Granting the relief requested by the Campaign may even be unconstitutional. See *Bush v. Gore*, 531 U.S. 98, 104-05 (per curiam) (“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.”).

III. CONCLUSION

¶32 Our laws allow the challenge flag to be thrown regarding various aspects of election administration. The challenges raised by the Campaign in this case, however, come long after the last play or even the last game; the Campaign is challenging the rulebook adopted before the season began. Election claims of this type must be brought expeditiously. The Campaign waited until after the election to raise selective challenges that could have been raised long before the election. We conclude the challenge to indefinitely confined voter ballots is without merit, and that laches bars relief on the remaining three categories of challenged ballots. The Campaign is not entitled to relief, and therefore does not succeed in its effort to strike votes and alter the certified winner of the 2020 presidential election.

By the Court. – The judgment of the circuit court is affirmed.

¶33 REBECCA FRANK DALLET and JILL J. KAROFSKY, JJ. (*concurring*). As acknowledged by the President’s counsel at oral argument, the President would have the people of this country believe that fraud took place in Wisconsin during the November 3, 2020 election. Nothing could be further from the truth. The President failed to point to even one vote cast in this election by an ineligible voter; yet he asks this court to disenfranchise over 220,000 voters. The circuit court, whose decision we affirm, found no evidence of any fraud.

¶34 The evidence does show that, despite a global pandemic, more than 3.2 million Wisconsinites performed their civic duty. More importantly as it relates to this lawsuit, these voters followed the rules that were in place at the time. To borrow Justice Hagedorn’s metaphor, Wisconsin voters complied with the election rulebook. No penalties were committed and the final score was the result of a free and fair election.

¶35 For the foregoing reasons, we concur.

¶36 BRIAN HAGEDORN, J. (*concurring*). I agree, of course, with the majority opinion I authored holding that the petitioners¹ (collectively, the “Campaign”) are not entitled to the relief they seek. But I understand the desire for at least some clarity regarding the underlying election administration issues. A comprehensive analysis is not possible or appropriate in light of the abbreviated nature of this review and the limited factual record in an action under Wis. Stat. § 9.01 (2017-18).² However, I do think we can be of some assistance, and will endeavor to address in some measure the categories of ballots the majority opinion properly applies laches to.

¶37 Beyond its challenge to indefinitely confined voters, an issue the court’s opinion quickly and appropriately dispenses with, the Campaign raises challenges to three categories of ballots: (1) all in-person absentee ballots in Dane and Milwaukee Counties for want of an absentee ballot application; (2) all absentee ballots in Dane and Milwaukee Counties where municipal officials added witness address information on the certification; and (3) all ballots collected at two City of Madison “Democracy in the Park” events occurring in late September and early October. I begin with some background, and address each while remaining mindful of the limited nature of this review.

¹ The petitioners are Donald J. Trump, Michael R. Pence, and Donald J. Trump for President, Inc.

² All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

I. LEGAL BACKGROUND

¶38 Elections in Wisconsin are governed by Chapters five through 12 of the Wisconsin Statutes. In applying these laws, we have a long history of construing them to give effect to the ascertainable will of the voter, notwithstanding technical noncompliance with the statutes. *Roth v. Lafarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶19, 268 Wis. 2d 335, 677 N.W.2d 599.³ This longstanding practice is confirmed in statute. Wisconsin Stat. § 5.01(1) says, “Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.” So generally, when ballots are challenged, they are counted if the will of the voter can be ascertained.

¶39 Wisconsin looks quite a bit more skeptically, however, at absentee ballots. Wisconsin Stat. § 6.84(2) provides:

³ See also *State ex rel. Wood v. Baker*, 38 Wis. 71, 89 (1875) (“It would be a fraud on the constitution to hold them disfranchised without notice or fault. They went to the election clothed with a constitutional right of which no statute could strip them, without some voluntary failure on their own part to furnish statutory proof of right. And it would be monstrous in us to give such an effect to the registry law, against its own spirit and in violation of the letter and spirit of the constitution.”); *State ex rel. Blodgett v. Eagan*, 115 Wis. 2d 417, 421, 91 N.W. 984 (1902) (“when the intention of the voter is clear, and there is no provision of statute declaring that such votes shall not be counted, such intention shall prevail”); *Roth v. Lafarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶¶19-25, 268 Wis. 2d 335, 677 N.W.2d 599 (collecting cases).

Notwithstanding [Wis. Stat. §] 5.01(1), with respect to matters relating to the absentee ballot process, [Wis. Stat. §§] 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

This tells us that, to the extent an absentee ballot does not comply with certain statutory requirements, it may not be counted.⁴

¶40 Our review in this case is of the determinations of the board of canvassers and elections commission. The determination shall be “set aside or modif[ied]” if the board of canvassers or elections commission “has erroneously interpreted a provision of law and a correct interpretation compels a particular action.” § 9.01(8)(d). We “may not substitute [our] judgment for that of the board of canvassers . . . as to the weight of the evidence on any disputed findings of fact.” *Id.* However, findings of fact “not supported by substantial evidence” shall be set aside. *Id.* Legal conclusions made by the board of canvassers or elections commission are reviewed independently. *Roth*, 268 Wis. 2d 335, ¶15.

⁴ Wisconsin courts have had few opportunities to opine on this statute. The court appeals noted in a 2001 case: “Section 6.84(2)’s strict construction requirement, applicable to statutes relating to the absentee ballot process, is consistent with the guarded attitude with which the legislature views that process.” *Lee v. Paulson*, 2001 WI App 19, ¶7, 241 Wis. 2d 38, 623 N.W.2d 577.

¶41 With this framework in mind, I turn to the three specific categories of ballots challenged here.

II. IN-PERSON ABSENTEE BALLOT APPLICATIONS

¶42 Wisconsin Stat. § 6.86(1)(ar) says that “the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality.” The mandatory requirement is that each ballot be matched with an application.

¶43 The Wisconsin Elections Commission (WEC) has designed, approved, and distributed forms for statewide use by local election officials. Among the forms are a separate absentee ballot application (form EL-121) and a combined application and certification (form EL-122). Milwaukee and Dane Counties, like many other communities around the state, use form EL-122 for in-person absentee voters. The Campaign argues that form EL-122 is not an application, and that all 170,140 in-person absentee ballots cast in Dane and Milwaukee Counties therefore lacked the required “written application.” This argument is incorrect.

¶44 “Written application” is not specially defined in the election statutes, nor is any particular content prescribed. EL-122 is entitled “Official Absentee Ballot *Application/Certification*.” (Emphasis added). Beyond containing basic voter information also present on EL-121, Form EL-122 requires the elector to sign, stating: “I further certify that I requested this ballot.” This would appear to satisfy the ordinary meaning of a written ballot application. *See Quick Charge Kiosk LLC v. Kaul*, 2020 WI 54, ¶18, 392 Wis. 2d 35, 944

N.W.2d 598 (“When statutory language is not specially defined or technical, it is given its ‘common, ordinary, and accepted meaning.’” (quoting *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110)).

¶45 The record further bears out its function as an application. In both Milwaukee and Dane Counties, voters completed the application portion of EL-122 and showed it to an election official before receiving a ballot.⁵ Then, after completing the ballot, the voter signed the certification portion of the form, which the clerk witnessed. Section 6.86(1)(ar) contains no requirement that the application and certification appear on separate documents, and the facts demonstrate that the application was completed before voters received a ballot. As best I can discern from this record, EL-122 is a “written application” within the meaning of § 6.86(1)(ar). That it also serves as a ballot certification form does not change its status as an application.⁶

¶46 Therefore, on the merits and the record before us, in-person absentee voters using form EL-122 in Dane and Milwaukee Counties did so in compliance

⁵ The Campaign appears to suggest a different sequence of events, but that is not what the record before us reflects.

⁶ It is not unusual or inherently problematic for administrative forms to have multiple functions. The MV1, for example, serves as both an application for registration under Wis. Stat. § 341.08 and an application for a certificate of title under Wis. Stat. § 342.06. See <https://wisconsin.gov/Documents/formdocs/mv1.pdf>.

with Wisconsin law.⁷

III. WITNESS ADDRESSES

¶47 The Campaign also challenges several thousand absentee ballots cast in Milwaukee and Dane Counties where election officials added missing witness address information to the certification. This challenge is oddly postured and seems to miss the statutory requirements.

¶48 Absentee ballots cast in Wisconsin must be witnessed. Wis. Stat. § 6.87(4)(b)1. In order to comply with this requirement, voters place absentee ballots in an unsealed envelope, the back of which includes a certificate. § 6.87(2). The certificate must include a statement for the witness to certify, along with space for the witness's signature, printed name, and "[a]ddress." *Id.* The law states that the "witness shall execute" the relevant witness information – including, one would presume, the required address. *Id.* "If a certificate is missing the address of a witness, the ballot may not be counted." § 6.87(6d).

¶49 Although Wis. Stat. § 6.87(6d) requires an address, § 6.87(2) and (6d) are silent on precisely what makes an address sufficient. This is in stark contrast to other provisions of the election statutes that are more specific. For example, Wis. Stat. § 6.34(3)(b)2. requires an identifying document to contain "[a]

⁷ It is presently unclear whether the statutes would be better or more clearly effectuated by separating the application and certification, or whether certain retention practices may be problematic. The expedited nature of our review of this case does not permit a full examination of this question. But the mandatory procedure insofar as the voter is concerned – that he or she fill out a written application – is surely satisfied.

current and complete residential address, including a numbered street address, if any, and the name of the municipality” for the document to be considered proof of residence. Similarly, Wis. Stat. § 6.18 requires former residents to swear or affirm their Wisconsin address as follows: “formerly residing at . . . in the . . . ward . . . aldermanic district (city, town, village) of . . . County of”⁸ While the world has surely faced more pressing questions, the contours of what makes an address an address has real impact. Would a street address be enough, but no municipality? Is the state necessary? Zip code too? Does it matter if the witness uses their mailing address and not the residential address (which can be different)?

¶50 Based on the record before the court, it is not clear what information election officials added to what number of certifications. Wisconsin Stat. § 6.87(6d) would clearly prohibit counting a ballot if the entire address is absent from the certification. However, if the witness provided only part of the address—for example, a street address and municipality, but no state name or zip code—it is at least arguable that this would satisfy § 6.87(6d)’s address requirement. And, to the extent clerks completed addresses that were already sufficient under the statute, I am not aware of any authority that would allow such votes to

⁸ “And ‘absent textual or structural clues to the contrary’ a particular word or phrase used more than once in the same act is understood ‘to carry the same meaning each time.’” *Town of Delafield v. Central Transport Kriewaldt*, 2020 WI 61, ¶15 n.6, 392 Wis. 2d 427, 944 N.W.2d 819 (quoting *State ex rel. DNR v. Wis. Court of Appeals*, Dist. IV, 2018 WI 25, ¶30, 380 Wis. 2d 354, 909 N.W.2d 114).

be struck.⁹

¶51 The parties did not present comprehensive arguments regarding which components of an address are necessary under the statute. It would not be wise to fully address that question now. But I do not believe the Campaign has established that all ballots where clerks added witness address information were necessarily insufficient and invalid; the addresses provided directly by the witnesses may very well have satisfied the statutory directive. The circuit court's findings of fact reflect that many of these ballots contained additions of the state name and/or zip code. I conclude the Campaign failed to provide sufficient information to show all the witness certifications in the group identified were improper, or moreover, that any particular number of ballots were improper.

¶52 Although I do not believe the Campaign has offered sufficient proof on this record to strike ballots, this broader issue appears to be a valid election administration concern. WEC, other election officials, the legislature, and others may wish to examine the requirements of the statute and measure them against

⁹ The statute seems to suggest only the witness should fill in the information necessary to comply with the statute. *See* Wis. Stat. § 6.87(2) (“the witness shall execute . . .”). If a zip code is not required under the statute, for example, I’m not sure clerks would be prohibited from adding the zip code. Then again, I’m not sure why they would want to add anything to an already sufficient ballot, or what their authority would be to do so. It’s possible WEC guidance to add witness information is aimed at complying with related WEC guidance that all aspects of a mailing address – including city, state, and zip code – should be included in the witness certification (arguably, information the statute does not always require). Regardless, this case is not well-postured to answer these questions.

the guidance and practice currently in place to avoid future problems.

IV. DEMOCRACY IN THE PARK

¶53 Finally, the Campaign challenges 17,271 ballots the City of Madison collected at “Democracy in the Park” events on September 27, 2020, and October 3, 2020. According to the record, at these events, sworn city election inspectors collected already completed absentee ballots and served as witnesses for absentee voters who brought an unsealed, blank ballot with them. During the events, no absentee ballots were distributed, and no absentee ballot applications were distributed or received.

¶54 Under the law, when a voter requests an absentee ballot, the voter must return the absentee ballot in a sealed envelope by mail or “in person, to the municipal clerk issuing the ballot or ballots.” Wis. Stat. § 6.87(4)(b)1. The phrase “municipal clerk” has a specific meaning in the election statutes. It is defined as “the city clerk, town clerk, village clerk and the executive director of the city election *commission and their authorized representatives*.” Wis. Stat. § 5.02(10) (emphasis added).¹⁰ A sworn city election inspector sent by the clerk to collect ballots would seem to be an authorized representative as provided in the definition. Even if “municipal clerk” were not a specially-defined term, the only reasonable reading of the law would allow those acting on a clerk’s behalf to

¹⁰ When words are “specially-defined” they are given their “special definitional meaning.” *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

receive absentee ballots, not just the clerk by him or herself. After all, many clerks manage a full office of staff to assist them in carrying out their duties. Accordingly, voters who returned ballots to city election inspectors at the direction of the clerk returned their absentee ballots “in person, to the municipal clerk” as required by § 6.87(4)(b)1.

¶55 The Campaign, however, asserts that the “Democracy in the Park” events were illegal in-person absentee voting sites that failed to meet the statutory requirements under Wis. Stat. § 6.855. Section 6.855(1) provides in relevant part:

The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality *may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election.* . . . If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.

§ 6.855(1) (emphasis added).

¶56 An alternative absentee ballot site, then, must be a location not only where voters may return absentee ballots, but also a location where voters “may request and vote absentee ballots.” *Id.* On the facts before the court, this is not what occurred at “Democracy in the Park” locations. Ballots were not

requested or distributed. Therefore, Wis. Stat. § 6.855 is not on point.

¶57 In short, based on the record before the court and the arguments presented, I see no basis to conclude the ballots collected at “Democracy in the Park” events were cast in contravention of Wisconsin law. This challenge fails.

V. CONCLUSION

¶58 The people of Wisconsin deserve confidence that our elections are free and fair and conducted in compliance with the law. Our elected leaders and election officials, including those at WEC, should continue to earn the trust of all Wisconsinites. The claims made by the Campaign in this case are not of widespread fraud or serious election improprieties. These are ordinary sorts of election administration issues – for example, challenging whether an “application” form in use statewide for a decade constitutes a sufficient application (it does). While this does not diminish the importance of the election procedures the legislature has chosen, Wisconsin’s electorate should be encouraged that the issues raised in this case are focused on rather technical issues such as whether a witness must include their zip code as part of their address.

¶59 That does not mean there is nothing to improve or clarify or correct. But as explained in the majority opinion, the Campaign waited far too long to challenge guidance and practices established weeks, months, or years earlier. Laches rightly bars the relief the Campaign seeks. Even on the merits, however, the Campaign is either incorrect on the law, or does not provide sufficient proof to identify particular ballots

that were improperly cast. At the end of the day, nothing in this case casts any legitimate doubt that the people of Wisconsin lawfully chose Vice President Biden and Senator Harris to be the next leaders of our great country. While the Campaign has every right to challenge ballots cast out of compliance with the law, its efforts to make that showing in this case do not succeed.

¶60 I am authorized to state that Justice ANN WALSH BRADLEY joins this concurrence.

¶61 PATIENCE DRAKE ROGGENSACK, C.J. (dissenting). Elections have consequences. One candidate wins and the other loses, but in every case, it is critical that the public perceive that the election was fairly conducted.

¶62 In the case now before us, a significant portion of the public does not believe that the November 3, 2020, presidential election was fairly conducted. Once again, four justices on this court cannot be bothered with addressing what the statutes require to assure that absentee ballots are lawfully cast. I respectfully dissent from that decision. I write separately to address the merits of the claims presented.¹

¶63 The Milwaukee County Board of Canvassers and the Dane County Board of Canvassers based their decisions on erroneous advice when they concluded that changes clerks made to defective witness addresses were permissible. And, the Dane County Board of Canvassers erred again when it approved the 200 locations for ballot collection that comprised Democracy in the Park. The majority does not bother addressing what the boards of canvassers did or should have done, and instead, four members of this court throw the cloak of laches over numerous problems that will be repeated again and again, until this court has the courage to correct them. The electorate expects more of us, and we are capable of

¹ See Antonin Scalia, *The Dissenting Opinion*, 1994 J. Sup. Ct. Hist. 33 (1994) (“Legal opinions are important, after all, for the reasons they give, not the results they announce; results can be announced in judgment orders without opinion. An opinion that gets the *reasons* wrong gets *everything* wrong which is the function of an opinion to produce.”).

providing it.² Because we do not, I respectfully dissent.

I. BACKGROUND

¶64 On November 3, 2020, people across Wisconsin and across the country exercised their constitutional right to vote. When the initial Wisconsin canvass was completed on November 17, 2020, Joseph R. Biden and Kamala D. Harris received 20,427 more votes than Donald J. Trump and Michael R. Pence.

¶65 On November 18, 2020, President Trump, Vice President Pence and the Trump campaign (the Petitioners) filed recount petitions in Milwaukee and Dane Counties. The recount petitions alleged that the following errors occurred during the election in both counties:

- (1) Municipal clerks improperly completed missing information on absentee ballot envelopes related to witness addresses;
 - (2) In-person absentee voters did not submit written applications for an absentee ballot;
- and

² See, e.g., *Texas v. Pennsylvania*, 592 U.S. ____, ____ (slip op., at 1) (Dec. 11, 2020) (order denying motion to file bill of complaint) (Alito and Thomas, J.J., statement on the denial of Texas’s motion to file a bill of complaint) (“In my view we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. . . . I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue”)(internal citation omitted).

(3) Voters who were not indefinitely confined claimed “indefinitely confined” status for the purposes of obtaining an absentee ballot without having to show a photo identification.

¶66 In addition to the above allegations raised during both recounts, in Dane County, the Petitioners alleged error in counting all ballots received during Democracy in the Park events in Madison on September 26, 2020, and October 3, 2020.

¶67 The recount lasted from November 20, 2020, to November 29, 2020.³ During the recount process, the Petitioners objected to irregularities in how the voting was conducted pursuant to Wis. Stat. § 9.01(5) (2017-18).⁴ Many irregularities were grounded in Wisconsin Elections Commission (WEC) advice on voting process. The boards of canvassers overruled all of the Petitioners’ irregularity objections.

¶68 As they relate to each alleged irregularity, the counties rejected the Petitioners’ arguments for the following reasons:

(1) Municipal clerks improperly completed missing information on absentee ballot envelopes related to witness addresses.

The Milwaukee County Board of Canvassers moved to accept ballots from envelopes with

³ Milwaukee County completed and certified its results on November 27, 2020, and Dane County completed and certified its recount results on November 29, 2020.

⁴ All further references to the Wisconsin Statutes are to the 2017-18 version.

witness addresses that had been completed by clerks consistent with specific guidance by the WEC, which the Board viewed as consistent with Wis. Stat. § 6.87(6d).

The Dane County Board of Canvassers also declined to “exclude envelopes that had a witness address added by the clerk.”

(2) In-person absentee voters did not submit written applications for an absentee ballot.

The Milwaukee County Board of Canvassers determined that there are multiple forms of application for an absentee ballot that can be made by absentee in-person voters and that the absentee ballot envelope provided to absentee in-person voters – which has the word “application” stated on it and must be completed by the voter – is an application for an absentee ballot. The Milwaukee Board thus rejected the Trump Campaign’s challenge to ballots cast by in-person absentee voters.

The Dane County Board of Canvassers voted not to exclude or draw down any absentee ballots on the basis that they “do not have an attached or identifiable application.” . . . The Dane County Board of Canvassers concluded that review of absentee ballot applications is not a part of the statutory recount process under Wis. Stat. § 9.01(1)(b) and therefore the applications were not relevant to the recount.

(3) Voters who were not indefinitely confined claimed “indefinitely confined” status for the purposes of obtaining an absentee ballot without having to show a photo identification.

The Milwaukee County Board of Canvassers found that “a designation of an indefinitely confined status is for each individual voter to make based upon their current circumstances” and that “no evidence of any voter in Milwaukee County [was] offered that has abused this process and voted through this status . . . not even an allegation that there was a single voter who abused this process to vote without providing proof of their ID, but eliminating proof that anyone did so. So there’s no allegation . . . no proof . . . no evidence.” . . . The Board voted to overrule any challenge to a voter with the status of “indefinitely confined.”

The Dane County Board of Canvassers also rejected the Trump Campaign’s challenge that would have required invalidating the ballots of all electors in Dane County who declared indefinitely confined status. The Board specifically declined to separate or “draw down” the ballots cast by electors who declared indefinitely confined status.

(4) Ballots received during democracy in the park.

The Dane County Board of Canvassers denied the challenge, ruling that the Democracy in the Park events were the equivalent of a

human drop box and valid under the statute.

¶69 On December 1, 2020, the Petitioners filed a petition for leave to file an original action with us. We denied that petition on December 3, 2020. That same day, the Petitioners filed two notices of appeal of the recount determinations pursuant to Wis. Stat. § 9.01(6)(a). Those cases were consolidated in Milwaukee County and the Honorable Stephen Simanek was assigned to the appeal pursuant to § 9.01(6)(b).

¶70 The circuit court held a hearing on December 11, 2020. At the conclusion of oral argument, the circuit court affirmed the recount determinations and, in so doing, adopted pages one through thirty of the Respondents' Joint Proposed Findings of Fact and Conclusions of Law. After the circuit court entered its final written decision, the Petitioners filed a notice of appeal. The Petitioners also filed a petition for bypass under Wis. Stat. § 809.60(1). Thereafter, we granted the petition for bypass and assumed jurisdiction over this appeal.

II. DISCUSSION

A. Standard of Review

¶71 In a Wis. Stat. § 9.01 proceeding, post election challenges “are permissible provided that they may affect the election results.” *Logerquist v. Board of Canvassers for Town of Nasewaupée*, 150 Wis. 2d 907, 916, 442 N.W.2d 551 (Ct. App. 1989). In such a proceeding, we review the determinations of the board of canvassers, not those of the circuit court. *Id.* at 917. “On appellate review of a [] § 9.01(1) proceeding, the question is whether the board [of canvasser’s] findings

are supported by substantial evidence.⁵ *Carlson v. Oconto Bd. of Canvassers*, 2001 WI App 20, ¶5, 240 Wis. 2d 438, 623 N.W.2d 195 (citing *Logerquist*, 150 Wis. 2d at 912).

¶72 This appeal also requires us to interpret and apply Wisconsin statutes. We interpret and apply statutes independently as questions of law, while benefitting from the discussion of the circuit court. *Voces De La Frontera, Inc. v. Clarke*, 2017 WI 16, ¶12, 373 Wis. 2d 348, 891 N.W.2d 803.

B. Alleged Irregularities

¶73 “If WEC has been giving advice contrary to statute, those acts do not make the advice lawful. WEC must follow the law. We, as the law declaring court, owe it to the public to declare whether WEC’s advice is incorrect. However, doing so does not necessarily lead to striking absentee ballots that were cast by following incorrect WEC advice. The remedy Petitioners seek may be out of reach for a number of reasons.” *Trump v. Evers*, No. 2020AP1917-OA, unpublished order (Wis. Dec. 3, 2020) (Roggensack, C.J., dissenting from the denial of the petition for leave to commence an original action).

¶74 This case is guided by Wis. Stat. § 6.84 which provides:

The legislature finds that voting is a constitutional right, the vigorous exercise of

⁵ In the matter before us, the material facts are not disputed. Rather, it is the legal consequences that follow from these facts that forms the controversy.

which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Notwithstanding s. 5.01, with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

Accordingly, the provisions that relate to obtaining and voting absentee ballots must be carefully examined as a recount proceeds.⁶

⁶ See also *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (“Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting. In this respect absentee voting is to voting in person as a take-home exam is to a proctored one.” (internal citations omitted)).

C. Witness Addresses

¶75 Wisconsin Stat. § 6.87(2) provides that absentee ballots must be accompanied by a certificate. The certificate may be printed on the envelope in which an absentee ballot is enclosed. Section 6.87(2) provides a model certificate, and directs that certificates must be in “substantially” the same form as the model. The model provides:

The witness shall execute the following:

I, the undersigned witness, subject to the penalties of s. 12.60 (1)(b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

...(Printed name)

...(Address)

Signed ...”^[7]

Accordingly, the plain language of § 6.87(2) requires that it is the witness who must affix his or her signature and write in his or her name and address. Section 6.87(2) does not mention an election official

⁷ Asterisks removed.

taking any action.

¶76 Wisconsin Stat. § 6.87(9) explains what an election official may do if an absentee ballot is received with an improperly completed certificate or no certificate:

[T]he clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).

Section 6.87(9)'s plain language authorizes election officials to return the ballot to "the elector" to correct "the defect." It does not authorize election officials to make corrections, i.e., to write anything on the certificate.

¶77 In addition, Wis. Stat. § 6.87(6d) provides that "[i]f a certificate is missing the address of a witness, the ballot may not be counted." This language is clear. And furthermore, its legislative history confirms its plain meaning. *Westmas v. Creekside Tree Serv., Inc.*, 2018 WI 12, ¶20, 379 Wis. 2d 471, 907 N.W.2d 68 (quoting *State v. Grunke*, 2008 WI 82, ¶22, 311 Wis. 2d 439, 752 N.W.2d 769) (explaining that courts may consult legislative history to confirm a statute's plain meaning). This subsection was added by 2015 Wis. Act 261. A memorandum prepared by the Legislative Council provides that "Act 261 . . . requires an absentee ballot to have a witness address to be counted. An absentee ballot voter must complete the certification and sign the certification in the presence

of a witness, and the witness must sign the certificate and provide his or her name and address.” Wis. Legis. Council Act Memo, 2015 Wis. Act 261, at 2, <https://docs.legis.wiscinsin.gov/2015/related/lcactmemo/act261.pdf>.

¶78 The contention that ballots with defective addresses cannot be counted is supported by more than the plain meaning of Wis. Stat. § 6.87(6d). The requirement that such ballots not be counted is found in Wis. Stat. § 6.84(2), which provides that the provisions in § 6.87(6d) are “mandatory.”

¶79 Notwithstanding the plain, clear requirements of two statutes, WEC’s guidance explicitly directs municipal clerks that they “*must* take corrective actions in an attempt to remedy a witness address error.” WEC guidance states, “municipal clerks shall do all that they can reasonably do to obtain any missing part of the witness address.” Then in addition, the WEC instructs clerks to add witness address information even though the guidance acknowledges that “some clerks have expressed [concern] about altering information on the certificate envelope, especially in the case of a recount.”

¶80 The WEC ignores that the legislature provided only one act an election official may take in regard to a defective witness address: mail the defective ballot back to the elector to correct the error. Wis. Stat. § 6.87(9). That the legislature made one choice about correcting a defective witness address excludes other methods of correction. “[T]he express mention of one matter excludes other similar matters [that are] not mentioned.” *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287 (quoting *Perra v. Menomonee Mut. Ins. Co.*, 2000 WI App 215, ¶12, 239 Wis. 2d 26, 619 N.W.2d 123) (modifications in

the original). In addition, and similarly, § 6.87(2) states, “[t]he witness shall execute the following . . . (Address).” It does not state that clerks shall execute anything.

¶81 My conclusion that errors in the certification of absentee ballots require discarding those ballots is consistent with our precedent. In *Kaufmann v. La Crosse City Bd. of Canvassers*, 8 Wis. 2d 182, 98 N.W.2d 422 (1959), absentee ballots were returned to a municipal clerk without bearing a notary’s signature on the accompanying certificate envelope, as required by statute at that time. The clerk added her signature to the certificates. *Id.* at 183. We explained that the electors’ failure to ensure that the certificate complied with the statute invalidated the ballots. Additionally, we stated, “[t]he fact that the . . . clerk further complicated the matter by signing her name to the . . . certificate cannot aid the voter. The two wrongs cannot make a right.” *Id.* at 186. The ballots were not counted. *Id.* In the case at hand, a defective witness address cannot be corrected by a clerk, just as the signature of the notary could not be completed by the clerk in *Kaufmann*.

¶82 In *Gradinjan v. Boho (In re Chairman in Town of Worchester)*, 29 Wis. 2d 674, 139 N.W.2d 557 (1966), absentee ballots were issued without the municipal clerk’s initials or signature, as required by statute at that time. We concluded that the ballots “should not have been counted.” *Id.* at 683. Furthermore, we said that the statute that obligated the invalidation of these ballots survived constitutional attack. *Id.* at 683–84. We emphasized that absentee voting is subject to different statutory requirements than voting at a polling place, i.e., while a ballot cast at a polling place without initials or a signature may be countable, an

absentee ballot subject to an analogous defect is not. *Id.* at 684. As we stated, “[c]learly, the legislature could determine that fraud and violation of the sanctity of the ballot could much more readily be perpetrated by use of an absentee ballot than under the safeguards provided at a regular polling place.” *Id.* In the case at hand, a witness address is a statutory requirement, mandated by law, just as the initials or signature of the municipal clerk was in *Gradinjan*.

¶83 The canvassing boards deferred to the WEC’s guidance about defective signatures and it appears that the circuit court did so as well when interpreting Wis. Stat. § 6.87. The circuit court stated:

Adding, the requisite information by the clerk has been in effect since before the 2016 election. The election which Trump prevailed in Wisconsin, I believe, after a recount. It’s longstanding, I believe it’s not prohibited by law, and it is therefore a reasonable interpretation to make sure, as the as the Court indicated earlier, that the will of the electors, the voters, are brought to fruition.

It is unfortunate that WEC has such sway, especially when its “guidance” is contrary to the plain meaning of two statutes.

¶84 Furthermore, we do not defer to administrative agencies when interpreting statutes. Wis. Stat. § 227.57(11); *see also Lamar Cent. Outdoor, LLC v. Div. of Hearings & Appeals*, 2019 WI 109, ¶9, 389 Wis. 2d 486, 936 N.W.2d 573 (quoting *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶108, 382 Wis. 2d 496, 914 N.W.2d 21). Accordingly, the issue is not whether the WEC adopted “a reasonable interpretation,” as the

circuit court seems to have suggested. We follow the plain meaning rule when interpreting statutes, which we do independently. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. “If the meaning of the statute is plain, we ordinarily stop the inquiry.” *Id.*, ¶45 (quoting *Seider v. O’Connell*, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659).

¶85 And finally, guidance documents “are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions.” *Service Emps. Int’l Union, Local 1 v. Vos*, 2020 WI 67, ¶102, 393 Wis. 2d 38, 946 N.W.2d 35. Guidance documents “impose no obligations, set no standards, and bind no one.” *Id.* “Functionally, and as a matter of law, they are entirely inert.” *Id.*

¶86 Administrative agencies, including the WEC, often treat their guidance as if it were law, but that does not make it so. *Id.*, ¶143 (Roggensack, C.J., concurring/dissenting). Such treatment is inappropriate – it confuses people by making them think that they have a legally cognizable reliance interest in WEC’s guidance when they do not.

D. Written Applications

¶87 The Petitioners assert that during the two weeks that permit early in-person absentee voting 170,151 electors who did not submit a sufficient “written application” before receiving an absentee ballot cast votes. The crux of the Petitioners’ argument is that the written application must be “separate” from the ballot and the certification.

¶88 The statutes provide that in the two weeks leading up to an election, electors may go to the municipal clerk's office and apply for an absentee ballot. Upon proof of identification, the elector receives a ballot, marks the ballot, the clerk witnesses the certification and the elector casts a vote by returning the absentee ballot to the municipal clerk. Wis. Stat. § 6.86(1)(b).

¶89 Pursuant to Wis. Stat. § 6.86(1)(ar), “the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector.” Other statutes provide for similar requirements. *See, e.g.*, Wis. Stat. § 6.86(1)(a)1.-6. (stating that “[a]ny elector of a municipality who is registered to vote . . . and who qualifies . . . as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods,” which are then listed); Wis. Stat. § 6.86(1)(ac) (stating that electors “may make written application to the municipal clerk for an official ballot by means of facsimile transmission or electronic mail”).

¶90 We begin statutory interpretation with the language of the statute. *Kalal*, 271 Wis. 2d 633, ¶45. “Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.*

¶91 None of the statutes in question contain the word “separate.” Rather, a “written application” is required before the elector's identity is established with a photo identification and the elector receives an absentee ballot. *See* Wis. Stat. §§ 6.86(1)(a), (ac), (ar), (b), 6.86(2m). Furthermore, § 6.86(2m) provides that “The application form and instructions shall be

prescribed by the commission” Here, the statutes do not provide a form application; the statutes do not define what is required on an application, but simply that it be written. Form EL 122 was employed here to apply for a ballot in-person.

¶92 Form EL 122 requires the applicant for an absentee ballot to provide the applicant’s name, street address, city, and zip code. It also asks for the date of the election for which the application is being made and the county and municipality in which the applicant votes. The substantive information that the application requests is substantially similar to form EL 121, which is titled “Wisconsin Application for Absentee Ballot.” Each of these application forms requires writing prior to being submitted by electors in advance of an elector receiving an absentee ballot.⁸

E. Indefinitely Confined

¶93 Wisconsin Stat. § 6.86(2)(a) provides a manner by which some electors may obtain an absentee ballot outside of the mode outlined above. Those who are “indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period” may apply for an absentee ballot on that basis. *Id.* Those electors are then excused from the absentee ballot photo identification requirement. Wis. Stat. § 6.87(4)(b)1.

⁸ This order of operations was confirmed in several affidavits. The affiants asserted that before they received their ballots the clerk’s office verified their photo identification and voter registration. The electors were then given an EL-122 envelope and instructed to complete it. Once the application was completed, the voters received their ballots

¶94 The Petitioners contend that all votes cast by electors claiming indefinitely confined status after March 25, 2020 (the date of McDonell’s Facebook post)⁹ are invalid. However, we have discussed the indefinitely confined status in *Jefferson v. Dane Cnty.*, 2020 WI 90, ___ Wis. 2d ___, ___ N.W.2d ___, which is released today, December 14, 2020.

¶95 In the pending matter, we do not have sufficient information about the 28,395 absentee voters who claimed this status in Milwaukee and Dane counties to determine whether they lawfully asserted that they were indefinitely confined prior to receiving an absentee ballot. Therefore, I go no further in addressing this contention.

F. Democracy in the Park

¶96 On September 26, 2020 and October 3, 2020, at more than 200 City of Madison parks,¹⁰ the City of Madison held events called, “Democracy in the Park.” During those events, poll workers, also referred to as “election inspectors,” helped in the completion of ballot envelopes, acted as witnesses for voters and collected completed ballots.¹¹ 17,271 absentee ballots were voted

⁹ On March 25, 2020, Dane County Clerk, Scott McDonell, stated on Facebook that community members are encouraged to claim indefinitely confined status due to COVID-19 and Governor Evers’ then-active Emergency Order #12.

¹⁰ Affidavit of Maribeth Witzel-Behl, Madison City Clerk.

¹¹ *Id.*

and delivered to these poll workers.¹²

¶197 The poll workers who staffed Democracy in the Park were volunteers. They were not employees of the City of Madison Clerk’s office.

¶198 Wisconsin Stat. § 6.87(4)(b)1. requires that when voting an absentee ballot “[t]he envelope [containing the ballot] shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” In addition, the plain words of Wis. Stat. § 6.84(2) specifically direct that the provisions of § 6.87(4)(b)1. “shall be construed as mandatory.” Notwithstanding the use of “shall” in § 6.87(4)(b)1. and the “mandatory” requirement to comply with the terms of § 6.87(4)(b)1. in § 6.84(2), the 17,271 ballots that were collected in Madison parks did not comply with the statutes. Stated otherwise, they were not “delivered in person, to the municipal clerk.”

¶199 It is conceivable that the 200 sites for Democracy in the Park could have become alternate absentee ballot sites. If the Madison Common Council had chosen to designate a site other than the municipal clerk’s office as the location from which voters could request and to which they could return absentee ballots, an alternate absentee ballot site could have been established. Wis. Stat. § 6.855(1). The statute also provides that the governing body of a municipality may designate more than one alternate site. § 6.855(5).¹³

¶100 However, if Democracy in the Park were held to be 200 alternate absentee ballot sites, then “no function related to voting and return of absentee

¹² Id.

¹³ However, 200 alternate sites does seem a bit much.

ballots. . . . may be conducted in the office of the municipal clerk.” Wis. Stat. § 6.855(1). This requirement does not fit the facts because the Madison clerk’s office continued to provide and accept return of absentee ballots. Therefore, these 200 park events do not meet the statutory criteria set out in § 6.855 for alternate absentee ballot sites.

¶101 One wonders, what were they? It is contended that they were “human drop boxes.” That gives little comfort because drop boxes are not found anywhere in the absentee voting statutes. Drop boxes are nothing more than another creation of WEC to get around the requirements of Wis. Stat. § 6.87(4)(b)1. The plain, unambiguous words of § 6.87(4)(b)1. require that voted ballots “shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” Drop boxes do not meet the legislature’s mandatory directive.

¶102 However, because drop boxes are not separately identified as a source of illegal voting in this lawsuit, I will not dwell on the accountability problems they create, but I do not doubt that challenges to drop boxes in general and in specific instances will be seen as problems in future elections. Therefore, we may have the opportunity to examine them in a case arising from a subsequent election.¹⁴

¹⁴ We had the opportunity to examine the use of drop boxes in *Mueller v. Jacobs*, 2020AP1958-OA, but the court refused to grant review, from which decision Annette Kingsland Ziegler, J., Rebecca Grassl Bradley, J. and I dissented.

¶103 It is also Respondent’s contention that the poll workers who staffed these events were agents¹⁵ of the city clerk; and therefore, delivery of ballots to them was personal delivery to the clerk within the meaning of Wis. Stat. § 6.87(4)(b)1. This is an amazing contention. Without question, delivery to voluntary poll workers is not “delivered in person to the municipal clerk,” as § 6.87(4)(b)1. requires.

¶104 The legislature prescribed the absentee voting procedure in Wis. Stat. § 6.87(4)(b)1. and commanded that those procedures are “mandatory” in Wis. Stat. § 6.84(2). Gatherings in 200 city parks did not meet the statutory requirements for lawful absentee voting. They also lack the safety and solemnity that are attached to personally delivering absentee ballots to the municipal clerk.

III. CONCLUSION

¶105 The Milwaukee County Board of Canvassers and the Dane County Board of Canvassers based their decisions on erroneous advice when they concluded that changes clerks made to defective witness addresses were permissible. And, the Dane County Board of Canvassers erred again when it approved the 200 locations for ballot collection that comprised Democracy in the Park. The majority does not bother addressing what the boards of canvassers did or

¹⁵ I would be amazed if the City of Madison agreed that all the volunteer poll workers who staffed Democracy in the Park were legally agents of the city clerk given the exposure to liability such a determination would bring. *Lang v. Lions Club of Cudahy Wis., Inc.*, 2020 WI 25, ¶25, 390 Wis. 2d 627, 939 N.W.2d 582 (lead opinion).

should have done, and instead, four members of this court throw the cloak of laches over numerous problems that will be repeated again and again, until this court has the courage to correct them. The electorate expects more of us, and we are capable of providing it. Because we do not, I respectfully dissent.

¶106 I am authorized to state that Justices ANNETTE KINGSLAND ZIEGLER, and REBECCA GRASSL BRADLEY join this dissent.

¶107 ANNETTE KINGSLAND ZIEGLER, J. (*dissenting*). We are called upon to declare what the law is. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). Once again, in an all too familiar pattern, four members of this court abdicate their responsibility to do so. They refuse to even consider the uniquely Wisconsin, serious legal issues presented. The issues presented in this case, unlike those in other cases around the United States, are based on Wisconsin statutory election law. Make no mistake, the majority opinion fails to even mention, let alone analyze, the pertinent Wisconsin statutes. Passing reference to other states’ decisionmaking is of little relevance given the Wisconsin legal issues at stake. *See Roggensack, C.J., dissent, supra*; Rebecca Grassl Bradley, J., dissent, *infra*. The people of Wisconsin deserve an answer – if not for this election, then at least to protect the integrity of elections in the future. Instead of providing clarity, the majority opinion is, once again, dismissive of the pressing legal issues presented.

¶108 The majority author’s concurrence is even more dismissive of the need for clarity in Wisconsin election law stating that he “understand[s] the desire for at least some clarity regarding the underlying election administration issues . . . [but] its just not possible.” Hagedorn, J., concurrence, ¶36. Indeed, we are presented with a rare opportunity to meaningfully engage in, among other things, a known conflict between guidance, given by an unelected committee, and what the law requires. These are more than mere “election administration issues.” *See Rebecca Grassl Bradley, J., dissent, infra*. This case presents not just a “desire” for clarity in the law, our constitutional duty

requires us to declare what the law is. Quite obviously, defaulting to laches and claiming that it is “just not possible,” is directly contradicted by the majority author’s own undertaking. If it is important enough to address in his concurrence, then it should also satisfy the discretionary standard which overcomes the application of laches. Instead of undertaking the duty to decide novel legal issues presented, this court shirks its institutional responsibility to the public and instead falls back on a self-prescribed, previously unknown standard it calls laches.

¶109 Stated differently, the majority claims the petitioners were too late, should have acted earlier and therefore, the court is neutered from being able to declare what the law is. The majority basically reiterates respondents’ soundbites. In so doing, the majority seems to create a new bright-line rule that the candidates and voters are without recourse and without any notice should the court decide to later conjure up an artificial deadline concluding that it prefers that something would have been done earlier. That has never been the law, and it should not be today. It is a game of “gotcha.” I respectfully dissent, because I would decide the issues presented and declare what the law is.

I. ABDICATION OF CONSTITUTIONAL DUTY

¶110 Unfortunately, our court’s adoption of laches as a means to avoid judicial decisionmaking has become a pattern of conduct. A majority of this court decided not to address the issues in this case, when originally presented to us by way of an original action. *Trump v. Evers*, No. 2020AP1971-OA, unpublished order (Wis. Dec. 3. 2020). In concluding that it is again

paralyzed from engaging in pertinent legal analysis, our court unfortunately provides no answer or even any analysis of the relevant statutes, in the most important election issues of our time. *See Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877; *Trump v. Evers*, No. 2020AP1971-OA (Rebecca Grassl Bradley, J., dissenting); *Mueller v. Jacobs*, No. 2020AP1958-OA, unpublished order (Wis. Dec. 3, 2020) (Roggensack, C.J., Ziegler, and Rebecca Grassl Bradley, JJ. dissenting); *Wis. Voters Alliance v. Wisconsin Elections Comm'n*, No. 2020AP1930-OA, unpublished order (Wis. Dec. 4, 2020) (Roggensack, C.J., dissenting).

¶111 Instead, the majority relies on what only can be viewed as a result-oriented application of the equitable doctrine of laches to avoid declaring what the law is. To be clear, I am not interested in a particular outcome. I am interested in the court fulfilling its constitutional responsibility. While sometimes it may be difficult to undertake analysis of hot-button legal issues – as a good number of people will be upset no matter what this court does – it is our constitutional duty. We cannot hide from our obligation under the guise of laches. I conclude that the rule of law and the equities demand that we answer these questions for not only this election, but for elections to come. I have concern over this court's pattern of indecision because that leaves no court declaring what Wisconsin election law is. *See Roggensack, C.J., dissent, supra*; Rebecca Grassl Bradley, J., dissent, *infra*. We can and should do better for the people of Wisconsin and for the nation, which depends on Wisconsin following its election laws.

¶112 Regarding this court's continued pattern of abdicating its responsibility concerning election issues,

earlier this term in *Hawkins*, the same members of the court relied on laches, without any analysis whatsoever of that doctrine, and denied a rightful candidate the opportunity to be placed on the ballot as a presidential candidate. Thus, the court likewise denied the voters the opportunity to choose that candidate's name amongst the others on the ballot. See *Hawkins*, 393 Wis. 2d 629 (Ziegler, J., dissenting).¹ The court in *Hawkins*, about two months before the November election, declared that it was unable to act, citing the doctrine of laches, and applied a newly invented and previously unknown, self-imposed, result-oriented, laches-based deadline as an excuse for inaction. *Id.*

II. LACHES DOES NOT AND SHOULD NOT BAR THIS CASE

¶113 Once again, the majority imposes its definition of laches, which is tailored to its judicial preference rather than based on well-established legal principles. The majority must know that under this court's previous laches jurisprudence, it should nonetheless address the merits of the issues. As this court has consistently held, "[l]aches is an affirmative,

¹ In 2016, the Green Party candidates received 31,072 votes. See *Certificate of Ascertainment for President, Vice President and Presidential Electors General Election – November 8, 2016*, available at <https://www.archives.gov/files/electoral-college/2016/ascertainment-wisconsin.pdf>. In 2020, the Green Party candidates received only 1,089 votes. See *WEC Canvass Results for 2020 General Election*, available at <https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf>.

equitable defense designed to bar relief when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim." *Wisconsin Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶11, 393 Wis. 2d 308, 946 N.W.2d 101. In Wisconsin, a defendant must prove three elements for laches to bar a claim: "(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay." *Id.*, ¶12. Even if respondents carry their burden of proving all three elements of laches, "application of laches is left to the sound discretion of the court asked to apply this equitable bar." *Id.*

¶114 The petitioners raised four allegations regarding election administration: absentee ballots lacking a separate application; absentee envelopes that are missing or have a defective witness address; indefinitely confined voters/faulty advice from election officials; and ballots cast at Madison's Democracy in the Park/ballot drop boxes. The respondents cannot demonstrate that laches bars a single one of these claims, and, even if they could, the court could still and should exercise its discretion to hear these issues.

A. No Unreasonable Delay

¶115 The first element of a laches defense requires the respondents to prove the petitioners unreasonably delayed in making their allegations. "What constitutes a reasonable time will vary and depends on the facts of a particular case." *Wisconsin Small Bus. United*, 393 Wis. 2d 308, ¶14.

¶116 Convenient to its purpose, the majority frames this case to meet its preferred outcome. The

majority characterizes this suit as a challenge to general election policies rather than what it is: this lawsuit is a challenge to specific ballots that were cast in this election, contrary to the law. The majority states, “[t]he time to challenge election policies such as these is not after all ballots in the election have been cast and the votes tallied.” Majority op., ¶22. According to the majority, “[s]uch delay in light of these specific challenges is unreasonable.” *Id.* The majority misses the mark.

¶117 In other words, contrary to the majority’s characterizations, this case is not about general election procedure: it is about challenging specific ballots. In Wisconsin, while voting is a right, absentee voting is a privilege, not a right. Wis. Stat. § 6.84(1). The Wisconsin Legislature has created a set of mandatory rules to which *the voters* must adhere for their absentee ballots to count.² Consistent with express mandatory rules, the petitioners allege that certain ballots were cast that did not adhere to the law and, therefore, should not be counted. It is a specific question: Were the ballots cast according to the law as stated in the statutes and if not, what, if any, remedy, exists?

¶118 With this proper framing of the issue, it is clear that the petitioners did not unreasonably delay in challenging the ballots. To somehow require that challenges must be made and legal relief given before

² See Wis. Stat. § 6.84(2) (“Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.”).

an election, before the ballots are cast and before a recount is absurd. No recount would ever amount to relief if that is the lodestar.

¶119 Thus, the petitioners did not unreasonably delay in filing this suit, and this element of laches has not been demonstrated as to any of the four allegations of election irregularity.

B. Respondents Knew Ballots Would Be Challenged.

¶120 The second element of laches addresses the knowledge of the party asserting laches. *See Wis. Small Bus. United*, 393 Wis. 2d 308, ¶18. If the party lacks knowledge of claim, the respondents have satisfied this element. *Id.* The majority summarily accepts, without any analysis, that “[t]he respondents all . . . were unaware that the Campaign would challenge various election procedures after the election” Majority op., ¶23. Virtually nothing is in the record to support this assertion other than the parties’ statements. In other words, the majority accepts one side’s statements as fact in order to disallow the other side its day in court.

¶121 As explained above, this is a challenge to the ballots cast in this election. The President tweeted numerous times shortly after Wisconsin announced the election results that he would challenge the results and prove certain ballots were impermissibly cast.³ The majority chose to accept the respondents’ assertion that they did not see this lawsuit coming

³ *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 28, 2020, 2:00 p.m.), <https://twitter.com/realDonaldTrump/status/1332776310196883461>.

despite the record to the contrary.

¶122 Moreover, the majority is incorrect that “nothing in the record suggests” that the respondents knew what the petitioners would be challenging. Majority op., ¶23. In fact, Wisconsin law mandates that the petitioners expressly declare on what grounds they plan to challenge the ballots in a recount. Wis. Stat. § 9.01(1). In the petitioners’ recount petition, the petitioners specifically laid out these claims.

¶123 Thus, the majority’s conclusion with respect to this element is particularly lean given the record. It is at least more than plausible that respondents had knowledge that the petitioners would challenge the ballots in a lawsuit.

C. Respondents Lack Prejudice.

¶124 Even if the respondents could prove the first two elements, the respondents themselves are not prejudiced by this delay. “What amounts to prejudice . . . depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position.” *Wis. Small Bus. United*, 393 Wis. 2d 308, ¶19. The party seeking to apply laches must “prove that the unreasonable delay” prejudiced the party, not a third party. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶32, 389 Wis. 2d 516, 936 N.W.2d 587. This court recognizes two different types of prejudice: evidentiary and economic. *Id.*, ¶33. Evidentiary prejudice is where “the defendant is impaired from successfully defending itself from suit given the passage of time.” *Id.*, ¶33 n.26. Economic prejudice occurs when “the costs to the defendant have significantly increased due to the delay.” *Id.*

¶125 The majority abandons these principles of laches and instead focuses on the prejudice to third parties. The majority states that “[t]o strike ballots cast in reliance on the guidance now, and to do so in only in two counties, would violate every notion of equity that undergirds our electoral system.” Majority op., ¶25. This is a new manner in which to approach the legal analysis of prejudice. The majority does not explain how this potential remedy prevents us from hearing the merits of this case. The majority does not explain how these notions are either evidentiary or economic prejudice, nor does it consider how it prejudices the actual parties in this case. It is unusual to conclude that overwhelming prejudice exists such that the court is paralyzed from considering whether the law was followed. In other words, the majority seems to be saying that they do not wish to grant relief and therefore they will not analyze the law. This remedy-focused analysis is not typical to laches.

¶126 Neither type of prejudice applies to the respondents in this case. None of the respondents claimed that they were unable to successfully defend themselves. All respondents filed briefs in this court addressing the merits. The circuit court’s opinion addresses the merits. Accordingly, evidentiary prejudice does not apply. Furthermore, no respondents have claimed that the costs of defending this claim have “significantly increased due to the delay.” Accordingly, economic prejudice does not apply.

¶127 At a more fundamental level, the respondents must *prove* each of the elements. The court cannot presume that the elements are met. Similarly, the court cannot assume that a party cannot successfully defend itself nor that a party faces “significantly increased” costs. To do so forces this court to step out

of our role as a neutral arbiter. *See Service Emp. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d.

¶128 Therefore, the respondents cannot prove and did not even allege that they are prejudiced. Accordingly, the majority determination in this regard is flawed.

D. Equitable Discretion

¶129 Even if the majority was correct that the elements of laches are met here, it still has the discretion to reach the merits. *See Wis. Small Bus. United*, 393 Wis. 2d 308, ¶12. The majority claims that the “only just resolution of these claims” is to use laches to not address the merits of this case. Majority op., ¶29. Not so. Our constitutional responsibility is to analyze the law and determine if it was followed regardless of whether any remedy might be available. In this way future elections benefit from our analysis. Curiously, it is unclear whether there is an actual majority given the fact that the writer does exercise his discretion to address the issues – again, a lack of clarity.

¶130 This court should address the merits because we should declare what the law is. The public has serious concerns about the election and about our election laws. Recent polls suggest that the American public, regardless of party affiliation, has serious questions about the integrity of the November 2020 election.⁴ Our court has an opportunity to analyze the

⁴ *See* Rasmussen Reports, *61% Think Trump Should Concede to Biden* (Nov. 19, 2020) https://www.rasmussenreports.com/public_content/politics/elections/election_2020/61_think_tr

law and answer the public's concerns, but it unfortunately declines this opportunity for clarification.

¶131 The majority should declare what the law is. Every single voter in this state is harmed when a vote is cast in contravention of the statutes. *See* Wis. Stat. § 6.84(1). This court should conduct a rigorous analysis, and determine whether the law was followed.

¶132 To counter these clear equities counseling us

ump_should_concede_to_biden (finding 47% of those who polled believe that Democrats stole votes or destroy pro-Trump ballots in several states to ensure that Biden would win); Politico, *National Tracking Poll*, Project 201133 (Nov. 6-9, 2020), <https://www.politico.com/f/?id=00000175-b306-d1da-a775-bb6691050000> (finding 34% of those polled believed the election was not free and fair); Jill Darling et al., *USC Dornsife Daybreak Poll Topline* at 14 (Nov. 19, 2020), Post-Election Poll UAS318, <https://dornsife-center-for-political-future.usc.edu/past-polls-collection/2020-polling/> (finding that those polled are only 58% confident that all votes in the election were accurately counted); R. Michael Alvarez, et al., *Voter Confidence in the 2020 Presidential Election: Nationwide Survey Results* (Nov. 19, 2020), The Caltech/MIT Voting Technology Project Monitoring the Election, 2020 Presidential Election Survey Reports & Briefs, <https://monitoringtheelection.us/2020-survey> (finding 39% of those polled are not confident that votes nationally were counted as the voter intended); Yimeng Li, *Perceptions of Election or Voter Fraud in the 2020 Presidential Election: Nationwide Survey Results* (Nov. 23, 2020), The Caltech/MIT Voting Technology Project Monitoring the Election, 2020 Presidential Election Survey Reports & Briefs, <https://monitoringtheelection.us/2020-survey> (finding between 29% and 34% of those polled believe voter fraud occurs); *Sharp Divisions on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct*, Pew Research Center, U.S. Politics & Policy (Nov. 20, 2020), <https://www.pewresearch.org/politics/2020/11/20/sharp-divisions-on-vote-counts-as-biden-gets-high-marks-for-his-post-election-conduct/> (finding that 41% of those polled believe the elections were run and administered not well).

to reach the merits, the majority nonetheless seemingly declines the opportunity in favor of a self-divined rule which would make it nearly impossible to know when and how such a claim could be made. The majority asserts that “[f]ailure to [raise these claims earlier] affects everyone, causing needless litigation and undermining confidence in the election results. It also puts courts in a difficult spot. Interpreting complicated election statutes in days is not consistent with best judicial practices.” Majority op., ¶30. A claim post-recount is always going to be tight on timing.

¶133 Under the majority’s new rule, a candidate will have to monitor all election-related guidance, actions, and decisions of not only the Wisconsin Elections Commission, but of the 1,850 municipal clerks who administer the election at the local level. And that is just in one state! Instead of persuading the people of Wisconsin through campaigning, the candidate must expend precious resources monitoring, challenging, and litigating any *potential* election-related issue hoping that a court might act on an issue that may very well not be ripe. Moreover, it would be nonsensical for a candidate, or worse, a disenfranchised voter, to challenge an election law. Thus, the majority’s new rule does not prevent “needless litigation”; it spawns it in the form of preventative lawsuits to address any possible infraction of our election laws. We have the opportunity to answer important legal questions now and should do so.

¶134 Similarly, the majority claims by not analyzing the law it is bolstering public confidence. I disagree. As explained, the American public has serious questions about the previous election. *See supra*, ¶23 n.4. Instead of addressing these serious

questions, the majority balks and says some other party can bring a suit at a later date. *See* majority op., ¶31 n.11. Lawsuits are expensive and time-consuming and require that the person bringing one has a claim. These issues are presented here before us today. If they are important enough to answer at a later date, they are important to answer in this pending lawsuit today. Addressing the merits of this case would bolster confidence in this election and future elections. Even if the court does not conclude that relief should be granted, this lawsuit is the opportunity to declare what the law is – which is our constitutional duty – and will help the public have confidence in the election that just occurred and confidence in future elections. An opinion of this court on the merits would prevent any illegal or impermissible actions of election officials going forward. *See* Roggensack, C.J., dissent, *supra*; Rebecca Grassl Bradley, J., dissent, *infra*. Accordingly, I fail to see how addressing the merits in this case would undermine confidence in the election results. If anything, addressing the merits will reassure the people of Wisconsin and our nation that our elections comport with the law and to the extent that the legislature might need to act, it is clear where the law might be that needs correction. The court’s indecision creates less, not more clarity.

¶135 The majority’s decision not to address the merits suffers from an even more insidious flaw – it places the will of this court and the will of the Wisconsin Elections Commission above the express intent of the legislature. The majority uses the potential remedy, striking votes, as an equitable reason to deny this case. Majority op., ¶31. But the majority ignores that the legislature specifically set forth a remedy that absentee ballots cast in

contravention of the statute not be counted. *See* Wis. Stat. § 6.84(2). When the law is not followed, the counting of illegal ballots effectively disenfranchises voters. This past election, absentee voting was at an extraordinarily high level.⁵ Perhaps this is why it mattered more now than ever that the law be followed. Also this might explain why the process has not been objected to before in the form of a lawsuit like this one. The majority gives virtually no consideration to this fact.

¶136 Despite the fact that the majority relies on laches to not declare the law in nearly all respects of the challenges raised, it nonetheless segregates out the indefinitely confined voter claim to analyze. Notably absent is any explanation why this claim is not treated like the other challenges.

¶137 Therefore, the majority's application of laches here is unfortunate and doomed to create chaos, uncertainty, undermine confidence and spawn needless litigation. Instead of declaring what the law is, the majority is legislating its preferred policy. It disenfranchises those that followed the law in favor of those who acted in contravention to it. This is not the rule of law; it is the rule of judicial activism through inaction.

III. CONCLUSION

¶138 As I would not apply laches in the case at issue and instead would analyze the statutes and available remedies as well as the actions of the Wisconsin Elections Commission, I respectfully

⁵ In 2016, 830,763 electors voted using absentee ballots. In 2020, 1,957,514 electors voted using absentee ballots.

dissent.

¶139 I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice REBECCA GRASSL BRADLEY join this dissent.

¶140 REBECCA GRASSL BRADLEY, J. (*dissenting*). Once again, the majority of the Wisconsin Supreme Court wields the discretionary doctrine of laches as a mechanism to avoid answering questions of law the people of Wisconsin elected us to decide. Although nothing in the law compels its application, this majority routinely hides behind laches in election law cases no matter when a party asserts its claims. Whether election officials complied with Wisconsin law in administering the November 3, 2020 election is of fundamental importance to the voters, who should be able to rely on the advice they are given when casting their ballots. Rather than fulfilling its duty to say what the law is, a majority of this court unconstitutionally converts the Wisconsin Elections Commission’s mere advice into governing “law,” thereby supplanting the actual election laws enacted by the people’s elected representatives in the legislature and defying the will of Wisconsin’s citizens. When the state’s highest court refuses to uphold the law, and stands by while an unelected body of six commissioners rewrites it, our system of representative government is subverted.

I

¶141 In Wisconsin, we have a constitution, and it reigns supreme in this state. “By section 1 of article 4 the power of the state to deal with elections except as limited by the Constitution is vested in the senate and assembly to be exercised under the provisions of the Constitution; therefore *the power to prescribe the manner of conducting elections is clearly within the province of the Legislature.*” *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 906 (1930) (emphasis added). The

Wisconsin Elections Commission (WEC) possesses no authority to prescribe the manner of conducting elections; rather, this legislatively-created body is supposed to *administer* and *enforce* Wisconsin's election laws. Wis. Stat. §§ 5.05(1) and (2m). While WEC may not create any law, it may “[p]romulgate rules under ch. 227 . . . for the purpose of *interpreting* or *implementing* the laws regulating the conduct of elections . . .” Wis. Stat. § 5.05(1)(f) (emphasis added). It is undisputed that the advice rendered by WEC was not promulgated by rule but took the form of guidance. “A guidance document does not have the force of law.” Wis. Stat. § 227.112(3). WEC’s guidance documents are merely “communications *about* the law – they are not the law itself.” *Serv. Employees Int’l Union, Local 1 v. Vos*, 2020 WI 67, ¶102, 393 Wis. 2d 38, 946 N.W.2d 35. The majority casts aside this black letter law, choosing to apply the majority’s subjective concept of “equity” in order to reach the outcome it desires.¹ In doing so, the majority commits grave error by according WEC guidance the force of law.

¶142 Chapters 5 through 12 of the Wisconsin Statutes contain the state’s enacted election laws. Section 5.01(1) states that “[e]xcept as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.”

¹ During oral arguments in this case, Justice Jill J. Karofsky made the following statement (among others) to the President’s attorney: “You want us to overturn this election so that your king can stay in power, and that is so un-American.” When a justice displays such overt political bias, the public’s confidence in the integrity and impartiality of the judiciary is destroyed.

This *substantial* compliance provision does not apply to absentee balloting procedures, however: “*Notwithstanding s. 5.01(1)*, with respect to matters relating to the *absentee* ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. *shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.*” Wis. Stat. § 6.84(2) (emphasis added).

¶143 “Section 6.84(2)’s strict construction requirement, applicable to statutes relating to the absentee ballot process, is consistent with the guarded attitude with which the legislature views that process.” *Lee v. Paulson*, 2001 WI App 19, ¶¶7-8, 241 Wis. 2d 38, 623 N.W.2d 577. The legislature expressed its “guarded attitude” toward absentee balloting in no uncertain terms, drawing a sharp distinction between ballots cast in person versus those cast absentee: “The legislature finds that *voting is a constitutional right*, the vigorous exercise of which should be strongly encouraged. *In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place.* The legislature finds that *the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse*; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.” Wis. Stat. § 6.84(1) (emphasis added). While the ascertainable will of the election-day voter may prevail over a “failure to fully comply” with “some of”

the provisions governing conventional voting (§ 5.01), any “[b]allots cast in contravention of” the law’s absentee balloting procedures “may not be counted.” Wis. Stat. § 6.84(2). This court has long recognized that in applying Wisconsin’s election laws, “an act done in violation of a *mandatory* provision *is void*.” *Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 269 Wis. 299, 303, 69 N.W.2d 235 (1955) (emphasis added) (citation omitted).

¶144 In order “to prevent the potential for fraud or abuse” associated with absentee voting, the legislature requires the laws governing the absentee balloting process to be followed. Wis. Stat. § 6.84(1). If an absentee ballot is cast “in contravention” of the absentee balloting procedures, it “may not be counted.” Wis. Stat. § 6.84(2). If an absentee ballot is counted “in contravention” of the absentee balloting procedures, it “may not be included in the certified result of any election.” *Id.* Long ago, this court understood that “we are obliged to conclude that if absentee ballots are improperly delivered in contravention of [Wisconsin’s statutes], the Board of Canvassers is under duty to invalidate and not include such ballots in the total count, *whether they are challenged at the election, or not.*” *Olson v. Lindberg*, 2 Wis. 2d 229, 238, 85 N.W.2d 775 (1957) (emphasis added). Accordingly, if absentee ballots were counted in contravention of the law, the people of Wisconsin, through their elected representatives, have commanded the board(s) of canvassers to exclude those absentee ballots from the total count, independent of any legal challenge an aggrieved candidate may (or may not) bring.

¶145 The majority carelessly accuses the President of asking this court to “disenfranchise” voters. Majority op., ¶27; Justices Rebecca Frank Dallet’s and Jill J.

Karofsky’s concurrence, ¶33. In the election context, “disenfranchise” means to deny a voter the right to vote.² Under Article III, Section 1 of the Wisconsin Constitution, “[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.” This court possesses no authority to remove any qualified elector’s constitutionally-protected right to vote. But it is not “disenfranchisement” to uphold the law. “It is true that the right of a qualified elector to cast his ballot for the person of his choice cannot be destroyed or substantially impaired. However, the legislature has the constitutional power to say how, when and where his ballot shall be cast” *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 472, 37 N.W.2d 473, 480 (1949). And the judiciary has the constitutional responsibility to say whether a ballot was cast in accordance with the law prescribed by the people’s representatives.

¶146 Each of the President’s legal claims challenge the counting of certain absentee ballots, which the President argues were cast in contravention of the Wisconsin Statutes. The majority misconstrues Wisconsin law in asserting that “[t]hese issues could have been brought weeks, months, or even years earlier.” Majority op., ¶30. Section 9.01(11) of the Wisconsin Statutes provides that “[t]his section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed

² Disenfranchise: “To deprive (someone) of a right, esp. the right to vote; to prevent (a person or group of people) from having the right to vote. — Also termed disfranchise.” *Disenfranchise*, Black’s Law Dictionary (11th ed. 2019).

during the voting or canvassing process.” Only a “candidate voted for at any election who is an aggrieved party” may bring an action under Chapter 9. Wis. Stat. § 9.01(1)(a). Surely the majority understands the absurdity of suggesting that the President should have filed a lawsuit in 2016 or anytime thereafter. Why would he? He was not “an aggrieved party” – he won. Obviously, the President could not have challenged any “irregularity, defect or mistake committed during the voting or canvassing process” related to the November 3, 2020 election until that election occurred.

¶147 The respondents recognize that under Chapter 9, the “purpose of a recount . . . is to ensure that the voters, clerks and boards of canvassers followed the rules in place at the time of the election.” Misunderstanding what the governing rules actually are, the respondents argue that having this court declare the law at this point would “retroactively change the rules” after the election. Justice Brian Hagedorn embraces this argument, using a misapplied football metaphor that betrays the majority’s contempt for the law: “the [President’s] campaign is challenging the rulebook adopted before the season began.” Majority op., ¶32. Justices Rebecca Frank Dallet and Jill J. Karofsky endorse the idea that this court should genuflect before “the rules that were in place at the time.” Justices Dallet’s and Karofsky’s concurrence, ¶34. How astonishing that four justices of the Wisconsin Supreme Court must be reminded that it is THE LAW that constitutes “the rulebook” for any election – not WEC guidance – and election officials are bound to follow the law, if we are to be governed by the rule of law, and not of men.

¶148 As the foundation for one of the President’s claims, Wis. Stat. § 6.87(6d) provides that “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” The only statutorily-prescribed means to correct that error is for the clerk to “return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized.” Wis. Stat. § 6.87(9). Contrary to Wisconsin law, WEC guidance says “the clerk should attempt to resolve any missing witness address information prior to Election Day if possible, and this can be done through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness).”³ WEC’s “Election Administration Manual for Wisconsin Municipal Clerks” erroneously provides that “[c]lerks may add a missing witness address using whatever means are available. Clerks should initial next to the added witness address.”⁴ Nothing in the election law statutes permits a clerk to alter witness address information. WEC’s guidance in this regard does not administer or enforce the law; it flouts it.

³ Memorandum from Meagan Wolfe to Wisconsin County and Municipal Clerks (Oct. 19, 2020), at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Spoiling%20Ballot%20Memo%2010.2020.pdf>.

⁴ Wisconsin Elections Commission, Election Administration Manual for Wisconsin Municipal Clerks (Sept. 2020), at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Election%20Administration%20Manual%20%282020-09%29.pdf>.

II

¶149 Under the Wisconsin Constitution, “all governmental power derives ‘from the consent of the governed’ and government officials may act only within the confines of the authority the people give them. Wis. Const. art. I, § 1.” *Wis. Legislature v. Palm*, 2020 WI 42, ¶66, 391 Wis. 2d 497, 942 N.W.2d 900 (Rebecca Grassl Bradley, J., concurring). The confines of the authority statutorily conferred on the WEC limit its function to administering and enforcing the law, not making it. The Founders designed our “republic to be a *government of laws, and not of men* . . . bound by fixed laws, which the people have a voice in making, and a right to defend.” John Adams, *Novanglus: A History of the Dispute with America, from Its Origin, in 1754, to the Present Time, in Revolutionary Writings of John Adams* (C. Bradley Thompson ed. 2000) (emphasis in original). Allowing any person, or unelected commission of six, to be “bound by no law or limitation but his own will” defies the will of the people. *Id.*

¶150 The judiciary is constitutionally compelled to safeguard the will of the people by interpreting and applying the laws duly enacted by the people’s representatives in the legislature. “A democratic state must therefore have the power to . . . prevent all those practices which tend to subvert the electorate and substitute for a government of the people, by the people and for the people, a government guided in the interest of those who seek to pervert it.” *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 905 (1930). The majority’s abdication of its judicial duty to apply the election laws of this state rather than the WEC’s “rulebook” precludes any legislative recourse short of

abolishing the WEC altogether.

¶151 While some will either commend or condemn the court’s decision in this case based upon its impact on their preferred candidate, the importance of this case transcends the results of this particular election. “A correct solution of the questions presented is of far greater importance than the personal or political fortunes of any candidate, incumbent, group, faction or party. We are dealing here with laws which operate in the political field – a field from which courts are inclined to hold aloof – a field with respect to which the power of the Legislature is primary and is limited only by the Constitution itself.” *Id.* The majority’s decision fails to recognize the primacy of the legislative power to prescribe the rules governing the privilege of absentee voting. Instead, the majority empowers the WEC to continue creating “the rulebook” for elections, in derogation of enacted law.

¶152 “The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards.” *State v. Conness*, 106 Wis. 425, 82 N.W. 288, 289 (1900). Instead of determining whether the November 3, 2020 election was conducted in accordance with the legal standards governing it, the majority denies the citizens of Wisconsin any judicial scrutiny of the election whatsoever. “Elections are the foundation of American government and their integrity is of such monumental importance that any threat to their validity should trigger not only our concern but our prompt action.” *State ex rel. Zignego v. Wis. Elec. Comm’n*, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)). The majority

instead belittles the President’s claims of law violations as merely “technical issues that arise in the administration of every election.” Majority op., ¶31. The people of Wisconsin deserve a court that respects the laws that govern us, rather than treating them with such indifference.

¶153 “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). The majority takes a pass on resolving the important questions presented by the petitioners in this case, thereby undermining the public’s confidence in the integrity of Wisconsin’s electoral processes not only during this election, but in every future election. Alarming, the court’s inaction also signals to the WEC that it may continue to administer elections in whatever manner it chooses, knowing that the court has repeatedly declined to scrutinize its conduct. Regardless of whether WEC’s actions affect election outcomes, the integrity of every election will be tarnished by the public’s mistrust until the Wisconsin Supreme Court accepts its responsibility to declare what the election laws say. “Only . . . the supreme court can provide the necessary clarity to guide all election officials in this state on how to conform their procedures to the law” going forward. *State ex rel. Zignego v. Wis. Elec. Comm’n*, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)).

¶154 This case represents only the majority’s latest evasion of a substantive decision on an election law controversy.⁵ While the United States Supreme

⁵ *Hawkins v. WEC*, 2020 WI 75, ¶¶84, 86, 393 Wis. 2d 629, 948 N.W.2d 877 (Rebecca Grassl Bradley, J., dissenting) (“The

Court has recognized that “a state indisputably has a compelling interest in preserving the integrity of its election process[.]” *Burson v. Freeman*, 504 U.S. 191, 199 (1992), the majority of this court repeatedly demonstrates a lack of any interest in doing so, offering purely discretionary excuses like laches, or no reasoning at all. This year, the majority in *Hawkins v. WEC* declined to hear a claim that the WEC unlawfully kept the Green Party’s candidates for President and Vice President off of the ballot, ostensibly because the majority felt the candidates’ claims were brought “too late.”⁶ But when litigants have filed cases involving voting rights well in advance of Wisconsin elections, the court has “take[n] a pass” on those as well, thereby unfailingly and “irreparably den[ying] the citizens of Wisconsin a timely resolution of issues that impact voter rights and the integrity of our elections.” *State ex rel. Zignego v. Wis. Elec. Comm’n*, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)). Having neglected to identify any principles guiding its decisions, the majority leaves Wisconsin’s voters and candidates guessing as to when, exactly, they should

majority upholds the Wisconsin Elections Commission’s violation of Wisconsin law, which irrefutably entitles Howie Hawkins and Angela Walker to appear on Wisconsin’s November 2020 general election ballot as candidates for President and Vice President of the United States In dodging its responsibility to uphold the rule of law, the majority ratifies a grave threat to our republic, suppresses the votes of Wisconsin citizens, irreparably impairs the integrity of Wisconsin’s elections, and undermines the confidence of American citizens in the outcome of a presidential election.”).

⁶ *Hawkins v. Wis. Elec. Comm’n*, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (denying the petition for leave to commence an original action).

file their cases in order for the majority to deem them worthy of the court’s consideration on the merits.

¶155 The consequence of the majority operating by whim rather than law is to leave the interpretation of multiple election statutes in flux – or worse yet, in the hands of the unelected members of the WEC. “To be free is to live under a government by law Miserable is the condition of individuals, danger is the condition of the state, if there is no certain law, or, which is the same thing, no certain *administration* of the law[.]” *Judgment in Rex v. Shipley*, 21 St Tr 847 (K.B. 1784) (Lord Mansfield presiding) (emphasis added). The Wisconsin Supreme Court has an institutional responsibility to interpret law—not for the benefit of particular litigants, but for citizens we were elected to serve. Justice for the people of Wisconsin means ensuring the integrity of Wisconsin’s elections. A majority of this court disregards its duty to the people of Wisconsin, denying them justice.

* * *

¶156 “This great source of free government, popular election, should be perfectly pure.” Alexander Hamilton, Speech at New York Ratifying Convention (June 21, 1788), in *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876). The majority’s failure to act leaves an indelible stain on our most recent election. It will also profoundly and perhaps irreparably impact all local, statewide, and national elections going forward, with grave consequence to the State of Wisconsin and significant harm to the rule of law. Petitioners assert troubling allegations of noncompliance with Wisconsin’s election laws by public officials on whom the voters rely to ensure free

and fair elections. It is our solemn judicial duty to say what the law is. The majority's failure to discharge its duty perpetuates violations of the law by those entrusted to administer it. I dissent.

¶157 I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice ANNETTE KINGSLAND ZIEGLER join this dissent.

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Appendix B

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You are hereby notified that the Court has entered the following order:

=====

No. 2020AP1971-OA *Trump v. Evers*

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a supporting legal memorandum, and an appendix have been filed on behalf of petitioners, Donald J. Trump, et al. Responses to the petition have been filed by (1) Governor Tony Evers; (2) the Wisconsin Elections Commission and its Chair, Ann S. Jacobs; (3) Scott McDonnell, Dane County Clerk, and Alan A. Arnsten and Joyce Waldrop, members of the Dane County

Board of Canvassers; and (4) George L. Christensen, Milwaukee County Clerk, and Timothy H. Posnanski, Richard Baas, and Dawn Martin, members of the Milwaukee County Board of Canvassers. A non-party brief in support of the petition has been filed by the Liberty Justice Center. A motion to intervene, a proposed response of proposed respondents-intervenors, and an appendix have been filed by the Democratic National Committee (DNC) and Margaret J. Andrietsch, Sheila Stubbs, Ronald Martin, Mandela Barnes, Khary Penebaker, Mary Arnold, Patty Schachtner, Shannon Holsey, and Benjamin Wikler (collectively, “the Biden electors”). The court having considered all of the filings,

IT IS ORDERED that the petition for leave to commence an original action is denied. One or more appeals from the determination(s) of one or more boards of canvassers or from the determination of the chairperson of the Wisconsin Elections Commission may be filed by an aggrieved candidate in circuit court. Wis. Stat. § 9.01(6); and

IT IS FURTHER ORDERED that the motion to intervene is denied as moot.

BRIAN HAGEDORN, J. (*concurring*). I understand the impulse to immediately address the legal questions presented by this petition to ensure the recently completed election was conducted in accordance with the law. But challenges to election results are also governed by law. All parties seem to agree that Wis.

Stat. § 9.01 (2017–18)¹ constitutes the “exclusive judicial remedy” applicable to this claim. § 9.01(11). After all, that is what the statute says. This section provides that these actions should be filed in the circuit court, and spells out detailed procedures for ensuring their orderly and swift disposition. See § 9.01(6)–(8). Following this law is not disregarding our duty, as some of my colleagues suggest. It is following the law.

Even if this court has constitutional authority to hear the case straightaway, notwithstanding the statutory text, the briefing reveals important factual disputes that are best managed by a circuit court.² The parties clearly disagree on some basic factual issues, supported at times by competing affidavits. I do not know how we could address all the legal issues raised in the petition without sorting through these matters, a task we are neither well-positioned nor institutionally designed to do. The statutory process assigns this responsibility to the circuit court. Wis. Stat. § 9.01(8)(b) (“The [circuit] court shall separately treat disputed issues of procedure, interpretations of law, and findings of fact.”).

¹ All subsequent references to the Wisconsin Statutes are to the 2017–18 version.

² The legislature generally can and does set deadlines and define procedures that circumscribe a court’s competence to act in a given case. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶9–10, 273 Wis. 2d 76, 681 N.W.2d 190. The constitution would obviously override these legislative choices where the two conflict.

We do well as a judicial body to abide by time-tested judicial norms, even — and maybe especially — in high-profile cases. Following the law governing challenges to election results is no threat to the rule of law. I join the court’s denial of the petition for original action so that the petitioners may promptly exercise their right to pursue these claims in the manner prescribed by the legislature.

PATIENCE DRAKE ROGGENSACK, C.J. (*dissenting*). Before us is an emergency petition for leave to commence an original action brought by President Trump, Vice President Pence and Donald Trump for President, Inc., against Governor Evers, the Wisconsin Elections Commission (WEC), its members and members of both the Milwaukee County Board of Canvassers and the Dane County Board of Canvassers. The Petitioners allege that the WEC and election officials caused voters to violate various statutes in conducting Wisconsin’s recent presidential election. The Petitioners raised their concerns during recount proceedings in Dane County and Milwaukee County. Their objections were overruled in both counties.

The Respondents argue, in part, that we lack subject matter jurisdiction because of the “exclusive judicial remedy” provision found in Wis. Stat. § 9.01(11) (2017-18).³ Alternatively, the Respondents assert that we should deny this petition because fact-finding is required, and we are not a fact-finding tribunal.

I conclude that we have subject matter jurisdiction that enables us to grant the petition for original action

³ All subsequent references to the Wisconsin Statutes are to the 2017–18 version.

pending before us. Our jurisdiction arises from the Wisconsin Constitution and cannot be impeded by statute. Wis. Const., art. VII, Section 3(2); *City of Eau Claire v. Booth*, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738. Furthermore, time is of the essence.

However, fact-finding may be central to our evaluation of some of the questions presented. I agree that the circuit court should examine the record presented during the canvasses to make factual findings where legal challenges to the vote turn on questions of fact. However, I dissent because I would grant the petition for original action, refer for necessary factual findings to the circuit court, who would then report its factual findings to us, and we would decide the important legal questions presented.

I also write separately to emphasize that by denying this petition, and requiring both the factual questions and legal questions be resolved first by a circuit court, four justices of this court are ignoring that there are significant time constraints that may preclude our deciding significant legal issues that cry out for resolution by the Wisconsin Supreme Court.

I. DISCUSSION

The Petitioners set out four categories of absentee votes that they allege should not have been counted because they were not lawfully cast: (1) votes cast during the 14-day period for in-person absentee voting at a clerk's office with what are alleged to be insufficient written requests for absentee ballots, pursuant to Wis. Stat. § 6.86(1)(b); (2) votes cast when a clerk has completed information missing from the ballot envelope, contrary to Wis. Stat. § 6.87(6d); (3) votes cast by those who obtained an absentee ballot

after March 25, 2020 by alleging that they were indefinitely confined; and (4) votes cast in Madison at “Democracy in the Park” events on September 26 and October 3, in advance of the 14-day period before the election, contrary to Wis. Stat. § 6.87.

Some of the Respondents have asserted that WEC has been advising clerks to add missing information to ballot envelopes for years, so the voters should not be punished for following WEC’s advice. They make similar claims for the collection of votes more than 14 days before the November 3 election.

If WEC has been giving advice contrary to statute, those acts do not make the advice lawful. WEC must follow the law. We, as the law declaring court, owe it to the public to declare whether WEC’s advice is incorrect. However, doing so does not necessarily lead to striking absentee ballots that were cast by following incorrect WEC advice. The remedy Petitioners seek may be out of reach for a number of reasons.

Procedures by which Wisconsin elections are conducted must be fair to all voters. This is an important election, but it is not the last election in which WEC will be giving advice. If we do not shoulder our responsibilities, we leave future elections to flounder and potentially result in the public’s perception that Wisconsin elections are unfair. The Wisconsin Supreme Court can uphold elections by examining the procedures for which complaint was made here and explaining to all where the WEC was correct and where it was not.

I also am concerned that the public will misunderstand what our denial of the petition means. Occasionally, members of the public seem to believe that a denial of our acceptance of a case signals that the petition’s allegations are either false or not serious.

Nothing could be further from the truth. Indeed, sometimes, we deny petitions even when it appears that a law has been violated. *Hawkins v. Wis. Elec. Comm'n*, 2020 WI 75, ¶¶14–16, 393 Wis. 2d 629, 948 N.W.2d 877 (Roggensack, C.J., dissenting).

II. CONCLUSION

I conclude that we have subject matter jurisdiction that enables us to grant the petition for original action pending before us. Our jurisdiction arises from the Wisconsin Constitution and cannot be impeded by statute. Wis. Const., art. VII, Section 3(2); *City of Eau Claire*, 370 Wis. 2d 595, ¶7. Furthermore, time is of the essence.

However, fact-finding may be central to our evaluation of some of the questions presented. I agree that the circuit court should examine the record presented during the canvasses to make factual findings where legal challenges to the vote turn on questions of fact. However, I dissent because I would grant the petition for original action, refer for necessary factual findings to the circuit court, who would then report its factual findings to us, and we would decide the important legal questions presented.

I am authorized to state that Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

REBECCA GRASSL BRADLEY, J. (*dissenting*). “It is emphatically the province and duty of the Judicial Department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Wisconsin Supreme Court forsakes its duty to the people of Wisconsin in declining to decide whether election officials complied with Wisconsin’s election laws in administering the November 3, 2020 election. Instead, a majority of this court passively permits the Wisconsin Elections Commission (WEC) to decree its own election rules, thereby overriding the will of the people as expressed in the election laws enacted by the people’s elected representatives. Allowing six unelected commissioners to make the law governing elections, without the consent of the governed, deals a death blow to democracy. I dissent.

The President of the United States challenges the legality of the manner in which certain Wisconsin election officials directed the casting of absentee ballots, asserting they adopted and implemented particular procedures in violation of Wisconsin law. The respondents implore this court to reject the challenge because, they argue, declaring the law at this point would “retroactively change the rules” after the election. It is THE LAW that constitutes “the rules” of the election and election officials are bound to follow the law, if we are to be governed by the rule of law, and not of men.

Under the Wisconsin Constitution, “all governmental power derives ‘from the consent of the governed’ and government officials may act only within the confines of the authority the people give them. Wis. Const. art. I, § 1.” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶66, 391 Wis. 2d 497, 942 N.W.2d 900 (Rebecca Grassl Bradley, J., concurring). The

Founders designed our “republic to be *a government of laws, and not of men* . . . bound by fixed laws, which the people have a voice in making, and a right to defend.” John Adams, *Novanglus: A History of the Dispute with America, from Its Origin, in 1754, to the Present Time*, in *Revolutionary Writings of John Adams* (C. Bradley Thompson ed. 2000) (emphasis in original). Allowing any person, or unelected commission of six, to be “bound by no law or limitation but his own will” defies the will of the people. *Id.*

The importance of having the State’s highest court resolve the significant legal issues presented by the petitioners warrants the exercise of this court’s constitutional authority to hear this case as an original action. See Wis. Const. Art. VII, § 3. “The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards.” *State v. Conness*, 106 Wis. 425, 82 N.W. 288, 289 (1900). While the court reserves this exercise of its jurisdiction for those original actions of statewide significance, it is beyond dispute that “[e]lections are the foundation of American government and their integrity is of such monumental importance that any threat to their validity should trigger not only our concern but our prompt action.” *State ex rel. Zignego v. Wis. Elec. Comm’n*, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)).

The majority notes that an action “may be filed by an aggrieved candidate in circuit court. Wis. Stat. § 9.01(6).” Justice Hagedorn goes so far as to suggest that § 9.01 “constitutes the ‘exclusive judicial remedy’ applicable to this claim.” No statute, however, can

circumscribe the constitutional jurisdiction of the Wisconsin Supreme Court to hear this (or any) case as an original action. “The Wisconsin Constitution IS the law — and it reigns supreme over any statute.” *Wisconsin Legislature v. Palm*, 391 Wis. 2d 497, ¶67 n.3 (Rebecca Grassl Bradley, J., concurring). “The Constitution’s supremacy over legislation bears repeating: ‘the Constitution is to be considered in court as a paramount law’ and ‘a law repugnant to the Constitution is void, and . . . courts, as well as other departments, are bound by that instrument.’ See *Marbury [v. Madison]*, 5 U.S. (1 Cranch) [137] at 178, 180 [1803].” *Mayo v. Wis. Injured Patients and Families Comp. Fund*, 2018 WI 78, ¶91, 383 Wis. 2d 1, 914 N.W.2d 678 (Rebecca Grassl Bradley, J., concurring). Wisconsin Statute § 9.01 is compatible with the constitution. While it provides an avenue for aggrieved candidates to pursue an appeal to a circuit court after completion of the recount determination, it does not foreclose the candidate’s option to ask this court to grant his petition for an original action. Any contrary reading would render the law in conflict with the constitution and therefore void. Under the constitutional-doubt canon of statutory interpretation, “[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt.” Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 247. See also *Wisconsin Legislature v. Palm*, 391 Wis. 2d 497, ¶31 (“[W]e disfavor statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration.”).

While some will either celebrate or decry the court’s inaction based upon the impact on their preferred candidate, the importance of this case

transcends the results of this particular election. “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). The majority takes a pass on resolving the important questions presented by the petitioners in this case, thereby undermining the public’s confidence in the integrity of Wisconsin’s electoral processes not only during this election, but in every future election. Alarming, the court’s inaction also signals to the WEC that it may continue to administer elections in whatever manner it chooses, knowing that the court has repeatedly declined to scrutinize its conduct. Regardless of whether the WEC’s actions affect election outcomes, the integrity of every election will be tarnished by the public’s mistrust until the Wisconsin Supreme Court accepts its responsibility to declare what the election laws say. “Only . . . the supreme court can provide the necessary clarity to guide all election officials in this state on how to conform their procedures to the law” going forward. *State ex rel. Zignego v. Wis. Elec. Comm’n*, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)).

The majority’s recent pattern of deferring or altogether dodging decisions on election law controversies⁴ cannot be reconciled with its lengthy

⁴ *Hawkins v. Wis. Elec. Comm’n*, 2020 WI 75, ¶¶84, 86, 393 Wis. 2d 629, 948 N.W.2d 877 (Rebecca Grassl Bradley, J., dissenting) (“The majority upholds the Wisconsin Elections Commission’s violation of Wisconsin law, which irrefutably entitles Howie Hawkins and Angela Walker to appear on Wisconsin’s November 2020 general election ballot as candidates for President and Vice President of the United States In dodging its responsibility to uphold the rule of law, the majority

history of promptly hearing cases involving voting rights and election processes under the court's original jurisdiction or by bypassing the court of appeals.⁵

ratifies a grave threat to our republic, suppresses the votes of Wisconsin citizens, irreparably impairs the integrity of Wisconsin's elections, and undermines the confidence of American citizens in the outcome of a presidential election"); *State ex rel. Zignego v. Wis. Elec. Comm'n*, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("In declining to hear a case presenting issues of first impression immediately impacting the voting rights of Wisconsin citizens and the integrity of impending elections, the court shirks its institutional responsibilities to the people who elected us to make important decisions, thereby signaling the issues are not worthy of our prompt attention."); *State ex rel. Zignego v. Wis. Elec. Comm'n*, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("A majority of this court disregards its duty to the people we serve by inexplicably delaying the final resolution of a critically important and time-sensitive case involving voting rights and the integrity of Wisconsin's elections.").

⁵ See, e.g., *NAACP v. Walker*, 2014 WI 98, ¶¶1, 18, 357 Wis. 2d 469, 851 N.W.2d 262 (2014) (this court took jurisdiction of appeal on its own motion in order to decide constitutionality of the voter identification act enjoined by lower court); *Elections Bd. of Wisconsin v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 653, 670, 597 N.W.2d 721 (1999) (this court granted bypass petition to decide whether express advocacy advertisements advocating the defeat or reelection of incumbent legislators violated campaign finance laws, in absence of cases interpreting applicable statutes); *State ex rel. La Follette v. Democratic Party of United States*, 93 Wis. 2d 473, 480-81, 287 N.W.2d 519 (1980) (original action deciding whether Wisconsin open primary system was binding on national political parties or infringed their freedom of association), rev'd, *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 548, 126 N.W.2d 551 (1964) (original action seeking to enjoin state from holding elections pursuant to legislative apportionment alleged to violate constitutional rights);

While the United States Supreme Court has recognized that “a state indisputably has a compelling interest in preserving the integrity of its election process[.]” *Burson v. Freeman*, 504 U.S. 191, 199 (1992), the majority of this court repeatedly demonstrates a lack of any interest in doing so, offering purely discretionary excuses or no reasoning at all. This year, the majority in *Hawkins v. Wis. Elec. Comm’n* declined to hear a claim that the WEC unlawfully kept the Green Party’s candidates for President and Vice President off of the ballot, ostensibly because the majority felt the candidates’ claims were brought “too late.”⁶ But when litigants have filed cases involving voting rights well in advance of Wisconsin elections, the court has “take[n] a pass,” thereby “irreparably den[ying] the citizens of Wisconsin a timely resolution of issues that impact voter rights and the integrity of our elections.” *State ex rel. Zignego v. Wis. Elec. Comm’n*, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)). Having neglected to identify

State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 400, 52 N.W.2d 903 (1952) (original action to restrain the state from holding elections based on districts as defined prior to enactment of reapportionment law), *overruled in part by Reynolds*, 22 Wis. 2d 544; *State ex rel. Conlin v. Zimmerman*, 245 Wis. 475, 476, 15 N.W.2d 32 (1944) (original action to interpret statutes in determining whether candidate for Governor timely filed papers to appear on primary election ballot).

⁶ *Hawkins v. Wis. Elec. Comm’n*, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (denying the petition for leave to commence an original action).

any principles guiding its decisions, the majority leaves Wisconsin's voters and candidates guessing as to when, exactly, they should file their cases in order for the majority to deem them worthy of the court's attention.

The consequence of the majority operating by whim rather than rule is to leave the interpretation of multiple election laws in flux — or worse yet, in the hands of the unelected members of the WEC. “To be free is to live under a government by law Miserable is the condition of individuals, danger is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of the law” *Judgment in Rex vs. Shipley*, 21 St Tr 847 (K.B. 1784) (Lord Mansfield presiding). The Wisconsin Supreme Court has an institutional responsibility to decide important questions of law—not for the benefit of particular litigants, but for citizens we were elected to serve. Justice for the people of Wisconsin means ensuring the integrity of Wisconsin's elections. A majority of this court disregards its duty to the people of Wisconsin, denying them justice.

“No aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law.” *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶37, 376 Wis. 2d 147, 897 N.W.2d 384. Once again, a majority of this court instead “chooses to sit idly by,”⁷ in a nationally important and time-sensitive case involving voting

⁷ *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1609 (2016) (Thomas, J., dissenting from the denial of certiorari).

rights and the integrity of Wisconsin's elections, depriving the people of Wisconsin of answers to questions of statutory law that only the state's highest court may resolve. The majority's "refusal to hear this case shows insufficient respect to the State of [Wisconsin], its voters,"⁸ and its elections.

"This great source of free government, popular election, should be perfectly pure." Alexander Hamilton, Speech at New York Ratifying Convention (June 21, 1788), in *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876). The majority's failure to act leaves an indelible stain on our most recent election. It will also profoundly and perhaps irreparably impact all local, statewide, and national elections going forward, with grave consequence to the State of Wisconsin and significant harm to the rule of law. Petitioners assert troubling allegations of noncompliance with Wisconsin's election laws by public officials on whom the voters rely to ensure free and fair elections. It is not "impulse"⁹ but our solemn judicial duty to say what the law is that compels the exercise of our original jurisdiction in this case. The majority's failure to embrace its duty (or even an impulse) to decide this case risks perpetuating violations of the law by those entrusted to follow it. I dissent.

I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice ANNETTE KINGSLAND ZIEGLER join this dissent.

⁸ *County of Maricopa, Arizona v. Lopez-Valenzuela*, 135 S. Ct. 2046, 2046 (2015) (Thomas, J., dissenting from the denial of certiorari).

⁹ See Justice Hagedorn's concurrence.

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104a

Appendix C

FILED
12-11-2020
John Barrett
Clerk of Circuit Court
2020CV007092

DATE SIGNED: December 11, 2020

Electronically signed by Judge Stephen A. Simanek
Circuit Court Judge

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

DONALD J. TRUMP,
MICHAEL R. PENCE, et al.

Plaintiffs/Appellants,

v.

JOSEPH R. BIDEN,
KAMALA D. HARRIS, et al.

Defendants/Appellees,

Milwaukee County Case No.: 2020CV7092
Dane County Case No.: 2020CV2514

FINAL ORDER

105a

TROUPIS 009353

The matter having come before the Court, Reserve Judge Stephen A. Simanek, on December 11, 2020 on Plaintiffs' Motion for Judgment on their appeal under Wis. Stat. § 9.01(6) from the final recount determinations of the Dane County Board of Canvassers and Milwaukee County Elections Commission, the Court having considered the submissions by all parties, and having heard oral argument from all parties;

IT IS HEREBY ORDERED:

For the reasons set forth on the record, which are incorporated herein by reference, incorporating pages 1-30 of the Joint Proposed Findings of Fact and Conclusions of Law by Joseph R. Biden, Kamala D. Harris, the Dane County Defendants and the Milwaukee County Defendants (Doc. 89) as the Court's findings of fact and conclusions of law, and pursuant to Wis. Stat. § 9.01(8)(a), the determinations of the Dane County Board of Canvassers and Milwaukee County Elections Commission under review are **AFFIRMED**.

Costs will be taxed in favor of Respondents pursuant to Wis. Stat. § 9.01(7)(b).

**THIS IS A FINAL ORDER
FOR PURPOSES OF APPEAL.**

FILED
12-09-2020
John Barrett
Clerk of Circuit Court
2020CV007092

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

DONALD J. TRUMP,
MICHAEL R. PENCE, *et al.*

Plaintiffs,

v.

JOSEPH R. BIDEN, *et al.*,

Defendants.

Milwaukee County Case No. 20-CV-7092
Dane County Case No. 20-CV-2514
Consolidated

**JOINT PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW
BY JOSEPH R. BIDEN, KAMALA D. HARRIS,
THE DANE COUNTY DEFENDANTS AND
MILWAUKEE COUNTY DEFENDANTS**

Defendants, Joseph R. Biden, Kamala D. Harris, Milwaukee County Clerk George L. Christensen, Milwaukee County Elections Commission (named herein as the Milwaukee County Board of Canvassers), Dane County Clerk Scott McDonnell, and Dane County Board of Canvassers, by their undersigned counsel, submit these Joint Proposed Findings of Fact and Conclusions of Law for the Court's consideration.

PROPOSED FINDINGS OF FACT

A. Procedural History and Background

1. The 2020 Presidential election was conducted on November 3, 2020.

2. On November 17, 2020, the initial Wisconsin county canvasses of the election results were completed. The canvass results showed Joseph R. Biden and Kamala D. Harris won the State of Wisconsin by 20,427 votes.

3. On November 18, 2020, Plaintiffs filed a Recount Petition with the Wisconsin Elections Commission ("WEC") (Doc. 36).¹ Despite alleging that "mistakes and fraud were [2] committed throughout the state of Wisconsin," the petition sought recounts in just two of Wisconsin's 72 counties — Milwaukee and Dane Counties.

4. Plaintiff's Recount Petition (Doc. 36) alleged, on information and belief, that the following errors

¹ "Doc." refers to the e-filing document number associated with electronic filings in this consolidated case.

occurred in the two counties:

a. Municipal clerks improperly completed missing information on absentee ballot envelopes related to witness addresses (Recount Petition, ¶ 4);

b. In-person absentee voters did not submit written applications for an absentee ballot (Recount Petition, ¶ 5); and

c. Voters who were not indefinitely confined claimed “indefinitely confined” status for the purposes of obtaining an absentee ballot without having to show photo identification (Recount Petition, ¶ 6).

5. While not raised in the Petition, Plaintiffs at the Dane County recount took issue with the City of Madison’s Democracy in the Park program, during which election officials collected properly sealed and witnessed absentee ballots.

6. The recount process lasted from November 20, 2020 to November 29, 2020.

7. During the recount and on this appeal, the Trump Campaign seeks to disenfranchise no fewer than 221,323 voters in the two counties. Trump Proposed Findings (Doc. 62), ¶¶ 93-96. If the Trump Campaign’s grounds for attempting to disqualify these ballots were applied throughout the state, more than 700,000 ballots cast by Wisconsin voters would

potentially be affected. (Def. App. 8-9).²

8. In both Dane and Milwaukee counties, the Trump Campaign challenged and sought to disqualify votes in the following categories, with the following result: **[3]**

a. Ballots cast which had an absentee envelope where a witness address, or a portion of a witness address, had been completed by a clerk (e.g., where the ballot envelope was initially submitted with a witness address that was missing the state).

i. The Milwaukee County Board of Canvassers moved to accept ballots from envelopes with witness addresses that had been completed by clerks consistent with specific guidance by the WEC, which the Board viewed as consistent with Wis. Stat. § 6.87(6d). (Milwaukee 11/20/20 126:23-128:17) (Doc. 37, pp. 126-128). The WEC guidance provides: “The WEC has determined that clerks must take corrective actions in an attempt to remedy a witness address error.” (emphasis in original) (Def. App. 50).

ii. The Dane County Board of Canvassers also declined to “exclude envelopes that had a witness address added by the clerk.” (Dane 11/20/20 65:1-15) (Doc. 49, p. 17).

²“Def. App.” refers to the Defendants’ Joint Appendix filed herewith.

b. All ballots cast by electors designating themselves as “indefinitely confined” after March 25, 2020.

i. The Milwaukee County Board of Canvassers found that “a designation of an indefinitely confined status is for each individual voter to make based upon their current circumstances” and that “no evidence of any voter in Milwaukee County [was] offered that has abused this process and voted through this status...not even an allegation that there was a single voter who abused this process to vote without providing proof of their ID, but eliminating proof that anyone did so. So there’s no allegation...no proof...no evidence.” (Milwaukee 11/21/20 145:2-146:2) (Doc. 39, pp. 14-15). [4] The Board voted to overrule any challenge to a voter with the status of “indefinitely confined.” (Id. 146:9-147:19) (Doc. 39, pp. 15-16).

ii. The Dane County Board of Canvassers also rejected the Trump Campaign’s challenge that would have required invalidating the ballots of all electors in Dane County who declared indefinitely confined status. The Board specifically declined to separate or “draw down”³ the ballots cast by electors who

³ When an absentee ballot envelope is rejected during a recount, the statutory remedy is to “randomly draw one absentee ballot” from the entire pool of absentee ballots and set it aside from the count. Wis. Stat. § 9.01(1)(b)(4)b. The process is random

declared indefinitely confined status. (Dane 11/20/20 65:18-66:9) (Doc. 49, pp. 17-18).

c. In Milwaukee County, all ballots cast through absentee in-person voting that, according to Plaintiffs, were obtained without a “written application.”

i. The Milwaukee County Board of Canvassers determined that there are multiple forms of application for an absentee ballot that can be made by absentee in-person voters and that the absentee ballot envelope provided to absentee in-person voters – which has the word “application” stated on it and must be completed by the voter – is an application for an absentee ballot. The Milwaukee Board thus rejected the Trump Campaign’s challenge to ballots cast by in-person absentee voters. (Milwaukee 11/21/20 183:15-187:10) (Doc. 39, pp. 52-56).

d. In Dane County, every absentee ballot on the basis that the Trump Campaign was not allowed to review the written absentee ballot applications during the recount [5] process, and also to all absentee in-person absentee ballots that, according to Plaintiffs, were obtained without a “written application.”

because ballots are not marked to correspond to individual voters, consistent with Wisconsin’s right to privacy in voting. See Wis. Const. Art. III, Section 3. Thus, the remedy sought by the Trump Campaign would randomly disenfranchise hundreds of thousands of voters in the two targeted counties.

i. The Dane County Board of Canvassers voted not to exclude or draw down any absentee ballots on the basis that they “do not have an attached or identifiable application.” (Dane 11/20/20 38:1-40:25) (Doc. 49, p. 11). The Dane County Board of Canvassers concluded that review of absentee ballot applications is not a part of the statutory recount process under Wis. Stat. § 9.01(1)(b) and therefore the applications were not relevant to the recount.

9. In addition to the challenges listed above, in Dane County only, the Trump Campaign sought to disqualify “all ballots received in the Democracy in the Park process” that elections officials conducted in Madison on September 26, 2020 and October 3, 2020. (Dane 11/24/20 52:7-11) (Doc. 51, p. 194). This challenge was a blanket challenge to 17,271 ballots. The Dane County Board of Canvassers denied the challenge, ruling that the Democracy in the Park events were the equivalent of a human drop box and valid under the statute. (Dane 11/24/20 53:13-25, 72:21-73:16) (Doc. 51, pp. 194, 199).

10. In Dane County, the Trump Campaign challenged nearly all of the absentee ballots in the Town of Westport (2,233 out of a total of 2,308) because the clerks failed to initial the absentee envelope reflecting that the voter submitted or showed a photo identification. The Dane County Board of Canvassers denied the challenge based on the testimony of the Town Clerk that “we check all photo ID” and “no ballots leave our office unless it has been

checked.” (Dane 11/23/20 50:14-51:5, 52:16-21) (Doc. 51, p. 161). [6]

11. In Milwaukee County, the Board of Canvassers instructed tabulators to take the following steps as part of the recounts to accommodate Plaintiffs’ standing challenges to categories of ballots:

a. Set aside any absentee envelope that “has a different color on the address versus the actual witness signature;”

b. Set aside any absentee envelope containing an “indefinite confinement” designation; and

c. Set aside any envelope that is the subject of a specific challenge other than the two challenges listed above. (Milwaukee 11/20/20 66:20-67:7; 11/21/20 42:2-18) (Doc. 37, pp. 66-67; Doc. 38, p. 61).

12. The Milwaukee County Elections Commission certified the results of its recount on November 27, 2020. (Doc. 42, pp. 162-63).

13. The Dane County Board of Canvassers certified the results of its recount on November 29, 2020. (Doc. 51, p. 320).

14. On November 30, 2020, Ann Jacobs, the chairperson of the WEC, certified the results of the 2020 Wisconsin Presidential Election, after the results of the Milwaukee County and Dane County recounts, pursuant to Wis. Stat. § 7.70(3)(a). The certified

results showed Joseph R. Biden and Kamala D. Harris received 1,630,866 votes, and Donald J. Trump and Michael R. Pence received 1,610,184 votes. The final margin of victory was 20,682 votes.

15. On December 1, 2020, Plaintiffs filed a Petition for Original Action with the Wisconsin Supreme Court seeking to exclude several categories of ballots from the presidential election results in Wisconsin. [7]

16. On December 2, 2020, President Trump sued the WEC, its members, the mayors of Wisconsin's five largest cities, multiple clerks, the Governor, and the Secretary of State in federal court, seeking a declaration that "the constitutional violations of the Defendants likely tainted more than 50,000 ballots" and that the court "remand[] the case to the Wisconsin legislature." *Trump v. Wisconsin Elections Commission*, E.D. Wis. Case No. 2:20-cv-01785.

17. On December 3, 2020, the Wisconsin Supreme Court denied Plaintiffs' Petition for Leave to Commence an Original Action.

18. On December 3, 2020, hours after the Wisconsin Supreme Court denied the petition for leave to commence an original action and pursuant to Wis. Stat. § 9.01(6), Plaintiffs filed separate Notices of Appeal from the Recounts in Dane County and Milwaukee County. (Doc. 7, 9).

19. On December 3, 2020, Chief Justice Patience D. Roggensack consolidated the two appeals, *Trump v. Biden*, Milwaukee County Case No. 2020-cv-7072, and *Trump v. Biden*, Dane County Case No. 2020-cv-2514,

and assigned the consolidated appeal to Reserve Judge Stephen A. Simanek. (Doc. 9).

B. Challenged Procedures

a. Absentee Ballot Applications

20. A municipal clerk may not issue an absentee ballot without receiving “a written application therefor from a qualified voter of the municipality.” Wis. Stat. § 6.86(1)(ar). The statute defines “written application...for an official ballot” to include a variety of “methods,” including “[b]y mail,” “[i]n person at the office of the municipal clerk,” on request forms, and “[b]y electronic mail or facsimile transmission.” Wis. Stat. § 6.86(1)(a).

21. For many years, the WEC has applied this broad definition to allow online ballot requests in multiple ways, including: **[8]**

a. through the MyVote website, which generates an email and prompts a clerk to mail an envelope and ballot (Milwaukee 11/20/20 50:3-11) (Doc. 37, p. 50);

b. by regular mail or e-mail (Milwaukee 11/20/20 49:2-4, 50:3-7, 76:6-25) (Doc. 37, pp. 49-50, 76);

c. if done in-person, through completion of an official WEC multi-step form, EL-122, titled “Official Absentee Ballot Application/Certification,” which provides both an application and a certification. (Milwaukee

11/20/20 51:2-8) (Doc. 37, p. 51).

22. The WEC and its predecessor agency, the Government Accountability Board (“GAB”), have used Form EL-122 since May 2010. (Affidavit of Kevin J. Kennedy, ¶ 14) (Def. App. 106-107). Since that time, Form EL-122 has been accepted as a lawful application for an absentee ballot. Id.

23. Form EL-122 and its predecessor, Form GAB-122, originated from “inefficiencies experienced with in-person absentee voting” in the November 2008 presidential election. (Affidavit of Kevin J. Kennedy, ¶ 6, Exh. A) (Def. App. 104-105, 108-150).

24. On December 17, 2009, the GAB unanimously voted to eliminate the requirement for a separate written application for in-person absentee voters, and instead to incorporate the application into the in-person process. (Affidavit of Kevin J. Kennedy, ¶ 10) (Def. App. 105-106).

25. The GAB thereafter amended the official absentee ballot envelope, Form GAB- 122, to also act as the written application for those voters who voted absentee in-person during the “early voting” period. (Affidavit of Kevin J. Kennedy, ¶ 11) (Def. App. 106).

26. The new Form GAB-122, entitled “Official Absentee Ballot Application/Certification,” was distributed to all Wisconsin municipal clerks on May 10, 2010, [9] and has been in use continually throughout Wisconsin since that time. (Affidavit of Kevin J. Kennedy, ¶ 11, Exhs. B-C) (Def. App. 151-154).

27. Consistent with statewide practice, municipalities and voters in Dane County and Milwaukee County use Form EL-122 for in-person absentee voting. The total number of in-person absentee votes cast in the state in the November 2020 Election using Form EL-122 was 651,422. WEC Absentee Ballot Report 11/3/20 General Election (Def. App. 8-9).

28. Plaintiffs' counsel James Troupis voted early in-person using Form EL-122. (Affidavit of Devin Remiker, Exhibit A) (Def. App. 169).

29. In Milwaukee County, when a voter requests an absentee ballot in person, the voter identifies himself or herself to the clerk, who then enters the request for the ballot into the WisVote system directly. (Milwaukee 11/20/20 46:7-21) (Doc. 37, p. 46). This generates "a record of application." (Milwaukee 11/20/20 85:14-17) (Doc. 37, p. 85). The system then generates a label for that envelope. The voter then shows the labeled envelope to an official to receive a ballot. The voter completes the ballot and signs a certification on the envelope, which a clerk witnesses. The vote is not cast until the day of the election. (Milwaukee 11/20/20 46:7-21) (Doc. 37, p. 46); (Dane Biden Exhs. 2-16; Milwaukee Biden Exhs. 798-809) (Def. App. 10-41) (affidavits of absentee inperson voters describing multi-step process).

30. The absentee in person process in Dane follows the same or similar procedures, whereby the application portion of the envelope is completed and shown to an official before the voter receives a ballot. (Def. App. 10-20)

31. The Dane County Board of Canvassers determined that 61,193 electors cast absentee ballots in person in Dane County using Form EL-122. (Dane 11/22/20 58:7-10). Each in-person **[10]** absentee voter completed an EL-122, which the Board concluded is legally sufficient to satisfy Wis. Stats. § 6.86(1)(ar). Id.

32. The Milwaukee County Board of Canvassers determined that the total number of voters who voted absentee in person in Milwaukee County using Form EL-122 was 108,947. (Milwaukee 11/21/20 184:14-19) (Doc. 39, p. 53).

33. At no time prior to the election on November 3, 2020 did the Trump Campaign assert that the use of Form EL 122 by voters and election officials in Wisconsin was in any way improper or inconsistent with Wisconsin law. The first time the Trump Campaign made that claim was in its recount petitions filed with Dane and Milwaukee counties on November 18, 2020, after election results showed that President Trump had lost the election in Wisconsin by more than 20,000 votes.

34. The Trump Campaign did not make any allegation that a single vote was cast in either county by an ineligible voter who applied via Form EL-122. There are no facts to support such an allegation.

35. The Trump Campaign did not make any allegation that any fraud occurred relating to the use of Form EL-122 in either county. There are no facts to support such an allegation.

b. Witness Addresses

36. An absentee voter must complete their ballot and sign a “Certification of Voter” on the absentee ballot envelope in the presence of a witness. Wis. Stat. § 6.87(4)(b). The witness must then sign a “Certification of Witness” on the envelope, which must include the witness’s address. Wis. Stat. § 6.87.

37. The witness-address requirement is “mandatory,” id. § 6.84(2), and “[i]f a certificate is missing the address of a witness, the ballot may not be counted,” id. § 6.87(6d). [11]

38. Since October 2016, the WEC has instructed municipal clerks that, while they may never add missing signatures, they “must take corrective action” to add missing witness addresses if they are “reasonably able to discern” that information by contacting the witnesses or looking up the addresses through reliable sources. 10/18/16 WEC Memo to Clerks “Missing or Insufficient Witness Address on Absentee Certificate Envelopes.” (Def. App. 50-51).

39. Since then, the WEC has repeated these instructions in multiple guidance documents, including in the WEC Election Administration Manual (Sept. 2020), at 98 (clerks “may add a missing witness address using whatever means are available,” and “should initial next to the added witness address”) and an October 19, 2020 guidance memo.⁴

⁴ Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Spoiling%20Ballot%20Memo%2010.2020.pdf>.

40. As a result, the WEC's guidance on the witness address issue has governed in eleven statewide races since then, including the 2016 presidential election and recount. Moreover, local election officials and voters throughout the State have relied on it, and it has never been challenged through Chapter 227 judicial review or otherwise. 11/10/20 WEC Release "Correcting Misinformation About Wisconsin's Election," No. 6 (Def. App. 55-56).

41. In November 2016, Candidate Donald Trump won a recount in which thousands of ballots were completed based upon the same WEC guidance on witness addresses used in the November 2020 election. (Milwaukee 11/20/20 117:15-25) (Doc. 37, p. 117). Neither Candidate Trump nor anyone else raised any objections to the use of that guidance in 2016. *Id.*

42. At no time prior to the election on November 3, 2020 did the Trump Campaign assert that the practice of election workers filling in missing, verifiable witness addresses was in any way improper or inconsistent with Wisconsin law. The first time the Trump Campaign made that claim was in its recount petitions filed with Dane and Milwaukee counties on November 18, [12] 2020, after election results showed that President Trump had lost the election in Wisconsin by more than 20,000 votes.

43. As the petition for recount admits, WEC guidance on completing addresses applies statewide, not just in Dane and Milwaukee counties. (Recount Petition, p. 1) (Doc. 36); (Dane County Transcript, 11/29/20 11:25) (Doc. 51, p. 320).

44. The witness address issue is not limited to situations in which absentee ballots are entirely missing address information for a witness. Instead, for the most part, clerks corrected partial addresses, such as by completing the city, zip code, or state. (Milwaukee 11/20/20 116:2-7; 11/21/20 271:3-6, 277:13-14) (Doc. 37, p. 116; Doc. 39, pp. 140, 146). As a result, the Trump Campaign objected to ballots that were witnessed, signed by a witness, and contained a witness' street address, but had the city, state, or zip code filled in by a clerk. (Id.; see also Milwaukee 11/20/20 125:2-5) (Doc. 37, p. 125).

45. In completing witness addresses, the City of Milwaukee "do[es]n't make guesses" if there are multiple persons with the name of a witness. In that situation, clerks do not fill in any missing witness address information. Instead, they contact the voter or mail the ballot back to the voter in an attempt to have the voter contact the witness and provide the missing information. (Milwaukee 11/20/20 117:1-7).

46. It is "very common" that an envelope will have a street address but that the address will not be "fill[ed] out completely." (Milwaukee 11/20/20 117:8-11) (Doc. 37, p. 117).

47. There is no evidence establishing beyond a reasonable doubt that adding missing witness address information to any particular voter's envelope was improper or in violation of Wisconsin law and thus no evidence establishing beyond a reasonable doubt that any absentee **[13]** ballots associated with envelopes containing added witness address information are improper or in violation of Wisconsin law.

c. “Indefinitely Confined” Voters

48. Voters who self-certify that they are “indefinitely confined because of age, physical illness or infirmity or...disabled for an indefinite period” are not required to submit photocopies of their photo IDs with their absentee ballot applications. Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)(2).

49. Voters who certify they are indefinitely confined and who do not provide proof of identification must submit with their ballot “a statement signed by the same individual who witnesses voting of the ballot which contains the name and address of the elector and verifies that the name and address are correct.” Wis. Stat. § 6.87(4)(b)2.

50. In contrast, if a voter is not indefinitely confined and has not previously submitted voter identification, they must submit such identification. See Wis. Stat. § 6.87(1).

51. After the COVID-19 pandemic hit Wisconsin in March 2020 and the State issued a “Safer-at-Home Order” on March 24, 2020, the Dane County Clerk stated in a Facebook post that pursuant to the Safer-At-Home Order all Dane County voters could meet the definition of “indefinitely confined” for purposes of voting absentee in the April 7 spring election. Wis. Sup.Ct. Order, p. 2, *Jefferson v. Dane Cty.*, No 2020AP557-OA (Mar. 31, 2020) (Def. App. 65).

52. The WEC was also considering the indefinite confinement issue in the context of COVID-19 and the Safer-At-Home Order prior to the April 7 election. On

March 29, 2020, the WEC issued a guidance memorandum to all clerks, stating in relevant part:

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period. [14]

2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

March 29, 2020 WEC Guidance for Indefinitely Confined Voters (Def. App. 61).

53. The WEC's guidance goes on to explain:

We understand the concern over the use of indefinitely confined status and do not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin. **During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates.** We have told clerks if they do not believe a voter understood the declaration they made when requesting an absentee ballot, they

can contact the voter for confirmation of their status. They should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status. Any request for confirmation of indefinitely confined status should not be accusatory in nature.

March 29, 2020 WEC Guidance for Indefinitely Confined Voters (Def. App. 62).

54. Consistent with Wisconsin’s decades-long legislative policy of taking voters at their word concerning indefinite confinement, the WEC’s guidance emphasizes the importance of avoiding any “proof” requirements: “Statutes do not establish the option to require proof or documentation from indefinitely confined voters. Clerks may tactfully verify with voters that the voter understood the indefinitely confined status designation when they submitted their request, but they may not request or require proof.” (Def. App. 62).

55. In a March 31, 2020 order, the Wisconsin Supreme Court granted the Republican Party of Wisconsin’s motion for a temporary restraining order, directing the Dane County Clerk to “refrain from posting advice as the County Clerk for Dane County inconsistent with the above quote from the WEC guidance.” *Jefferson v. Dane Cty.*, No 2020AP557-OA (Mar. 31, 2020) (Def.App. 64-66). **[15]**

56. The Wisconsin Supreme Court’s Order stated: “We conclude that the WEC’s guidance quoted above provides the clarification on the purpose and proper

use of the indefinitely confined status that is required at this time.” Id. at p. 2 (Def. App. 65).

57. Voters claiming “indefinite confinement” status increased significantly in 2020, during the COVID-19 pandemic, as compared to voters claiming that status in 2016 when there was no pandemic. The increases in voters designating themselves as indefinitely confined occurred statewide, not only in Dane and Milwaukee counties. See Dane County Board Exh. 2 (Def. App. 214-215).

58. Neither the WEC nor the Wisconsin Supreme Court provided further guidance about the criteria for voters to claim indefinitely confined status before the November 3, 2020 election, meaning the guidance in place for the election was the WEC guidance approved by the Wisconsin Supreme Court. (Def. App. 65). The Wisconsin Supreme Court heard oral argument in Jefferson on September 29, 2020, and has not issued a decision, which means the WEC guidance quoted above remains in place.

59. At no time prior to the election on November 3, 2020 did the Trump Campaign assert that the WEC guidance relating to indefinitely confined status was in any way improper or inconsistent with Wisconsin law. The first time the Trump Campaign made that claim was in its recount petitions filed with Dane and Milwaukee counties on November 18, 2020, after election results showed that President Trump had lost the election in Wisconsin by more than 20,000 votes.

60. Statewide, voters who indicated that they were indefinitely confined received a form letter from a

municipal clerk stating: “Identifying as an indefinitely confined voter is an individual choice based on your current situation and it does not require you to be permanently confined.” The letter then gave the voter an option to (1) continue to claim indefinite confinement **[16]** status, (2) to opt out of the parameters of indefinitely confinement but still continue to receive absentee ballots for the remainder of 2020, or (3) cancel the voter’s request to be designated as indefinitely confined. (Dane County Board of Canvassers Exh. 3) (Def. App. 200) (Dane 11/29/20 7:3-6).

61. The Milwaukee County Board of Canvassers did not determine how many voters cast ballots while indefinitely confined that had not previously submitted an ID within the past year.

62. The Dane County Board of Canvassers did not determine how many voters cast ballots while indefinitely confined that had not previously submitted an ID within the past year.

63. No facts were presented to the Milwaukee County Board of Canvassers that any voter in the county cast a ballot as indefinitely confined that did not qualify as indefinitely confined. Specifically, “no evidence of any voter in Milwaukee County [was] offered that has abused this process and voted through this status...not even an allegation that there was a single voter who abused this process to vote without providing proof of their ID, but eliminating proof that anyone did so. So there’s no allegation...no proof...no evidence.” (Milwaukee 11/21/20 145:2-146:2) (Doc. 39, pp. 14-15).

64. No facts were presented to the Milwaukee County Board of Canvassers that any voter relied upon any statement made by County Clerk George Christensen to determine their eligibility as indefinitely confined. (Milwaukee 11/21/2020 136:8-16; 145:18–146:8) (Doc. 39, pp. 5, 14-15).

65. The Trump Campaign presented the Dane County Board with a list of “eight or nine Facebook posts” allegedly by persons whose names were also names of persons who had voted absentee as “indefinitely confined.” (Dane 11/28/20 14:19-25) (Doc. 51, p. 288). [17]

66. The Trump Campaign did not challenge the ballots of these voters or seek a factual determination as to their indefinitely confined status. The Trump Campaign also did not provide evidence concerning whether the election clerk already had each voter’s photo ID on file. Accordingly, no finding was alleged, requested, or made that any voter had improperly invoked indefinitely confined status.

67. There is no evidence establishing beyond a reasonable doubt that any voter cast a vote as indefinitely confined who did not qualify as indefinitely confined.

d. “Democracy in the Park”

68. On two Saturdays before the November 3, 2020 general election (September 26, 2020 and October 3, 2020), the City of Madison held “Democracy in the Park” events in 206 Madison parks. The events were designed to create a safe way for voters to personally

deliver absentee ballots to the City of Madison Clerk during the pandemic. (Affidavit of Maribeth Witzel-Behl, ¶¶ 4-6) (Def. App. 209).

69. No absentee ballots were distributed, and no absentee ballot applications were accepted or distributed at Democracy in the Park. (Affidavit of Michael Haas, ¶ 4) (Def. App. 202).

70. At the events, sworn city election inspectors collected sealed and properly witnessed absentee ballots that the voters had previously received. (Haas Aff., ¶ 4) (Def. App. 202).

71. At the events, city election inspectors served as witnesses for absentee electors only if the elector brought an unsealed, blank ballot with them. (Haas Aff., ¶ 4) (Def. App. 202).

72. The Madison City Attorney emphasized in a letter to counsel for the Legislature that:

The procedures that the City Clerk has established to secure ballots [at the Democracy in the Park events] are equivalent to the procedures used to secure all absentee ballots. ... Sworn election [18] officials will retrieve ballots that have already been issued and will ensure that ballots are properly witnessed and are secured and sealed in absentee ballot envelopes and ballot containers with tamperevident seals, to be tabulated on Election Day. The election officials will maintain a chain of custody log that is open to public inspection. No new ballots will be issued

in the parks.

(Def. App. 204-205).

73. Neither the Madison City Attorney nor any other City official received any response to the letter to the counsel for the Legislature “and no further legal concerns regarding the Democracy in the Park program were communicated to [him].” (Haas Aff., ¶ 6) (Def. App. 203).

74. The City Clerk for the City of Madison designed the Democracy in the Park event “to comply with all applicable election laws.” (Witzel-Behl Aff., ¶ 4) (Def. App. 209). There is no evidence that the Democracy in the Park events violated any Wisconsin election laws or resulted in any improper votes being cast.

75. In creating the program, the City Clerk for the City of Madison “sought to accommodate the unprecedented demand for absentee ballots, address concerns about the capacity of the U.S. Postal Service to deliver ballots by Election Day, and provide City of Madison voters with a secure and convenient means of returning their completed ballots and obtain a witness if necessary.” (Witzel-Behl Aff., ¶ 4) (Def. App. 209).

76. Voters relied on the City of Madison’s determination that the Democracy in the Park events complied with Wisconsin laws, and they cast their votes at the events based on that reliance. See, e.g., Affidavit of Michael Martin Walsh (“I dropped off my ballot based on the assurance from the City of Madison that doing so was legal and proper”) (Biden Exh. 253)

(Def. Aff. 93). [19]

77. The City of Madison invited both major political parties to observe the entire process at the Democracy in the Park events. (Haas Aff., Exh. B) (Def. App. 204).

78. According to the City Clerk of the City of Madison, a total of 17,271 absentee ballots were collected during the Democracy in the Parks events. (Witzel-Behl Aff., ¶ 7) (Def. App. 210).

79. The Democracy in the Park events did not function as in-person absentee voting sites. Voters could not obtain and vote ballots there; they could only return absentee ballots they had previously received in the mail. At the events, city election inspectors “collected completed, sealed, and properly witnessed absentee ballots.” (Witzel-Behl Aff., ¶ 6) (Def. App. 209).

80. The 206 staffed locations were not “alternate absentee ballot sites” regulated under Wis. Stat. § 6.855. Instead, they were ballot return locations governed under Wis. Stat. § 6.87(4)(b)1 (“The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.”).

81. The WEC has interpreted Wis. Stat. § 6.87(4)(b)1 to allow the use of secured ballot drop boxes in a variety of locations and circumstances. These include book slots at public libraries, mail slots used for payment of taxes and other government fees, “staffed temporary drive-through drop offs,” and

“unstaffed 24-hour ballot drop boxes.” August 19, 2020 WEC Guidance re Absentee Ballot Drop Box Information. (Def. App. 71-72).

82. The drop-offs that were used in the Democracy in the Park events were functionally identical in all respects to the “staffed” and “unstaffed” drop boxes endorsed by the WEC and Wisconsin legislature. Thus, deposit of a sealed ballot envelope in one of the drop boxes staffed by duly designated agents of the clerk constituted “deliver[y] in person, to the municipal clerk” within the meaning of Wis. Stat. § 6.87(4)(b)1. **[20]**

83. No allegations were made, and the Dane County Board of Canvassers did not find, that a single vote cast at Democracy in the Park was cast by an ineligible voter.

PROPOSED CONCLUSIONS OF LAW

1. Voting is a fundamental right:

The right of a qualified elector to cast a ballot for the election of a public officer, which shall be free and equal, is one of the most important of the rights guaranteed to him by the constitution. If citizens are deprived of that right, which lies at the very basis of our Democracy, we will soon cease to be a Democracy. For that reason no right is more jealously guarded and protected by the departments of government under our constitutions, federal and state, than is the right of suffrage.

State ex rel. Frederick v. Zimmerman, 254 Wis. 600, 613, 37 N.W.2d 473, 480 (1949).

**A. Standard of Review on
Wis. Stat. § 9.01 Appeal**

2. Unless the court finds grounds for setting aside or modifying the determination of the Board of Canvassers, it must affirm the Board's determination. Wis. Stat. § 9.01(8)(c).

3. The court must separately treat disputed issues of procedure, interpretations of law, and findings of fact. Wis. Stat. § 9.01(8)(b).

4. The court will set aside or modify the determination of the Board of Canvassers only if it finds that the Board of Canvassers has erroneously interpreted a provision of law and a correct interpretation compels a particular action. Wis. Stat. § 9.01(8)(c).

5. If the determination depends on any fact found by the Board, the court may not substitute its judgment for that of the Board as to the weight of the evidence on any disputed finding of fact. The court shall set aside the determination if it finds that the determination depends on any finding of fact that is not supported by substantial evidence. Wis. Stat. § 9.01(8)(c).

6. The Court will review questions of law de novo. *Clifford v. Sch. Dist. of Colby*, 143 Wis. 2d 581, 585, 421 N.W.2d 852, 853 (Ct. App. 1988). [21]

7. But, when a party tries to change the results of an election by disqualifying the votes of certain voters, the challenger must “demonstrate beyond a reasonable doubt that the person does not qualify as an elector or is not properly registered.” *Logerquist v. Board of Canvassers for Town of Nasewaupee*, 150 Wis. 2d 907, 917, 442 N.W.2d 551, 555-56 (Ct. App. 1988).

8. Wisconsin courts have established a general rule that, in order to successfully challenge an election in a subsequent judicial appeal, the challenger must show that the outcome of the election would have been changed absent the challenged irregularity. See *Carlson v. Oconto County Board of Canvassers*, 2001 WI App 20, ¶ 10, 240 Wis. 2d 438, 444-45, 623 N.W.2d 195 (“Under the outcome test, to successfully challenge an election, the challenger must show the probability of an altered outcome, in the absence of the challenged irregularity...our supreme court has approved the outcome test for most election irregularities.”).

9. Wisconsin courts have historically protected the right to vote and declined to disenfranchise voters for clerical errors by election officials where the voter acted in good faith. See e.g. *Ollmann v. Kowalewski*, 238 Wis. 574, 578, 300 N.W. 183, 186 (1941) (“The voter would not knowingly be doing wrong. And not to count his vote for no fault of his own would deprive him of his constitutional right to vote. ... A statute purporting so to operate would be void, rather than the ballots.”); *Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 269 Wis. 299, 304, 69 N.W.2d 235, 238 (1955) (rejecting “purely technical” “complaint as to the delivery of the ballots”); *Lanser v. Koconis*, 62 Wis. 2d 86, 93, 214 N.W.2d 425, 428 (1974) (“[W]e are not

inclined to disenfranchise these voters who acted in conformance with the statutory requirements. There is absolutely no evidence from which it could be inferred that the method of delivery by the municipal clerk in any way affected their vote.”); *Matter of Hayden*, 105 Wis. 2d 468, 478, 313 N.W.2d 869, [22] 873–74 (Ct. App. 1981) (construing mandatory language about delivery of ballots as directory because “[o]nly when the municipal clerk appears to have solicited voters, or when there is any evidence of fraud, will voters who acted in good faith be disenfranchised.”); *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App 221, ¶ 27, 247 Wis.2d 708, 726, 634 N.W.2d 882, 889 (“A statute which merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election should be construed as directory.”) (quoting *Matter of Hayden*, 105 Wis. 2d at 483).

10. While the provisions in Wis. Stat. §§ 6.86, 6.87 (3)-(7) and 9.01 (1) (b) 2. and 4 shall be construed as mandatory, the reason is “to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.” Wis. Stat. § 6.84 (1)-(2).

11. But where fraud or impropriety is not alleged, outside of §§ 6.86, 6.87 (3)-(7) and 9.01 (1) (b) 2. and 4, the will of the voter controls. *See, e.g., Lanser v. Koconis*, 62 Wis. 2d 86, 93-94, 214 N.W.2d 425, 429 (1974) (holding that technical noncompliance with a

statutory provision for delivery of absentee ballots and signature requirement did not render the ballots invalid and that voters were entitled to have their votes counted).

12. Except as otherwise provided, the Wisconsin Election Code shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to comply fully with some of its provisions. Wis. Stats. § 5.01 (1). In this context, the Wisconsin Supreme Court has “quite consistently” held mandatory language to in fact be permissive. *Id.* This is particularly true for absentee ballots. *Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 269 Wis. 299, 302, 69 N.W.2d 235, 237 (1955) (“The [23] number of absentee ballots is increasing rather than decreasing. Where possible our statute should be interpreted to enable these people to vote.”). *See also Ollman v. Kowalewski*, 238 Wis. 574, 578, 300 N.W. 183, 185 (1941) (where a clerk erroneously placed his initials on ballots when initials from two clerks were required: “The voter would not knowingly be doing wrong. And not to count his vote for no fault of his own would deprive him of his constitutional right to vote. Any statute that purported to authorize refusal to count ballots cast under the instant circumstance would be unconstitutional. A statute purporting so to operate would be void, rather than the ballots.”).

**B. Plaintiffs’ Legal Challenges to WEC
Statewide Guidance are Not Within the
Scope of a Recount Under Wis. Stat. § 9.01.**

13. Post-election challenges under Wis. Stat. § 9.01 are limited in scope. This court may not wade into alleged statewide procedural irregularities underlying the election process itself. *Clapp v. Joint School Dist. No. 1*, 21 Wis. 2d 473, 478, 124 N.W.2d 678, 681-82 (1963) (“The statute does not contemplate a judicial determination by the board of canvassers of the legality of the entire election but of certain challenged ballots. ... True, there is an appeal from the board of canvassers to the circuit court but the scope of that appeal is no greater than the duties of the board of canvassers and does not reach a question of the illegality of the election as a whole.”).

14. WEC is an agency of the executive branch. See *State ex rel. Zignego v. Wisconsin Elections Commission*, 2020 WI App 17, ¶ 38, 391 Wis. 2d 441, 463, 941 N.W.2d 284.

15. Among other duties, WEC administers all of Wisconsin’s election laws. Wis. Stat. § 5.05(1).

16. Each one of the categories of absentee ballots challenged by Plaintiffs was accepted by the municipal clerks in reliance on published guidance documents issued by the WEC. The categories and associated WEC guidance documents include: [24]

a. *In-Person Absentee Voting Using EL-122 as the Written Application*: WEC Form EL-122 has been in use since May 2010. WEC’s Form EL-122 (in use since 2010) and Election Administration Manual, p. 91 (Sept. 2020) provide that the absentee certificate envelope itself constitutes an in-person absentee voter’s written absentee ballot application.

b. *Correcting Missing Witness Address Information*: The WEC’s October 18, 2020 Memo to Clerks re: “Missing or Insufficient Witness Address on Absentee Certificate Envelopes” states that municipal clerks “must take corrective action” to add missing witness address information if they are “reasonably able to discern” that information. (Def. App. 50). The WEC Election Administration Manual states at p. 99 that: “Clerks may add a missing witness address using whatever means are available.”

c. *Indefinitely Confined Voters*: The WEC’s March 29, 2020 guidance (approved by the Wisconsin Supreme Court on March 31, 2020) stated that to claim “indefinitely confined” status, a voter need not suffer from a “permanent or total inability to travel outside of the residence”; that the decision “is for each individual voter to make based upon their current circumstance”; and that “many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the [pandemic] crisis abates.”

d. *Democracy in the Park*: The WEC’s “Absentee Ballot Drop Box Information” guidance dated August 19, 2020 expressly recommended “outdoor” “staffed” ballot drop boxes like those used in Madison’s Democracy in the Park events. **[25]**

17. Plaintiffs only avenue to challenge a procedure contained in a WEC guidance document is pursuant to Wis. Stat. § 227.40. Wis. Stat. § 227.40(1) provides that “the exclusive means of judicial review of the validity of a[n] [agency’s] rule or guidance document” shall be in the form of “an action for declaratory judgment . . .

brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides . . .” These exclusive review provisions “are not permissive, but rather are mandatory.” *Richards v. Young*, 150 Wis. 2d 549, 555, 441 N.W.2d 742 (1989); see *State v. Town of Linn*, 205 Wis. 2d 426, 449, 556 N.W.2d 394 (Ct. App. 1996).

18. The WEC documents attacked as “illegal” by the Plaintiffs are “guidance” documents under Chapter 227. See Wis. Stat. § 227.01(3m) (defining “guidance document” to include “any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the following: (1) Explains the agency’s implementation of a statute or rule enforced or administered by the agency, . . . [or] (2) Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly situated.”).

19. The Court therefore has no jurisdiction under Wis. Stat. § 9.01 to reject broad categories of ballots based upon Plaintiffs’ contention that the WEC’s statewide guidance was inconsistent with the statutes the agency is statutorily required to administer. **[26]**

C. Plaintiffs’ Challenges to Voters Relying on the WEC’s Guidance Fail on the Merits.

1. Absentee Ballot Applications

20. Wis. Stat. § 6.86(1)(ar) states: “Except as

authorized in s. 6.875(6), the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality.”

21. No election statute requires any absentee application to take any particular form or structure.

22. WEC Form EL-122 is entitled “Official Absentee Ballot Application/Certification.” When completed by a voter during the in-person absentee voting period, Form EL-122 operates as the voter’s “written application” for an absentee ballot. See WEC Election Administration Manual (Sept. 2020), pp. 90-91 (“The applicant does not need to fill out a separate written request if they only wish to vote absentee for the current election. The absentee certificate envelope doubles as an absentee request and certification when completed in person in the clerk’s office.”).

23. WEC’s use of Form EL-122 as the written application for in-person absentee voters is consistent with WEC’s “responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections.” Wis. Stat. § 5.05(1).

24. Plaintiff’s position that Form EL-122 does not constitute a “separate written application” for an absentee ballot has no basis in Wisconsin’s election laws. Form EL-122 is a separate document from the absentee ballot itself.

25. There is no statutory or other basis upon which to overturn either Board’s finding that the Trump

Campaign's objections to the use of Form EL-122 should be overruled. [27]

2. Adding Missing Witness Address Information

26. WEC guidance in place for more than four years permits — and in some instances even requires — the practice of curing missing witness addresses based on reliable information.

27. The WEC's guidance to clerks to cure missing witness address information is not unlawful. On the contrary, the WEC's guidance is grounded in a reasonable interpretation of the Election Code. While Wis. Stat. § 6.87(9) states that a clerk "may" return an absentee ballot with an improperly completed certificate, the statute does not preclude a clerk from remedying a witness address deficiency herself. In addition, the statute is not mandatory. See Wis. Stat. § 6.84(2).

28. The law does not direct who may add or correct a witness's address on an envelope.

29. Plaintiffs' generalization that even corrected envelopes, where clerks filled in only the municipality, the state or the zip code in red ink, are "missing" an address is inconsistent with the plain language of Wis. Stat. § 6.87(6d), which states: "if a certificate is missing the address of a witness, the ballot may not be counted." (emphasis added). Wisconsin Statutes, court forms, and tax forms all treat one's "address" as distinct from the city, state or zip code. See *e.g.* Wis. Stats. § 801.095(1) (form of summons listing "Address,

city, state, zip code”); *Acuity Mut. Ins. Co. v. Olivas*, 2007 WI 12, ¶ 158, 298 Wis. 2d 640, 697, 726 N.W.2d 258, 287 (describing Form 1099 which asks for “Payer's name, street address, city, state, ZIP code, and telephone no.”). And the absentee ballot envelope in question itself treats address, city, state, and zip code as distinct and in separate boxes for the voter’s information in the top half the application. (Def. App 7). So too, does Form EL-121, which Plaintiffs endorse. (P. App. 24). To read into the statute that “missing the address” means missing a city, state, or zip code defies principles of statutory construction, internal consistency, and common sense. *State v. Kozel*, 2017 WI 3, ¶ 39, 373 Wis. 2d 1, 21-22, 889 N.W.2d 423, 433 (Court would not “require a specific type or degree of direction where the statute at issue does not so specify. We will not read into the statute a limitation the plain language [28] does not evidence.”) (internal quotation omitted). Doing so ignores Wis. Stat. § 5.01, which requires giving effect to the will of the elector, which requirement is not overridden—even if § 6.87(6d) is mandatory—where an address but not a zip code or state appears and that zip code or state is readily ascertainable. See Wis. Stat. § 5.01 (1).

30. That an absentee envelope’s witness address was completed by a clerk is not a statutory basis for objecting to or invalidating a vote during a recount. Wis. Stat. § 9.01(1)(b)2 (“An absentee ballot envelope is defective only if it is not witnessed or if it is not signed by the voter or if the certificate accompanying an absentee ballot that the voter received by facsimile transmission or electronic mail is missing.”).

31. No allegation has been made and the court cannot find that any corrected witness address involved any fraud, impropriety or abuse by a municipal clerk, or allowed ineligible votes to be cast.

32. Therefore, the Milwaukee Elections Commission and the Dane County Board of Canvassers properly rejected the Plaintiffs' challenges to ballots where a clerk added missing witness address information.

3. "Indefinitely Confined" Voters

33. The substantive provision allowing absentee voting for "indefinitely confined" electors has been in place for more than forty years, and the relevant text of Wis. Stat. § 6.82(2)(a) has been unchanged since 1985. See Wis. Stat. § 6.86(2) (1985); 1985 Wisconsin Act 304.

34. On March 29, 2020, the WEC issued guidance on applying the "indefinitely confined" exemption during the pandemic.

35. On March 31, 2020, in considering a challenge to informal guidance provided on social media by certain county election officials, the Wisconsin Supreme Court held that the WEC's March 29, 2020 guidance "provide[d] the clarification on the purpose and proper use of [29] the indefinitely confined status that is required at this time." *Jefferson v. Dane Cnty.*, No.2020AP557-OA, at 2 (Mar.31, 2020). The WEC's guidance has remained unchanged since then and was effective for the 2020 general election.

36. During the recount proceedings, Plaintiffs submitted two pieces of evidence regarding indefinitely confined voters: (a) a spreadsheet with nineteen (19) names of voters and links to Facebook posts by each identified voter; and (b) a November 25, 2020 affidavit of Kyle Hudson attaching seven (7) purported “social media posts” by voters registered as “indefinitely confined” that show the individuals outside of their homes. None of the posts related to Milwaukee County electors.

37. Plaintiffs’ evidence lacks proper foundation regarding the identity of the individual voters, whether they are the same persons with the social media accounts, the particular circumstances of the individuals at the time they registered as indefinitely confined and at the time of the election, and the posts are hearsay. See Wis. Stat. § 906.02 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”); § 908.01(3) (“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”).

38. The court cannot draw any conclusions based upon this tenuous and inadmissible evidence and cannot extrapolate from the evidence a conclusion that over 28,000 Dane and Milwaukee County residents fraudulently identified themselves as indefinitely confined.

39. Ballots from voters who claimed indefinite confinement status in reliance of WEC rules and the Wisconsin Supreme Court's order are therefore lawful. [30]

40. The Milwaukee Elections Commission and Dane County Board of Canvassers properly denied Plaintiffs' challenges to indefinitely confined voters.

4. "Democracy in the Park"

41. Wis. Stat. § 6.87(4)(b)1 states that an absentee ballot envelope "shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." The statute does not restrict the manner in which a voter can return an absentee ballot to a municipal clerk.

42. The Democracy in the Park events conducted by the City of Madison were for the express purpose of allowing voters to deliver absentee ballots in person to the municipal clerk.

43. The affidavits of Maribeth Witzel-Behl and Michael Haas establish that the Democracy in the Park events were properly staffed by employees of the City of Madison Clerk, and that proper procedures were used to ensure the security of the ballots so delivered. (Def. App. 201-210).

44. The Democracy in the Park events were not "early voting" as Plaintiffs allege, because no absentee ballots were requested or issued at the events. *See* Wis. Stat. § 6.86(1) (b); Dane 11/24/20 53:14-19 (Doc. 51, p. 194). *See also* Haas Aff., ¶ 4 (Def. App. 202).

45. Plaintiffs do not allege and submitted no evidence that any ballot delivered to the City of Madison during the Democracy in the Park events was tampered with or cast by an ineligible voter.

46. The court therefore finds no statutory basis to disqualify more than 17,000 ballots personally delivered to the City of Madison Clerk at the Democracy in the Park events.

D. Plaintiffs' Legal Challenges to WEC's Guidance are Barred by Laches.

47. "A party who delays in making a claim may lose his or her right to assert that claim based on the equitable doctrine of laches." *Dickau v. Dickau*, 2012 WI App 111, ¶ 9, 344 Wis. 2d 308, 824 N.W.2d 142.

48. Laches has three elements: (1) the party asserting a claim unreasonably delayed in doing so; (2) a second party lacked knowledge that the first party would raise that claim; and (3) the delay prejudiced the second party. *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 12, 393 Wis. 2d 308, 318, 946 N.W.2d 101. All three elements are satisfied here.

49. Plaintiffs unreasonably delayed pursuing a legal challenge to the four categories of absentee voters targeted in the recount. Form EL-122 has been used as the "written application" for in-person early voters for more than 10 years and could have been challenged prior to the election. The WEC's guidance instructing municipal clerks to cure missing witness address information was created prior to the 2016 Presidential

election and for 10 additional statewide elections thereafter. The WEC’s guidance regarding “indefinitely confined” voters during the pandemic is currently being challenged in court and Plaintiffs did not intervene in the case. Finally, the Democracy in the Park events were the subject of threatened litigation by the Wisconsin Legislature, and the City of Madison commenced a declaratory judgment action that the Plaintiffs did not attempt to join. (Def. App. 189-198).

50. Defendants had no way to anticipate Plaintiffs would pursue a post-election challenge seeking to disenfranchise hundreds of thousands of Wisconsinites based on participation in an election according to procedures of which Plaintiffs have been aware for years and never challenged. **[32]**

51. Allowing Plaintiffs to now challenge the WEC’s forms and guidance, to invalidate the votes of voters in two out of seventy-two counties, would prejudice both the Defendants and the targeted voters. *Brennan*, 2020 WI 69, ¶ 19, 393 Wis. 2d at 322 (“What amounts to prejudice ... depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position.”) (citation omitted).

E. Plaintiffs are Equitably Estopped from Seeking to Disenfranchise Targeted Groups of Voters for Following the Guidance of Elections Officials.

52. Equitable estoppel doctrine “focuses on the conduct of the parties” and consists of four elements:

“(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment.” *Milas v. Labor Ass’n of Wisconsin, Inc.*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997). All four elements are met here.

53. Plaintiffs failed to act prior to the election to challenge any of the categories of votes challenged in this recount appeal, despite an opportunity to do so.

54. Plaintiffs’ acquiescence in the manner in which the 2016 Presidential Election was conducted in Wisconsin induced reasonable reliance by voters, elections officials and opposing candidates that that the machinery for absentee voting during a pandemic – including use of the standard application Form EL-122, the clerk’s curing of absentee ballot witness address information, the grounds for claiming indefinite confinement, and the use of mobile drop boxes – was legal.

55. Disenfranchising hundreds of thousands of Dane and Milwaukee County voters after the fact would be to their grave and constitutional detriment. *See Shipley v. Chi. Bd. of Election Comm’rs*, 947 F.3d 1056, 1061 (7th Cir. 2020) (“It is undeniable that the right to vote is **[33]** a fundamental right guaranteed by the Constitution. The right to vote is not just the right to put a ballot in a box but also the right to have one’s vote counted.”) (citations omitted).

F. Disenfranchising Dane and Milwaukee County Votes While Counting Similar Voters in Other Counties Would Violate Equal Protection.

56. The Equal Protection Clause forbids Wisconsin from, “by later arbitrary and disparate treatment, valu[ing] one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam); see also *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause.”); *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 54, 132 N.W.2d 249 (1965) (“The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.”).

57. Discarding the votes of Dane and Milwaukee County voters for use of the EL-122 absentee ballot application form, but allowing all other similarly situated voters to remain counted, would devalue the targeted voters in violation of the Equal Protection Clause.

58. Discarding the votes of over 28,000 Dane and Milwaukee County voters who self designated as “indefinitely confined,” but allowing all other indefinitely confined voters to remain counted, would devalue the targeted voters in violation of the Equal Protection Clause.

59. Discarding the votes of over 4,000 Dane and Milwaukee County voters because municipal clerks corrected missing witness address information, but allowing all other voters whose absentee envelopes were similarly corrected pursuant to WEC guidance, would devalue the targeted voters in violation of the Equal Protect Clause. [34]

Dated this 9th day of December, 2020.

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Appendix D

PERTINENT STATUTES

TITLE 3, U.S. CODE: THE PRESIDENT

CHAPTER 1: PRESIDENTIAL ELECTIONS AND VACANCIES

§2. Failure to make choice on prescribed day

Whenever 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.

CHAPTER 5, WISCONSIN STATUTES: ELECTIONS — GENERAL PROVISIONS; BALLOTS AND VOTING SYSTEM

5.01 Scope.

(1) CONSTRUCTION OF CHS. 5 TO 12. Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.

CHAPTER 6, WISCONSIN STATUTES: THE ELECTORS

SUBCHAPTER III: VOTING

6.79 Recording electors.

(1m) SEPARATE POLL LISTS. The municipal clerk may elect to maintain the information on the poll list manually or electronically. If the clerk elects to maintain the list electronically, an election official at each election ward shall be in charge of and shall maintain the poll list. The system employed to maintain the list electronically is subject to the approval of the commission. If the clerk elects to maintain the information manually, 2 election officials at each election ward shall be in charge of and shall maintain 2 separate poll lists.

(2) VOTING PROCEDURE. (a) Unless information on the poll list is entered electronically, the municipal clerk shall supply the inspectors with 2 copies of the most current official registration list or lists prepared under s. 6.36 (2) (a) for use as poll lists at the polling place. Except as provided in subs. (6), (7), and (8), each eligible elector, before receiving a serial number, shall state his or her full name and address and present to the officials proof of identification. The officials shall verify that the name on the proof of identification presented by the elector conforms to the name on the poll list or separate list and shall verify that any photograph appearing on that document reasonably resembles the elector. The officials shall then require the elector to enter his or her signature on the poll list, supplemental list, or separate list maintained under par. (c) unless the elector is exempt from the signature requirement under s. 6.36 (2) (a). The officials shall

verify that the name and address stated by the elector conform to the elector's name and address on the poll list.

* * *

(3) REFUSAL TO PROVIDE NAME, ADDRESS, OR PROOF OF IDENTIFICATION.

(a) Except as provided in sub. (6), if any elector offering to vote at any polling place refuses to give his or her name and address, the elector may not be permitted to vote.

(b) If proof of identification under sub. (2) is not presented by the elector, if the name appearing on the document presented does not conform to the name on the poll list or separate list, or if any photograph appearing on the document does not reasonably resemble the elector, the elector shall not be permitted to vote, except as authorized under sub. (6) or (7), but if the elector is entitled to cast a provisional ballot under s. 6.97, the officials shall offer the opportunity for the elector to vote under s. 6.97.

SUBCHAPTER IV: VOTING ABSENTEE

6.84 Construction.

(1) **LEGISLATIVE POLICY.** The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

(2) **INTERPRETATION.** Notwithstanding s. 5.01 (1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87 (3) to (7) and 9.01 (1) (b) 2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election

6.855 Alternate absentee ballot site.

(1) The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. The designated site shall be located as near as practicable to the office of the municipal clerk

or board of election commissioners and no site may be designated that affords an advantage to any political party. An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15 (1) (cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.

(2) The municipal clerk or board of election commissioners shall prominently display a notice of the designation of the alternate site selected under sub. (1) in the office of the municipal clerk or board of election commissioners beginning on the date that the site is designated under sub. (1) and continuing through the period that absentee ballots are available for the election and for any primary under s. 7.15 (1) (cm). If the municipal clerk or board of election commissioners maintains a website on the Internet, the clerk or board of election commissioners shall post a notice of the designation of the alternate site selected under sub. (1) on the website during the same period that notice is displayed in the office of the clerk or board of election commissioners.

(3) An alternate site under sub. (1) shall be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners.

(4) An alternate site under sub. (1) shall be accessible to all individuals with disabilities.

(5) A governing body may designate more than one alternate site under sub. (1).

6.86 Methods for obtaining an absentee ballot.

(1) (a) Any elector of a municipality who is registered to vote whenever required and who qualifies under ss. 6.20 and 6.85 as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods:

1. By mail.

2. In person at the office of the municipal clerk or at an alternate site under s. 6.855, if applicable.

3. By signing a statement and filing a request to receive absentee ballots under sub. (2) or (2m) (a) or s. 6.22 (4), 6.24 (4), or 6.25 (1) (c).

4. By agent as provided in sub. (3).

5. By delivering an application to a special voting deputy under s. 6.875 (6).

6. By electronic mail or facsimile transmission as provided in par. (ac).

(ac) Any elector qualifying under par. (a) may make written application to the municipal clerk for an official ballot by means of facsimile transmission or electronic mail. Any application under this paragraph need not contain a copy of the applicant's original signature. An elector requesting a ballot under this paragraph shall return with the voted ballot a copy of the request bearing an original signature of the elector as provided in s. 6.87 (4). Except as authorized in ss. 6.87 (4) (b) 2. to 5. and 6.875 (6), and notwithstanding s. 343.43 (1) (f), the elector shall transmit a copy of his

or her proof of identification in the manner provided in s. 6.87 (1) unless the elector is a military elector or an overseas elector or the elector has a confidential listing under s. 6.47 (2).

(ag) An elector who is unable to write his or her name due to physical disability may authorize an application to be made by another elector on his or her behalf. In such case, the application shall state that it is made on request and by authorization of a named elector who is unable to sign the application due to physical disability.

(ar) Except as authorized in s. 6.875 (6), the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality. The clerk shall retain each absentee ballot application until destruction is authorized under s. 7.23 (1). Except as authorized in s. 6.79 (6) and (7), if a qualified elector applies for an absentee ballot in person at the clerk's office, the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification. The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application and shall verify that any photograph appearing on that document reasonably resembles the elector. The clerk shall then enter his or her initials on the certificate envelope indicating that the absentee elector presented proof of identification to the clerk.

* * *

6.87 Absent voting procedure.

(1) Upon proper request made within the period prescribed in s. 6.86, the municipal clerk or a deputy

clerk authorized by the municipal clerk shall write on the official ballot, in the space for official endorsement, the clerk's initials and official title. Unless application is made in person under s. 6.86 (1) (ar), the absent elector is exempted from providing proof of identification under sub. (4) (b) 2. or 3., or the applicant is a military or overseas elector, the absent elector shall enclose a copy of his or her proof of identification or any authorized substitute document with his or her application. The municipal clerk shall verify that the name on the proof of identification conforms to the name on the application. The clerk shall not issue an absentee ballot to an elector who is required to enclose a copy of proof of identification or an authorized substitute document with his or her application unless the copy is enclosed and the proof is verified by the clerk.

(2) Except as authorized under sub. (3) (d), the municipal clerk shall place the ballot in an unsealed envelope furnished by the clerk. The envelope shall have the name, official title and post-office address of the clerk upon its face. The other side of the envelope shall have a printed certificate which shall include a space for the municipal clerk or deputy clerk to enter his or her initials indicating that if the absentee elector voted in person under s. 6.86 (1) (ar), the elector presented proof of identification to the clerk and the clerk verified the proof presented. The certificate shall also include a space for the municipal clerk or deputy clerk to enter his or her initials indicating that the elector is exempt from providing proof of identification because the individual is a military elector or an overseas elector who does not qualify as a resident of this state under s. 6.10 or is exempted from providing proof of identification under

sub. (4) (b) 2. or 3. The certificate shall be in substantially the following form:

[STATE OF

County of]

or

[(name of foreign country and city or other jurisdictional unit)]

I,, certify subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, that I am a resident of the [... ward of the] (town) (village) of, or of the aldermanic district in the city of, residing at ...* in said city, the county of, state of Wisconsin, and am entitled to vote in the (ward) (election district) at the election to be held on; that I am not voting at any other location in this election; that I am unable or unwilling to appear at the polling place in the (ward) (election district) on election day or have changed my residence within the state from one ward or election district to another later than 28 days before the election. I certify that I exhibited the enclosed ballot unmarked to the witness, that I then in (his) (her) presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and any person rendering assistance under s. 6.87 (5), Wis. Stats., if I requested assistance, could know how I voted.

Signed

Identification serial number, if any:

The witness shall execute the following:

I, the undersigned witness, subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen** and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for

any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

...(Printed name)

...(Address)***

Signed

* — An elector who provides an identification serial number issued under s. 6.47 (3), Wis. Stats., need not provide a street address.

** — An individual who serves as a witness for a military elector or an overseas elector voting absentee, regardless of whether the elector qualifies as a resident of Wisconsin under s. 6.10, Wis. Stats., need not be a U.S. citizen but must be 18 years of age or older.

*** — If this form is executed before 2 special voting deputies under s. 6.875 (6), Wis. Stats., both deputies shall witness and sign.

(4) (a) In this subsection, “military elector” has the meaning given in s. 6.34 (1).

(b) 1. Except as otherwise provided in s. 6.875, an elector voting absentee, other than a military elector or an overseas elector, shall make and subscribe to the certification before one witness who is an adult U.S. citizen. A military elector or an overseas elector voting absentee, regardless of whether the elector qualifies as a resident of this state under s. 6.10, shall make and subscribe to the certification before one witness who is an adult but who need not be a U.S. citizen. The absent elector, in the presence of the witness, shall mark the ballot in a manner that will not disclose how

the elector's vote is cast. The elector shall then, still in the presence of the witness, fold the ballots so each is separate and so that the elector conceals the markings thereon and deposit them in the proper envelope. If a consolidated ballot under s. 5.655 is used, the elector shall fold the ballot so that the elector conceals the markings thereon and deposit the ballot in the proper envelope. If proof of residence under s. 6.34 is required and the document enclosed by the elector under this subdivision does not constitute proof of residence under s. 6.34, the elector shall also enclose proof of residence under s. 6.34 in the envelope. Except as provided in s. 6.34 (2m), proof of residence is required if the elector is not a military elector or an overseas elector and the elector registered by mail or by electronic application and has not voted in an election in this state. If the elector requested a ballot by means of facsimile transmission or electronic mail under s. 6.86 (1) (ac), the elector shall enclose in the envelope a copy of the request which bears an original signature of the elector. The elector may receive assistance under sub. (5). The return envelope shall then be sealed. The witness may not be a candidate. The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots. If the envelope is mailed from a location outside the United States, the elector shall affix sufficient postage unless the ballot qualifies for delivery free of postage under federal law. Failure to return an unused ballot in a primary does not invalidate the ballot on which the elector's votes are cast. Return of more than one marked ballot in a primary or return of a ballot prepared under s. 5.655 or a ballot used with an electronic voting system in a primary which is marked for candidates of more than one party invalidates all

votes cast by the elector for candidates in the primary.

2. Unless subd. 3. applies, if the absentee elector has applied for and qualified to receive absentee ballots automatically under s. 6.86 (2) (a), the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement signed by the same individual who witnesses voting of the ballot which contains the name and address of the elector and verifies that the name and address are correct.

3. If the absentee elector has received an absentee ballot from the municipal clerk by mail for a previous election, has provided proof of identification with that ballot, and has not changed his or her name or address since providing that proof of identification, the elector is not required to provide proof of identification.

(6) The ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day. Except in municipalities where absentee ballots are canvassed under s. 7.52, if the municipal clerk receives an absentee ballot on election day, the clerk shall secure the ballot and cause the ballot to be delivered to the polling place serving the elector's residence before 8 p.m. Any ballot not mailed or delivered as provided in this subsection may not be counted.

(6d) If a certificate is missing the address of a witness, the ballot may not be counted.

(9) If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no

certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).

* * *

6.88 Voting and recording the absentee ballot.

(1) When an absentee ballot arrives at the office of the municipal clerk, or at an alternate site under s. 6.855, if applicable, the clerk shall enclose it, unopened, in a carrier envelope which shall be securely sealed and endorsed with the name and official title of the clerk, and the words "This envelope contains the ballot of an absent elector and must be opened in the same room where votes are being cast at the polls during polling hours on election day or, in municipalities where absentee ballots are canvassed under s. 7.52, stats., at a meeting of the municipal board of absentee ballot canvassers under s. 7.52, stats." If the elector is a military elector, as defined in s. 6.34 (1), or an overseas elector, regardless of whether the elector qualifies as a resident of this state under s. 6.10, and the ballot was received by the elector by facsimile transmission or electronic mail and is accompanied by a separate certificate, the clerk shall enclose the ballot in a certificate envelope and securely append the completed certificate to the outside of the envelope before enclosing the ballot in the carrier envelope. The clerk shall keep the ballot in the clerk's office or at the alternate site, if applicable until delivered, as required in sub. (2).

**CHAPTER 7, WISCONSIN STATUTES:
ELECTION OFFICIALS; BOARDS;
SELECTION AND DUTIES; CANVASSING**

SUBCHAPTER I: SELECTION AND DUTIES

7.15 Municipal clerks.

*** * ***

(2m) OPERATION OF ALTERNATE ABSENTEE BALLOT SITE. In a municipality in which the governing body has elected to establish an alternate absentee ballot site under s. 6.855, the municipal clerk shall operate such site as though it were his or her office for absentee ballot purposes and shall ensure that such site is adequately staffed.

**CHAPTER 7, WISCONSIN STATUTES:
POST-ELECTION ACTIONS;
DIRECT LEGISLATION**

9.01 Recount.

(1) PETITION; FEES; GENERAL PROCEDURES.

(a) 1. Any candidate voted for at any election who is an aggrieved party, as determined under subd. 5., or any elector who voted upon any referendum question at any election may petition for a recount. The petitioner shall file a verified petition or petitions with the proper clerk or body under par. (ar) not earlier than the time of completion of the canvass following canvassing of any valid provisional ballots under s. 6.97 (4) and, except as provided in this subdivision, not later than 5 p.m. on the 3rd business day following the last meeting day of the municipal or county board of canvassers determining the election for that office or on that referendum question following canvassing of all valid provisional ballots or, if more than one board of canvassers makes the determination, not later than 5 p.m. on the 3rd business day following the last meeting day of the last board of canvassers which makes a determination following canvassing of all valid provisional ballots. If the commission chairperson or chairperson's designee makes the determination for the office or the referendum question, the petitioner shall file the petition not earlier than the last meeting day of the last county board of canvassers to make a statement in the election or referendum following canvassing of all valid provisional ballots and not later than 5 p.m. on the 3rd business day following the day on which the commission receives the last statement from a county board of canvassers for the election or referendum

following canvassing of all valid provisional ballots. With regard to an election for president, the petitioner shall file the petition not later than 5 p.m. on the first business day following the day on which the commission receives the last statement from a county board of canvassers for the election following canvassing of all valid provisional ballots.

* * *

5. In this paragraph, “aggrieved party” means any of the following:

a. For an election at which 4,000 or fewer votes are cast for the office that the candidate seeks, a candidate who trails the leading candidate, as defined under par. (ag) 5., by no more than 40 votes, as determined under par. (ag) 5.

b. For an election at which more than 4,000 votes are cast for the office that the candidate seeks, a candidate who trails the leading candidate, as defined under par. (ag) 5., by no more than 1 percent of the total votes cast for that office, as determined under par. (ag) 5.

* * *

(5) OATHS; MINUTES; WITNESS FEES; TABULATORS; TIMING; PUBLICATION.

(a) The board of canvassers or the commission chairperson or the chairperson’s designee shall keep complete minutes of all proceedings before the board of canvassers or the chairperson or designee. The minutes shall include a record of objections and offers of evidence. If the board of canvassers or the commission chairperson or the chairperson’s designee

receives exhibits from any party, the board of canvassers or the chairperson or designee shall number and preserve the exhibits. The board of canvassers or the chairperson or chairperson's designee shall make specific findings of fact with respect to any irregularity raised in the petition or discovered during the recount. Any member of the board of canvassers or the chairperson or chairperson's designee may administer oaths, certify official acts, and issue subpoenas for purposes of this section. Witness fees shall be paid by the county. In the case of proceedings before the commission chairperson or chairperson's designee, witness fees shall be paid by the commission.

* * *

(6) APPEAL TO CIRCUIT COURT.

(a) Within 5 business days after completion of the recount determination by the board of canvassers in all counties concerned, or within 5 business days after completion of the recount determination by the commission chairperson or the chairperson's designee whenever a determination is made by the chairperson or designee, any candidate, or any elector when for a referendum, aggrieved by the recount may appeal to circuit court. The appeal shall commence by serving a written notice of appeal on the other candidates and persons who filed a written notice of appearance before each board of canvassers whose decision is appealed, or in the case of a statewide recount, before the commission chairperson or the chairperson's designee. The appellant shall also serve notice on the commission if the commission chairperson or the chairperson's designee is responsible for determining

the election. The appellant shall serve the notice by certified mail or in person. The appellant shall file the notice with the clerk of circuit court together with an undertaking and surety in the amount approved by the court, conditioned upon the payment of all costs taxed against the appellant.

(b) If an appeal is filed from a recount determination in an election which is held in more than one judicial circuit, the chief judge of the judicial administrative district in which the election is held shall consolidate all appeals relating to that election and appoint a circuit judge, who shall be a reserve judge if available, to hear the appeal. If the election is held in more than one judicial administrative district, the chief justice of the supreme court shall make the appointment.

(7) COURT PROCEDURES.

(a) The court with whom an appeal is filed shall forthwith issue an order directing each affected county, municipal clerk, or board, and the commission, to transmit immediately all ballots, papers and records affecting the appeal to the clerk of court or to impound and secure such ballots, papers and records, or both. The order shall be served upon each affected county, municipal clerk, or board, the commission, and all other candidates and persons who filed a written notice of appearance before any board of canvassers involved in the recount.

(b) The appeal shall be heard by a judge without a jury. Promptly following the filing of an appeal, the court shall hold a scheduling conference for the purpose of adopting procedures that will permit the court to determine the matter as expeditiously as possible. Within the time ordered by the court, the appellant shall file a complaint enumerating with

specificity every alleged irregularity, defect, mistake or fraud committed during the recount. The appellant shall file a copy of the complaint with each person who is entitled to receive a copy of the order under par. (a). Within the time ordered by the court, the other parties to the appeal shall file an answer. Within the time ordered by the court, the parties to the appeal shall provide the court with any other information ordered by the court. At the time and place ordered by the court, the matter shall be summarily heard and determined and costs shall be taxed as in other civil actions. Those provisions of chs. 801 to 806 which are inconsistent with a prompt and expeditious hearing do not apply to appeals under this section.

(8) SCOPE OF REVIEW. (a) Unless the court finds a ground for setting aside or modifying the determination of the board of canvassers or the commission chairperson or chairperson's designee, it shall affirm the determination.

(b) The court shall separately treat disputed issues of procedure, interpretations of law, and findings of fact.

(c) The court may not receive evidence not offered to the board of canvassers or the commission chairperson or the chairperson's designee except for evidence that was unavailable to a party exercising due diligence at the time of the recount or newly discovered evidence that could not with due diligence have been obtained during the recount, and except that the court may receive evidence not offered at an earlier time because a party was not represented by counsel in all or part of a recount proceeding. A party who fails to object or fails to offer evidence of a defect or irregularity during the recount waives the right to object or offer evidence before the court except in the

case of evidence that was unavailable to a party exercising due diligence at the time of the recount or newly discovered evidence that could not with due diligence have been obtained during the recount or evidence received by the court due to unavailability of counsel during the recount.

(d) The court shall set aside or modify the determination of the board of canvassers or the commission chairperson or the chairperson's designee if it finds that the board of canvassers or the chairperson or chairperson's designee has erroneously interpreted a provision of law and a correct interpretation compels a particular action. If the determination depends on any fact found by the board of canvassers or the commission chairperson or the chairperson's designee, the court may not substitute its judgment for that of the board of canvassers or the chairperson or designee as to the weight of the evidence on any disputed finding of fact. The court shall set aside the determination if it finds that the determination depends on any finding of fact that is not supported by substantial evidence.

(9) APPEAL TO COURT OF APPEALS.

(a) Within 30 days after entry of the order of the circuit court, a party aggrieved by the order may appeal to the court of appeals.

(b) If an appeal is filed in respect to an election which is held in more than one court of appeals district, the chief justice of the supreme court shall consolidate all appeals relating to that election and designate one district to hear the appeal, except that if an appeal is filed in respect to an election for statewide office or a statewide referendum, the appeal shall be heard by the 4th district court of appeals.

(c) The court of appeals shall give precedence to

the appeal over other matters not accorded similar precedence by law.

(10) STANDARD FORMS AND METHODS. The commission shall prescribe standard forms and procedures for the making of recounts under this section. The procedures prescribed by the commission shall require the boards of canvassers in recounts involving more than one board of canvassers to consult with the commission staff prior to beginning any recount in order to ensure that uniform procedures are used, to the extent practicable, in such recounts.

(11) EXCLUSIVE REMEDY. This section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process.

1/16/24, 2:52 PM

SUBJECT: Fwd: Plans for next week?
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Brian Schimming <[REDACTED]@gmail.com>
DATE: 12/29/2020 12:30

Received this earlier today.
Jim

Sent from my iPhone

Begin forwarded message:

From: "Helderman, Rosalind" <[REDACTED]@washpost.com>
Date: December 29, 2020 at 9:33:14 AM CST
To: [REDACTED]@gmail.com
Subject: Plans for next week?

Judge Troupis--

I wanted to check in and see if you have any Wisconsin-specific plans regarding next week's Congressional opening of the Electoral College votes? Will you be in Washington? Do you believe that Congress should be opening Wisconsin's alternate Trump slate instead and, if so, how do you plan to press that argument?

I'm at [REDACTED] to discuss.

Thank you so much!

Rosalind Helderman

Staff writer, The Washington Post

TROUPIS 009423

SUBJECT: Re: [EXTERNAL]Fwd: Your Electronic Filing record has been submitted.
FROM: Boris Epshteyn <[REDACTED]@donaldtrump.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
CC: Bruce Marks <[REDACTED]@mslegal.com>, John Eastman <[REDACTED]@chapman.edu>, George Burnett <[REDACTED]@lcojlaw.com>, Joe Olson <[REDACTED]@michaelbest.com>, Kenneth Chesebro <[REDACTED]@msn.com>
DATE: 12/29/2020 17:14

Statement is live! Congratulations!

Here's statement!

<https://bit.ly/2KEEsum>

<https://twitter.com/borisep/status/1344058523282505728?s=21>

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

--

Please Note: The information in this email is confidential and may be legally privileged. If you are not the intended recipient, you must not read, use or disseminate the information; please advise the sender immediately by reply email and delete this message and any attachments without retaining a copy. Although this email and any attachments are believed to be free of any virus or other defect that may affect any computer system into which it is received and opened, it is the responsibility of the recipient to ensure that it is virus free and no responsibility is accepted by the sender for any loss or damage arising in any way from its use.

On Dec 29, 2020, at 5:04 PM, Judge Troupis <[REDACTED]@gmail.com> wrote:

We are electronically filed.
The brief, motion and appendix will be sent in next few minutes.
Hard copy will be filed in an hour or so.
BORIS—Do we have anything we can tell the press? We would like to alert our friends in the press here.
Jim

Sent from my iPhone

Begin forwarded message:

From: [REDACTED]@supremecourt.gov
Date: December 29, 2020 at 4:00:52 PM CST
To: [REDACTED]@gmail.com

TROUPIS 009424

Subject: Your Electronic Filing record has been submitted.

Your Petition for a Writ of Certiorari has been submitted. It will be reviewed once the hard copy is received. If you are not expecting this email, please contact the Supreme Court Electronic Filing Support Group at eFilingSupport@supremecourt.gov.

CONFIDENTIALITY NOTICE: This message (including any attachments) may contain confidential, proprietary, privileged, and/or private information. This information is intended to be for the use of the individual(s) designated above. If you are not the intended recipient of this message, please notify the sender immediately, and delete the message and any attachments. Any disclosure, reproduction, distribution, or other use of this message or any attachments by an individual or entity other than the intended recipient is prohibited. Copyright and any other intellectual property rights are the sole property of Donald J. Trump for President, Inc.

SUBJECT: Re: Filing
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: "William Bock, III" <[REDACTED]@kgrlaw.com>, Judge Troupis <[REDACTED]@gmail.com>
CC: Bruce Marks <[REDACTED]@mslegal.com>
DATE: 12/29/2020 17:21
ATTACHMENTS (20201229-172109-0000975): "[image001.jpg](#)", "[image002.png](#)"

It's now posted, on Rudy's press release -- follow link here:
<https://twitter.com/BorisEP/status/1344058523282505728>

From: William Bock, III <[REDACTED]@kgrlaw.com>
Sent: Tuesday, December 29, 2020 6:20 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>; Judge Troupis <[REDACTED]@gmail.com>
Cc: Bruce Marks <[REDACTED]@mslegal.com>
Subject: RE: Filing

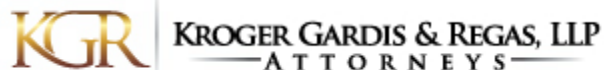
Ken,

Bruce and Prof. Eastman are absolutely helping us a great deal. They have provided several rounds of outstanding recommendations and edits. I think we are getting closer. . .

Looking forward to reading your final version. Congratulations!

Bill

William Bock, III | Partner



111 Monument Circle Suite 900
Indianapolis, IN 46204-5125

Phone: [REDACTED]

Fax: [REDACTED]

Mobile: [REDACTED]

[REDACTED]@kgrlaw.com www.kgrlaw.com

Follow us on [Twitter](#) and [LinkedIn](#) and visit our [Blog](#)



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From: Kenneth Chesebro [mailto:[REDACTED]@msn.com]
Sent: Tuesday, December 29, 2020 6:05 PM
To: William Bock, III; Judge Troupis
Cc: Bruce Marks
Subject: Re: Filing

Bruce and Prof. Eastman were incredibly helpful in improving this brief. Hope they are also involved with your effort!

TROUPIS 009426

From: William Bock, III <[REDACTED]@kgrlaw.com>
Sent: Tuesday, December 29, 2020 6:01 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>; Bruce Marks <[REDACTED]@mslegal.com>
Subject: RE: Filing

Congratulations! Fingers crossed! Really appreciate the opportunity to work with you guys.

Bill

William Bock, III | Partner



111 Monument Circle Suite 900
Indianapolis, IN 46204-5125

Phone: [REDACTED]

Fax: [REDACTED]

Mobile: [REDACTED]

[REDACTED]@kgrlaw.com www.kgrlaw.com

Follow us on [Twitter](#) and [LinkedIn](#) and visit our [Blog](#).



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From: Judge Troupis [[mailto:\[REDACTED\]@gmail.com](mailto:[REDACTED]@gmail.com)]

Sent: Tuesday, December 29, 2020 5:27 PM

To: William Bock, III

Cc: Kenneth Chesebro; Bruce Marks

Subject: Filing

Bill,

We just now filed. The filing is attached.

Jim T.

SUBJECT: Re: Petition--Work Possible

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>, Judge Troupis <[REDACTED]@gmail.com>, Chirst Troupis <[REDACTED]@gmail.com>, "Clinton W. Lancaster" <[REDACTED]@thelancasterlawfirm.com>, [REDACTED] <[REDACTED]@gmail.com>, Beauty and the Bees <[REDACTED]@gmail.com>, [REDACTED] <[REDACTED]@outlook.com>, [REDACTED] <[REDACTED]@gmail.com>, [REDACTED] <[REDACTED]@swvalawfirm.com>, Joe Voiland <[REDACTED]@yahoo.com>, Stewart Karge <[REDACTED]@gmail.com>, "Boerke, Nicholas J (12767)" <[REDACTED]@michaelbest.com>, "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>

CC: George Burnett <[REDACTED]@lcojlaw.com>

DATE: 12/29/2020 17:30

ATTACHMENTS (20201229-173009-0004122): ["image001.png"](#)

Want to make sure everyone on the team knows about the Trump press release, with copies of the filings:

Boris Epshteyn on Twitter

"🚨 BREAKING 🚨 .@RudyGiuliani announcement on @realDonaldTrump campaign's petition for Certiorari with SCOTUS challenging the Wisconsin Supreme Court decision allowing over 50,000 illegal absentee ballots in violation of Article II of U.S. Constitution. <https://t.co/CDeAfo6Vkd>"

twitter.com

From: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>

Sent: Tuesday, December 29, 2020 6:27 PM

To: Kenneth Chesebro <[REDACTED]@msn.com>; Judge Troupis <[REDACTED]@gmail.com>; Chirst Troupis <[REDACTED]@gmail.com>; Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@outlook.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; Joe Voiland <[REDACTED]@yahoo.com>; Stewart Karge <[REDACTED]@gmail.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>

Cc: George Burnett <[REDACTED]@lcojlaw.com>

Subject: RE: Petition--Work Possible

Awesome

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com



From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Tuesday, December 29, 2020 5:11 PM
To: Judge Troupis <[REDACTED]@gmail.com>; Chirst Troupis <[REDACTED]@gmail.com>; Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@outlook.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; Joe Voiland <[REDACTED]@yahoo.com>; Stewart Karge <[REDACTED]@gmail.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>
Cc: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Re: Petition--Work Possible

Just saw the filing mentioned on Fox News.

We're going national!

ha ha

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Tuesday, December 29, 2020 5:24 PM
To: Chirst Troupis <[REDACTED]@gmail.com>; Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@outlook.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; Joe Voiland <[REDACTED]@yahoo.com>; Stewart Karge <[REDACTED]@gmail.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>
Cc: Joe Olson <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Re: Petition--Work Possible

Here are the filings made this afternoon. Enjoy. Thank you again everyone for your help. This was not possible without your help.

Now the real fun begins. (and I don't mean the 10 inches of snow predicted for tonight...)

Jim

On Mon, Dec 28, 2020 at 10:56 PM Judge Troupis <[REDACTED]@gmail.com> wrote:

All,
 The Cert Petition will be filed Tuesday morning. Thank you for your help.
 In the "be careful what you ask for" tradition, should the Court grant expedited review there may be much more work that will need to be done between now and January 6. Just a heads-up.
 In the alternative, if the Court grants review but does not expedite, then there will be even more work that will need to be done because there would be full briefing over the next several weeks/months.
 Here is hoping one of those alternatives is chosen, and, if that comes, it would be a pleasure for you to join again in the effort.
 It's never boring in Trump World.
 Thank you again.
 Jim T.

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TRROUPIS 009429

1/16/24, 2:53 PM

of its contents, is strictly prohibited. If you have received this communication in error, please return it to the sender immediately and delete the original message and any copy of it from your computer system. If you have any questions concerning this message, please contact the sender.

SUBJECT: Confirmed: 2 PM, Zoom/Fox 11 Green Bay
FROM: Brian Schimming <[REDACTED]@gmail.com>
TO: Alesha Guenther <[REDACTED]@wisgop.info>, Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/30/2020 11:55
ATTACHMENTS (20201230-115547-0003538): "[image001.png](#)"

Jim and Alesha: Jim, Alesha will be handling your Zoom schedule from RPW this afternoon.

We have one current confirmed, Kia Murray of Fox 11 in Green Bay at 2 pm. The Zoom link is below. Should link in by 1:55 at the very latest.

Thanks

B

On Wed, Dec 30, 2020 at 11:30 AM Kia Murray <[REDACTED]@sbgvtv.com> wrote:

Hi Brian,

Thanks again for your help this morning. Here's that Zoom link we talked about, along with some additional details:

[REDACTED]@sbgvtv.com is inviting you to a scheduled Zoom meeting.

Topic: Interview with Jim Troupis

Time: Dec 30, 2020 02:00 PM Central Time (US and Canada)

Join Zoom Meeting

[https://us02web.zoom.us/j/\[REDACTED\]](https://us02web.zoom.us/j/[REDACTED])

Meeting ID: [REDACTED]

Passcode: [REDACTED]

I myself am an anchor and reporter for FOX 11 News in Green Bay, WI. The interview would be asking Judge Troupis what remedy the campaign seeks in taking a Wisconsin State Supreme Court case to the U.S. Supreme Court, if the campaign thinks it will be successful in its petition, and elaborating on the argument that the state Supreme Court didn't rule based on the merits of the case.

The link above is for a Zoom interview scheduled at 2p.m., however if that changes I can always edit the interview request and resend it.

Thanks, and stay warm out there!

Kia

Kia Murray

News Reporter

WLUK-TV FOX 11 News

C: [REDACTED]

W: [REDACTED]

[REDACTED] [@sbgvtv.com](mailto:[REDACTED]@sbgvtv.com)



Exodus 14:14

1/16/24, 2:54 PM

SUBJECT: Re: Confirmed: 2 PM, Zoom/Fox 11 Green Bay
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Brian Schimming <[REDACTED]@gmail.com>
CC: Alesha Guenther <[REDACTED]@wisgop.info>
DATE: 12/30/2020 12:10

Got it
Jim

Sent from my iPhone

On Dec 30, 2020, at 11:55 AM, Brian Schimming <[REDACTED]@gmail.com> wrote:

Jim and Alesha: Jim, Alesha will be handling your Zoom schedule from RPW this afternoon.

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Topic: Interview with Jim Troupis

Time: Dec 30, 2020 02:00 PM Central Time (US and Canada)

Join Zoom Meeting

[https://us02web.zoom.us/j/\[REDACTED\]](https://us02web.zoom.us/j/[REDACTED])

Meeting ID: [REDACTED]

TROUPIS 009433

Passcode: [REDACTED]

I myself am an anchor and reporter for FOX 11 News in Green Bay, WI. The interview would be asking Judge Troupis what remedy the campaign seeks in taking a Wisconsin State Supreme Court case to the U.S. Supreme Court, if the campaign thinks it will be successful in its petition, and elaborating on the argument that the state Supreme Court didn't rule based on the merits of the case.

The link above is for a Zoom interview scheduled at 2p.m., however if that changes I can always edit the interview request and resend it.

Thanks, and stay warm out there!

Kia

Kia Murray

News Reporter

WLUK-TV FOX 11 News

C: [REDACTED]

W: [REDACTED]

[REDACTED]@sbgvtv.com

<image001.png>

Exodus 14:14

1/16/24, 2:54 PM

SUBJECT: trump

FROM: Bruce Marks <[REDACTED]@mslegal.com>

TO: Kenneth Chesebro <[REDACTED]@msn.com>, "William Bock, III" <[REDACTED]@kgrlaw.com>, Jim Troupis <[REDACTED]@gmail.com>

DATE: 01/02/2021 12:30

TROUPIS 009435

Ken: Are you going to be in DC this week? Will you be available to assist with Congress?

Judge, Bill: Are you available to field questions from Congress?

I'm not sure what will be needed, but want to let RG/Boris know what resources are available.

1/16/24, 2:54 PM

SUBJECT: Re: trump
FROM: "William Bock, III" <[REDACTED]@kgrlaw.com>
TO: Bruce Marks <[REDACTED]@mslegal.com>
CC: Kenneth Chesebro <[REDACTED]@msn.com>, Jim Troupis <[REDACTED]@gmail.com>
DATE: 01/02/2021 12:54

Yes. I'm available. I can be in DC on Dec 6 (I have 2 kids that live there) and/or be available from Indianapolis.

Bill Bock

On Jan 2, 2021, at 1:30 PM, Bruce Marks <[REDACTED]@mslegal.com> wrote:

Ken: Are you going to be in DC this week? Will you be available to assist with Congress?

Judge, Bill: Are you available to field questions from Congress?

I'm not sure what will be needed, but want to let RG/Boris know what resources are available.

1/16/24, 2:55 PM

SUBJECT: Re: trump
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Bruce Marks <[REDACTED]@mslegal.com>
CC: Kenneth Chesebro <[REDACTED]@msn.com>, "William Bock, III" <[REDACTED]@kgrlaw.com>
DATE: 01/02/2021 13:02

Yes I can be available. I already have a call set for Congressman Tiffany and his staff Monday.
It was not my intention to be in Washington but let me know if that is something needed.

Jim T

Sent from my iPhone

On Jan 2, 2021, at 12:30 PM, Bruce Marks <[REDACTED]@mslegal.com> wrote:

Ken: Are you going to be in DC this week? Will you be available to assist with Congress?

Judge, Bill: Are you available to field questions from Congress?

I'm not sure what will be needed, but want to let RG/Boris know what resources are available.

SUBJECT: Re: trump
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>, Bruce Marks <[REDACTED]@mslegal.com>
CC: "William Bock, III" <[REDACTED]@kgrlaw.com>
DATE: 01/02/2021 14:08

At Trump International in DC from about 6 pm Jan 3 until at least the 8th. I'm pretty sure I have an extra room for prof Eastman, starting the 4th, if he can come to dc. I hope he can!

Get [Outlook for iOS](#)

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Saturday, January 2, 2021 1:02:58 PM
To: Bruce Marks <[REDACTED]@mslegal.com>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>; William Bock, III <[REDACTED]@kgrlaw.com>
Subject: Re: trump

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Jim T

Sent from my iPhone

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Judge, Bill: Are you available to field questions from Congress?

I'm not sure what will be needed, but want to let RG/Boris know what resources are available.

SUBJECT: RE: trump
FROM: Bruce Marks <[REDACTED]@mslegal.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>, Judge Troupis <[REDACTED]@gmail.com>
CC: "William Bock, III" <[REDACTED]@kgrlaw.com>
DATE: 01/02/2021 14:24

I'm joining the resistance from January 5 to 7. Let me know what you need from cabellas. Looking forward to meeting all in person.

----- Original message -----

From: Kenneth Chesebro <[REDACTED]@msn.com>
Date: 1/2/21 12:08 PM (GMT-08:00)
To: Judge Troupis <[REDACTED]@gmail.com>, Bruce Marks <[REDACTED]@mslegal.com>
Cc: "William Bock, III" <[REDACTED]@kgrlaw.com>
Subject: Re: trump

At Trump International in DC from about 6 pm Jan 3 until at least the 8th. I'm pretty sure I have an extra room for prof Eastman, starting the 4th, if he can come to dc. I hope he can!

Get [Outlook for iOS](#)

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Saturday, January 2, 2021 1:02:58 PM
To: Bruce Marks <[REDACTED]@mslegal.com>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>; William Bock, III <[REDACTED]@kgrlaw.com>
Subject: Re: trump

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Jim T

Sent from my iPhone

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Ken: Are you going to be in DC this week? Will you be available to assist with Congress?

Judge, Bill: Are you available to field questions from Congress?

I'm not sure what will be needed, but want to let RG/Boris know what resources are available.

On Tuesday, December 15, 2020, 02:46:14 PM CST,
Judge Troupis <[REDACTED]@gmail.com> wrote:

Austin and All,

We are confirmed for 3:30pm East at the Oval Office with the President. We will arrive at the Executive Office Building adjacent to the West Wing at 2:00 pm so that we may each have a rapid COVID test. After that is completed, and assuming we are all good, Austin will be arranging something to keep us busy before we head over to the White House at 3:00.

We MUST leave Dane County Regional Airport, Wisconsin Aviation (it is on the opposite side of the Airport from the Terminal) at 5:30 a.m. Central. Please be at Wisconsin Aviation no later than 5:15 a.m. We will be back between 7-8 pm. NOTE THIS IS A CHANGE TO AN EARLIER TIME BECAUSE WE MUST GO TO DULLES RATHER THAN REAGAN NATIONAL.

I am testifying before the Senate Homeland Security and Government Affairs Committee at 10:00 a.m. East. Austin will help with logistics on this, but likely except for Christ and I, you'll be watching the proceedings from somewhere in the Capitol complex. After the testimony, we'll probably all go to Ebbits Grill, across from the White House, for lunch.

Thank you for all you did during the Recount and after in Court. I hope tomorrow will go well. Thank you especially to Austin and Reince for making the meeting with the President happen.

Austin is coordinating with the White House the various forms you must complete TODAY. Watch for his email. If you have any question about logistics, please email or call Austin. ([REDACTED]).

See you early tomorrow.
Jim T.

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Judge Troupis <[REDACTED]@gmail.com> wrote:

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I am testifying before the Senate Homeland Security and Government Affairs Committee at 10:00 a.m. East. Austin will help with logistics on this, but likely except

TROUPIS 009448

for Christ and I, you'll be watching the proceedings from somewhere in the Capitol complex. After the testimony, we'll probably all go to Ebbits Grill, across from the White House, for lunch.

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Austin is coordinating with the White House the various forms you must complete TODAY. Watch for his email. If you have any question about logistics, please email or call Austin. (██████████).

See you early tomorrow.
Jim T.

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1/16/24, 2:49 PM

SUBJECT: Re: Cert call

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: Joe Olson <[REDACTED]@gmail.com>, "[REDACTED]@lcojlaw.com" <[REDACTED]@lcojlaw.com>, "[REDACTED]@gmail.com" <[REDACTED]@gmail.com>

DATE: 12/22/2020 08:01

ATTACHMENTS (20201222-080146-0000195): ["Image.jpeg"](#)

TROUPIS 009450

Get [Outlook for iOS](#)

From: Joe Olson <[REDACTED]@gmail.com>

Sent: Tuesday, December 22, 2020 8:14:27 AM

To: [REDACTED]@msn.com <[REDACTED]@msn.com>; [REDACTED]@lcojlaw.com <[REDACTED]@lcojlaw.com>; [REDACTED]@gmail.com <[REDACTED]@gmail.com>

Subject: Cert call

Cert call

Scheduled: Tuesday, Dec 22, 2020 from 8:00 AM to 9:00 AM

Location: Dial In Number: [REDACTED] Conference Room #: [REDACTED] Moderator PIN: [REDACTED]

Invitees: Kenneth Chesebro, George Burnett, Judge Troupis

Sent from my iPhone

SUBJECT: Re: Jan 16 weekend / Local Republican Meeting
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: "Clinton W. Lancaster" <[REDACTED]@thelancasterlawfirm.com>
CC: [REDACTED] <[REDACTED]@thelancasterlawfirm.com>
DATE: 12/30/2020 09:57

Good Morning,

These are interesting times.

On the Op Ed I think it will be even more important after this is over. The issues, process and future all make it timely well beyond the present.

Definitely talk to the Republicans. Give them some feel for what it is like to be at the absolute center of the storm. If you have some pictures use them as well, they will love it. No way they will want just 10 minutes!

We would love to see you if you have time the weekend of the 16th. We are of course here until at least Jan 6 and then will be headed to Bentonville.

Next 48 hours are the critical time—will the Court expedite? We shall see.

Thank you again for all you did and continue to do.

Jim

PS About 6” of snow last night. We call that a “dusting”...much more to come in January and February.
Sent from my iPhone

On Dec 29, 2020, at 11:30 PM, Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com> wrote:

Judge,

I have three issues that I need to discuss with you.

First, the editorial has gone nowhere. Wren is busy with the legislature. It was more for entertainment than anything, but, since this case is not over, the idea of an editorial has lost its luster. By the time this case is finally decided, the editorial probably won't be relevant or important anymore for a variety of reasons.

Second, Jen and I have been asked to speak at our local county Republican meeting next Thursday about the Wisconsin recount and lawsuit. We are only willing to do it if you approve. Our plan was to talk about the following:

1. The overall legal process in Wisconsin for challenging elections (general information only-- board of canvassers>circuit court>appellate court).
2. The recount procedure on the floor at Monona Terrace.
3. The role of attorneys on the floor at the recount.
4. The atmosphere at the Dane County recount vs. reports from Milwaukee county.
5. The dynamic and relationship of the attorneys (as well as Austin and Brian) at the headquarters (how we functioned as a team doing various roles--nothing information specific--just how great and interesting everyone was to work with on the project).
6. The litigation process (our filings and the results--nothing privileged).

My close family and friends who know I was part of the conference call with the President have asked me what was said and by whom. I only quote them Roger Stone, and tell them that when you are on the phone with President Trump, you don't talk--you listen--and what was said is attorney-client privileged information. No one has ever pressed further. If that topic comes up, that will be our response.

Our local chairman only gives ten minutes to speak during the event, though that rule is regularly disregarded if the topic is remotely interesting. If you think it better to wait until the February meeting, or later, we can do that too. Our county in Arkansas is the "reddest" county in the United States so we have a lot of die hard Trump supporters and Republicans wanting updates from the front lines. They will wait, and we can make them do it forever without a problem if you think that is best.

[REDACTED]

Enjoy the fresh snow and Happy New Year.

--

Clinton W. Lancaster,
Partner, Attorney at Law

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Ken Chesebro

Wednesday, Nov 11, 2020 09:20

Let's talk when you have a moment. Jim T

Wednesday, Nov 11, 2020 09:27

Ken Chesebro

Now is good, Jim

Sunday, Nov 15, 2020 22:01

Ken Chesebro



Sunday, Nov 15, 2020 22:01

Ken Chesebro

TROUPIS 009454

<https://twitter.com/bhweingarten/status/1328052801335947265?s=21>

Wednesday, Nov 25, 2020 10:16

Ken Chesebro

Jim, unless you think it's a waste of time, I plan to draft a memo, in simple question-and-answer format, arguing that the Trump campaign nationwide should push back on any idea that it needs to win in enough states by December 8 to have 270 electoral votes by then, or at least deny Biden 270 votes by then.

Wednesday, Nov 25, 2020 10:17

TROUPIS 009456

Ken Chesebro

Ken Chesebro

Only plausible way to have time enough to win is to say Jan 6 is the deadline.

Wednesday, Nov 25, 2020 10:18

Ken Chesebro

Which is legit if the Trump electors all cast their votes on Dec 14, which they don't need court or legislature authorization to do

Wednesday, Nov 25, 2020 10:21

Ken Chesebro

No disruption to country by viewing Jan 6 as the deadline. Biden is getting security briefings and transition is going forward smoothly. If by Jan Trump ends up winning, the govt will go on as normal. Waiting until Jan 6 would only be a problem if the challenger were the non incumbent.

Wednesday, Nov 25, 2020 10:23

Ken Chesebro

I will work up a memo unless you have a better use of my time. I can focus on helping the next few days as necessary—have cancelled everything else

Wednesday, Nov 25, 2020 12:42

Ken Chesebro

Good call!

Wednesday, Nov 25, 2020 12:42

Ken Chesebro

I sent email on Dec 14 mechanics

Saturday, Nov 28, 2020 09:57

Ken Chesebro

Jim, call-in info?

Monday, Nov 30, 2020 13:37

TROUPIS 009457

Ken Chesebro

Does 5 business days run from yesterday, or today? Big difference.

Monday, Nov 30, 2020 13:37

Ken Chesebro

<https://twitter.com/bobspindell/status/1333491712837234691?s=21>

Tuesday, Dec 01, 2020 07:02

Ken Chesebro



Jim, hope you're getting sleep. I know you're super close to her, but just a reminder to have someone get copies to Vicki (and I suppose Clarke, O'Keefe, Esenberg, Belling, Weber, O'Donnell). Obvious, I guess, but you are so overstretched!

Tuesday, Dec 01, 2020 07:02

Ken Chesebro

Emoji was an accident. But perhaps a Freudian slip? (g)

Thursday, Dec 03, 2020 13:53

Ken Chesebro

I spoke with Bill Bock. He is very open to coordinating.

Friday, Dec 04, 2020 07:59

Ken Chesebro

I don't have Call info

Friday, Dec 04, 2020 08:03

Ken Chesebro

Never mind - Joe sent it

Sunday, Dec 06, 2020 12:46

Ken Chesebro

I just emailed the beefed up constitutional argument. Glad you suggested this!!

Sunday, Dec 06, 2020 18:19

Ken resend it so I am certain it gets in.

Sunday, Dec 06, 2020 18:41

Ken Chesebro

Just did

Sunday, Dec 06, 2020 20:22

Thanks. I will soon get Memo and will get it in.

Sunday, Dec 06, 2020 20:26

Ken Chesebro

Jim, I am about to send you a 6-page memo on having all Trump electors in all 6 contested states vote Dec 14. I think Justin Clark should have it ASAP. Okay if I copy him on my email to you? That way you're not endorsing it - though I'm confident it's valuable input.

Monday, Dec 07, 2020 07:25

Ken Please send me yet again your additions to Laches. I fear folks in Milwaukee have badly dropped the ball.

Monday, Dec 07, 2020 07:29

Ken Chesebro

Oh, yeah.

Monday, Dec 07, 2020 07:32

Ken Chesebro

Just sent

Monday, Dec 07, 2020 07:32

Ken Chesebro

You must be exhausted

Hi, have been working all day to get the other States in line in Dec 14

Friday, Dec 11, 2020 16:45

Ken Chesebro

Pls see email I just sent with updates on press release

Friday, Dec 11, 2020 19:14

Ken Chesebro

Oops – I forgot to hit send on the email on press release

Friday, Dec 11, 2020 19:14

Ken Chesebro

Mike Brown, with campaign, asked about WI status. I gave him Schimming's email

Sunday, Dec 13, 2020 15:27

Ken Chesebro

Hi, I'm at hotel working on a memo for Rudy on endgame in Congress. Everyone at HQ? I will probably get there about 6. Ok to bring my friend Aziza? She's fine staying here; no problem.

Sunday, Dec 13, 2020 15:49

Ken Chesebro

Could u give me Brian's #? I accidentally deleted it

Sunday, Dec 13, 2020 15:49

Ken Chesebro

Also Jefferson's

Sunday, Dec 13, 2020 15:51

[VCARD]

Sunday, Dec 13, 2020 15:54

[VCARD]

Sunday, Dec 13, 2020 15:54

Ken Chesebro

Thx

Sunday, Dec 13, 2020 20:53

Ken Chesebro

Any idea if a decision tonight?

Sunday, Dec 13, 2020 21:53

wo ■ 2ibcut to leave.

Sunday, Dec 13, 2020 21:55

Is everything under control for tomorrow electors vote?

Sunday, Dec 13, 2020 21:59

Ken Chesebro

Yes - I told Mark it was fine if he and Hitt want to leave me out, but I'm going. One plus is no one would recognize me; they want to be low profile. Mark might not go for that reason. Only 10 electors and 2-3 others.

Sunday, Dec 13, 2020 21:59

Ken Chesebro

Other states are all fine, I fielded questions from pa, az and ga

Sunday, Dec 13, 2020 22:01

Good. Just want to be sure we preserve our options here without regard to what Wi S Crt rules.

Sunday, Dec 13, 2020 22:01

Ken Chesebro

Yes, exactly.

Sunday, Dec 13, 2020 22:03

Ken Chesebro

Pretty clear national people realize this wouldn't be happening if you and reince and others hadn't pushed it!

Monday, Dec 14, 2020 11:25

Ken Chesebro

They won't let electors in the capital building

Monday, Dec 14, 2020 11:27

Ken Chesebro

DOA is keeping out everyone but the Biden electors. Not even staff can get in. Apparently plan is to do it outside. Maybe you or Schimming or someone else wants to come over.

Monday, Dec 14, 2020 11:30

Ken Chesebro

They're just doing it outside – no big deal. Apparently on west side. They seem to have it covered.

Monday, Dec 14, 2020 12:03

Ken Chesebro

WI meeting of the *real* electors is a go!!!

Monday, Dec 14, 2020 12:18

Ken Chesebro



Monday, Dec 14, 2020 12:37

Ken Chesebro

I will email video later

Monday, Dec 14, 2020 12:37

Ken Chesebro

Are people at headquarters?

Monday, Dec 14, 2020 12:38

Ken Chesebro

I'm here with Hitt if you want to talk

Monday, Dec 14, 2020 12:38

Ken Chesebro

All went fine – was done by 12:15

Monday, Dec 14, 2020 12:38



Monday, Dec 14, 2020 12:40

Need you here Ken to discuss S Crt possibility

Monday, Dec 14, 2020 12:43

Ken Chesebro

Mark Jefferson said a Ron Johnson staffer called asking if there would be a summary of situation—I guess talking points? Have someone call mark

Monday, Dec 14, 2020 12:44

Ken Chesebro

Andrew Hitt is putting out a two sentence statement about why the electors voted, which I thought was perfect

Monday, Dec 14, 2020 13:07

Ken Chesebro

Be there by 1:25

Tuesday, Dec 15, 2020 07:54

Ken Chesebro

https://drive.google.com/file/d/lm1OOP2RJICnI3807yzbh41-fMhS_jdgO/view?usp=drivesdk

Tuesday, Dec 15, 2020 09:12

Ken Chesebro

I'll be there about 9:30

Wednesday, Dec 16, 2020 04:54

Ken Chesebro

ETA 5:05

Wednesday, Dec 16, 2020 04:55

Ken Chesebro

I'll be flying back with you!

Wednesday, Dec 16, 2020 05:31

Ken Chesebro





Saturday, Dec 19, 2020 06:15

Ken Chesebro

Wow. Based on 3 days ago, I think we have unique understanding of this.

Saturday, Dec 19, 2020 06:15

Ken Chesebro

<https://twitter.com/gatewaypundit/status/1340266922840043521?s=21>

Saturday, Dec 19, 2020 06:15

Ken Chesebro

Your interview with Vicki was amazing. Incredibly powerful. A clarion call!!!

Saturday, Dec 19, 2020 09:23

Thank you Ken.

Saturday, Dec 19, 2020 15:02

Ken Chesebro

Disgusting that info like this would ever leak, whether attorney-client privileged or not.

Saturday, Dec 19, 2020 15:02

Ken Chesebro

<https://www.nytimes.com/2020/12/19/us/politics/trump-sidney-powell-voter-fraud.html>

Saturday, Dec 19, 2020 17:34

Gross violation of privilege. Sad.

Sunday, Dec 20, 2020 10:09

Ken Chesebro

On Hagedorn, make sure to alert Vicki and Dan and make sure they have someone like Rick Esenberg, or a legal ethics prof, explain how bad this is.

Sunday, Dec 20, 2020 10:10

Have contacted Both this AM.

Tuesday, Dec 22, 2020 15:30

Ken Chesebro

Hi, any call at 4 central or later today

Tuesday, Dec 22, 2020 15:30

Ken Chesebro

?

Wednesday, Dec 30, 2020 06:41

Ken Chesebro

This is good at showing some of the dynamics around the President, and why I think he puts so much trust in you. He must be self aware that he has a weakness for overly loyal "yes" men. He knows you're loyal, and fighting hard, but respects that you set limits and don't sugarcoat anything. And you don't need a job.

Wednesday, Dec 30, 2020 06:42

Ken Chesebro

<https://nymag.com/intelligencer/2020/12/four-seasons-total-landscaping-the-full-est-possible-story.html>

Wednesday, Dec 30, 2020 06:42

Ken Chesebro

The president's narcissism cripples him in these moments," the adviser added, "because as long as people are telling him what they think he wants to hear, it's a struggle for him to abandon hope. He's just such a curiously wounded narcissist. If Rudy tells him, 'We're gonna destroy all the norms and burn it down and make sure you get reinstated, the president goes, 'Great!'" The truth, the adviser said, took longer for him to process, and it required whoever uttered it to approach Trump as if he were a wild animal. "When people would bring him bad news, he would blow up, and they would sort of back out of the room." The trick, the adviser said, is "don't hit him immediately with something he can react emotionally to" and "don't appear intimidated."

Wednesday, Dec 30, 2020 06:42

Ken Chesebro

Lsecond person familiar with the legal team aid Giuliani was put in charge because "the resident wanted a peer and a fighter. He wanted somebody that he can relate to." This person described competing power centers, with the litigators and other serious people on the one side, who realized almost immediately that the president had no legitimate pathway to change the election results, and the conspiracy theorists and crazy people, led by Giuliani, on the other side. The second group won, even after multiple interventions staged by lawyers and family members and other advisers. As usual, Trump was unwilling to let go of the people he perceived to be fighting the hardest for him in public. Which wasn't a surprise, of course, though it still managed to disappoint the optimists (or idiots, depending on your view) still working for the president with hopes that, after all this time, he might change well-established aspects of his personality.

Wednesday, Dec 30, 2020 06:42

Ken Chesebro

One person familiar with the legal team never brought the idea, for instance, that Sidney Powell had really been removed as one of the president's representatives, even though the campaign had put out a statement to that effect. What came out of the president's mouth, and through his Twitter feed, seemed a reflection of what went into his head via people like Powell, Giuliani, and fellow legal-team member Jenna Ellis. A senior White House official told me that, in the vacuum created by the absence of officials who might try to reason with the president, Trump spent even more time on the phone, dialing up whomever he saw defending him most rabidly on TV. Sometimes, this official said, the White House switchboard operator wouldn't even know how to contact the person the president wanted to speak to, and this would result in members of the staff being roped in to locate a number for some random pundit from Fox or, increasingly, Fox News or CNN. As if he were the lackey!

Wednesday, Dec 30, 2020 08:23

Thank you Ken

Wednesday, Dec 30, 2020 11:05

Jan 6. Do the Senator and Representative objecting to counting Wisconsin need to be from WI? Once they object, then break for 2 hrs? Can they do that for each State...with 2 hrs for each?
Oral Arguments: if expedited, I will need a serious set of Moot Courts to prepare. Who might we ask who would be willing to participate?

Wednesday, Dec 30, 2020 12:02

Ken Chesebro

Any Rep and Senator will do

Wednesday, Dec 30, 2020 12:02

Ken Chesebro

2 hours each state

Wednesday, Dec 30, 2020 12:03

Ken Chesebro

But biggest problem is no one can speak more than once,
for 5 mins!

Wednesday, Dec 30, 2020 12:04

Ken Chesebro

First confirmed senate objector?

Wednesday, Dec 30, 2020 12:04

Ken Chesebro

<https://twitter.com/hawleymo/status/1344307458085412867?s=21>

Wednesday, Dec 30, 2020 12:05

Ken Chesebro

I've made the following point to Boris – maybe raise
with him or Rudy, or Johnson, though it needs to be
kept quiet

Wednesday, Dec 30, 2020 12:05

Ken Chesebro

I hope Hawley, Trump, etc can at minimum get Pence to
commit, privately, that in presiding over Senate debate
he will let Hawley talk until there are 60 votes for
cloture.

Wednesday, Dec 30, 2020 12:07

Ken Chesebro

I think normal rules of debate apply here, be senate
under the constitution has power to set its own rules

Wednesday, Dec 30, 2020 12:07

Ken Chesebro

I will send an email on this in like an hour

Thursday, Dec 31, 2020 14:53

Ken Chesebro

Hi, do you plan to be in DC for strategy surrounding the electoral count? If so, and if you want to be at Trump International, which might be a beehive of activity, I have an extra room you can have – made reservations 2 weeks ago, before rates tripled. It'd be on me, though it would be great if you could eventually submit it as an expense, and reimburse.

Thursday, Dec 31, 2020 14:54

Ken Chesebro

I would need to know by tomorrow noon what date you would want to arrive. It could be as early as Jan. 2.

Thursday, Dec 31, 2020 14:54

Ken Chesebro

Happy New Year!

Thursday, Dec 31, 2020 15:20

I am not presently intending to come out. Thank you for that kind offer.
Happy New Year. What a year!

Sunday, Jan 03, 2021 12:52

If each State gets one vote in House, then Pelosi must take Acting and cannot allow a vote because I believe the R's have more States. Am I right?

Sunday, Jan 03, 2021 12:54

Ken Chesebro

Yes. Republicans have 26 states

Sunday, Jan 03, 2021 12:56

Ken Chesebro

McConnell should not allow a vote either, because Republicans electing Pence would look illegitimate—would seem like Pence froze the process to become acting president instead of Pelosi

Sunday, Jan 03, 2021 12:56

Ken Chesebro

Republicans electing Harris would be a horror

Sunday, Jan 03, 2021 12:57

Ken Chesebro

McConnell would need to protect his caucus from such a Hobson's choice

Sunday, Jan 03, 2021 12:59

Ken Chesebro

Best way for Dems to break impasse would be to get a few Republican Reps in states with close delegations to abstain, so Dems can win a majority of States that aren't tied, which is how Jefferson beat Burr in 1801

Sunday, Jan 03, 2021 13:00

Ken Chesebro

But none of this happens unless Pence freezes the count, or the Continuing Resolution is filibustered

Sunday, Jan 03, 2021 13:01

Ken Chesebro

I've been in touch with Eastman and Boris on that last 2 days. I think they briefed the senators

Sunday, Jan 03, 2021 13:04

Ken Chesebro

Filibustering states seems impossible unless someone withholds unanimous consent to the Concurrent Resolution that typically is voted Jan 3 to ratify the

Electoral Count Act and its debate limitations. That's how current Senate binds itself to an Act that otherwise can't be binding

Sunday, Jan 03, 2021 13:05

Ken Chesebro

Here is the 2017 CR.

Sunday, Jan 03, 2021 13:05

Ken Chesebro

<https://www.congress.gov/115/crec/2017/01/03/CREC-2017-01-03-pt1-PgS6-5.pdf>

Sunday, Jan 03, 2021 16:34

RHINO-sad

Sunday, Jan 03, 2021 21:02

Does this change anything we discussed earlier?

Sunday, Jan 03, 2021 21:18

Ken Chesebro

Can't stop Pence from claiming the power to count the votes, unilaterally force delay (eg, by refusing to open envelopes).

Sunday, Jan 03, 2021 21:20

Ken Chesebro

Makes it hard force Pence to allow for unlimited debate

in the senate. I assume the Continuing Resolution, once adopted by the Senate, modified the usual filibuster rules.

Monday, Jan 04, 2021 07:55

Ken Chesebro

Clearly, a filibuster of the states would be a more serious remedy than proposing a Commission that won't be adopted, so I agree that that can be viewed as a dodge.

Monday, Jan 04, 2021 07:55

Ken Chesebro

<https://twitter.com/lindseygrahamsc/status/1345771122470621186?s=21>

Monday, Jan 04, 2021 07:56

Ken Chesebro

But it might be politically more effective than a filibuster, which might be viewed as a useless delay tactic. Forcing Dems to vote against transparency might be the best strategy of Pence has decided to be inert – no chance of winning in that event, anyway.

Monday, Jan 04, 2021 07:56

Ken Chesebro

Possibly the Concurrent Resolution can be read as merely related to scheduling, and overall procedure, for the joint session itself, and as not amending the normal Senate rules. Maybe it merely indicates an intent to follow the Act. Maybe Pence can let a senator talk as long as he wants, ruling the Act on its own does not displace Rule 22, and only the a "nuclear option" could eliminate the filibuster in this context – so we get at least 32 hours of debate on

Monday, Jan 04, 2021 07:57

Ken Chesebro

... each state!

Monday, Jan 04, 2021 07:57

Ken Chesebro

https://www.senate.gov/reference/reference_index_subjects/Cloture_vrd.htm

Monday, Jan 04, 2021 07:57

Ken Chesebro

Even if this is a stretch, if Pence made this ruling, then it would at least force all Dems and the turncoat Republicans to vote to impose the 2-hour debate limit. So far they've gotten off easy, with a Concurrent Resolution passed by unanimous consent.

Monday, Jan 04, 2021 07:57

Ken Chesebro

If Pence, in the Senate, will first do this, forcing the other side to vote to limit debate at ridiculous levels, and then let Cruz make a motion to create the Commission, the combined effect of showing that the other side is trying to hide the facts from the American people could be considerable.

Monday, Jan 04, 2021 07:57

Ken Chesebro

<https://www.politico.com/f/?id=00000176-c96a-d162-a7ff-e96e76a90000>

Monday, Jan 04, 2021 08:33

Ken Chesebro

Chris Van Hollen is on CNN saying on Wednesday Dems will raise Trump Georgia call. Maybe move to censure Trump. Any Impropropriary in that call is irrelevant to objecting to an electoral slate. If Dems do raise this in a debate, they'll depart from the Act's narrow constraints. Maybe Pence could take the view that this opens the door to unlimited debate on Georgia. President 's defenders will need hours to show why the president was so frustrated on that call – because they cheered in half a dozen ways, each enough to account for them election result, yet officials have swept it under the rug, and courts have refused to review!

Monday, Jan 04, 2021 08:46

Ken Chesebro

[VIDEO]

Turley on Fox.

Monday, Jan 04, 2021 09:06

Ken Chesebro

Prof. Dorf on Pence.

Monday, Jan 04, 2021 09:06

Ken Chesebro

<https://verdict.justia.com/2021/01/04/the-stakes-on-january-6>

Monday, Jan 04, 2021 09:06

Ken Chesebro

.nted." Gohmert and the Arizona
litiffs argued that notwithstanding a
tute that Congress has followed since the
neteenth century, the Constitution thereby
signs to the Vice President not only the
inisterial task of opening the certificates
it also the substantive power to rule on the
lidity of each slate—even though, as is true
is year, the sitting Vice President will
ten be a candidate. Indeed, the sitting Vice
esident has been a candidate either for re-
jection or for the Presidency in all but four
the last sixteen presidential elections.

ould Pence attempt to assert a
nstitutional power to be the judge in his
m case, presumably a majority of senators
llovrerule him, but the very fact that the
sertion is even a possibility worth
scussing shows how far down the road to
struction of the American republic Trump
s led a substantial number of craven
acted Republicans.

Monday, Jan 04, 2021 09:21

Ken Chesebro

Ron Johnson on Fox next

Monday, Jan 04, 2021 10:50

Ken Chesebro

Eric has a point.

Monday, Jan 04, 2021 10:50

Ken Chesebro

<https://twitter.com/ericrweinstein/status/1345973768397627392?s=21>

Tuesday, Jan 05, 2021 09:18

Ken Chesebro

<https://twitter.com/derektmuller/status/1346284989009309697?s=21>

Wednesday, Jan 06, 2021 10:45

Ken Chesebro

Just listened to you on Vicki's show Monday

Wednesday, Jan 06, 2021 10:46

Ken Chesebro

Brilliant summary of what could happen, and Jan 20 not

being a deadline.

Wednesday, Jan 06, 2021 10:46

Ken Chesebro

Center of the storm, for sure.

Wednesday, Jan 06, 2021 10:47

Ken Chesebro

One quibble: even if Pelosi first were acting president, I think if a VP is elected, that person would become acting president.

Wednesday, Jan 06, 2021 10:56

I have been on phone w Mike Roman and Senator Johnson and Johnson's COS to get an original copy of Wi slate to VP. Not sure if u are involved but call Mike to make sure he gets what he needs. Thanks. Jim

Wednesday, Jan 06, 2021 10:58

Ken Chesebro

Mike had me drop off 2 originals yesterday at 4, to a Rep. Kelly aid, who walked it over to Senate Parliamentarian.

Wednesday, Jan 06, 2021 10:59

Ken Chesebro

I was with Mike's top guy, Michael Brown.

Wednesday, Jan 06, 2021 11:04

Excellent. Tomorrow let's talk about SCOTUS strategy going forward. Enjoy the history you have made possible today.

Wednesday, Jan 06, 2021 11:45

Ken Chesebro

Trump sounds so forceful that maybe Pence has actually agreed to do something at least like not opening the envelopes until a Commission investigates. We'll see soon.

Wednesday, Jan 06, 2021 11:45

Ken Chesebro

Trump sounds so forceful that maybe Pence has actually agreed to do something at least like not opening the envelopes until a Commission investigates. We'll see soon.

Wednesday, Jan 06, 2021 11:46

Ken Chesebro

Trump sounds so forceful that maybe Pence has actually agreed to do something at least like not opening the envelopes until a Commission investigates. We'll see soon.

Wednesday, Jan 06, 2021 12:02

Johnson cannot give the certificate we got to him to the VP because it is not sealed. Someone opened it!

Wednesday, Jan 06, 2021 12:03

We have been informed the VP cannot accept any unsealed mail and I cannot hand it to him.

THAT HIS NOTE

Wednesday, Jan 06, 2021 12:08

Ken Chesebro

Mine was sealed

Wednesday, Jan 06, 2021 12:08

Ken Chesebro

So was the Michigan one

Wednesday, Jan 06, 2021 12:10

Ken Chesebro

The ones delivered by Kelly's aide to Senate Parliamentarian yesterday, from mi and wi, were sealed

Wednesday, Jan 06, 2021 12:10

Ken Chesebro

This could be an excuse for delay

Wednesday, Jan 06, 2021 12:11

I gather this is about one delivered today.

Wednesday, Jan 06, 2021 12:11

To Johnson

Wednesday, Jan 06, 2021 12:11

Ken Chesebro

Some of the envelopes sent by registered mail to senate President didn't timely arrive

Wednesday, Jan 06, 2021 12:11

Ken Chesebro

Be registered mail is slow

Wednesday, Jan 06, 2021 12:12

Ken Chesebro

Ones in mi stayed there 2 weeks

Wednesday, Jan 06, 2021 12:12

Watching now. Is anyone objecting to Arizona

Wednesday, Jan 06, 2021 12:12

Did it

Wednesday, Jan 06, 2021 12:13

Ken Chesebro

We did it as required by statute

Wednesday, Jan 06, 2021 12:13

Ken Chesebro

If us mail messed up, that's an excuse For delay

Wednesday, Jan 06, 2021 12:14

Ken Chesebro

Archivist illegally is refusing to release originals to pence

Wednesday, Jan 06, 2021 12:15

You got Arizona. Well done Ken!

Wednesday, Jan 06, 2021 12:15

History is made!

Wednesday, Jan 06, 2021 12:24

Ken Chesebro



Wednesday, Jan 06, 2021 12:57



Thursday, Jan 07, 2021 07:11

Ken Chesebro

Maybe they'll all in hiding, but it'd be nice if Trump surrogates get across that without antifa's role in the actual breaking in, plus Capitol security (totally controlled by Pelosi and McConnell) the scene at the Capitol would have been entirely peaceful. And that Trump could not reasonably foreseen this.

Thursday, Jan 07, 2021 07:11

TROUPIS 009481

Ken Chesebro

I think the President can put this behind him if he invites Biden and Harris over for coffee on inauguration morning, and attends the (virtual) inauguration. If he boycotts, it feeds the idea that he's a breaker of all norms.

Thursday, Jan 07, 2021 07:12

Ken Chesebro

He could lighten it up with a couple of well-placed jokes. Like he wants to make sure Joe feels comfortable calling him for advice in the challenging days ahead. Or we invited Joe over for coffee because he wants to be sure Joe invites him four years from now.

Thursday, Jan 07, 2021 08:26

Did any Wisconsin folks ever speak in the legislative debates?

Thursday, Jan 07, 2021 08:39

Ken Chesebro

I don't know. Very little of the debate was covered, even on Fox – covered riot instead.

Thursday, Jan 07, 2021 08:40

Ken Chesebro

I think it was stupid to have a rally on Jan. 6. Original plan was Jan. 5, right? Would have been perfect to have a Jan. 5 rally, then told people to go home, so focus would be on debate in Congress.

Thursday, Jan 07, 2021 09:16

Yes originally 5th

Thursday, Jan 07, 2021 11:14

Ken Chesebro

I think Pence is a lot to blame for this fiasco. He had top-flight advice available to him more than a month ago, from his general counsel, a former O'Melveny partner, who said he'd already studied the historical record of what the President of the Senate had done on every objection. I sketched what we had in mind for alternate electors, with Pence not opening envelopes. I detected no enthusiasm for any deviation from the ECA. I now think Pence had decided by then not to do anything to press the envelope or create a test case, but decided not to be straight with the president. If he had been up front, Trump would have known he had no chance to win other than win in the courts or state legislatures before Jan. 6. If I'm right, Pence gave him false hope. He allowed Trump to hear of valid legal theories from Rudy and Eastman which gave him hope, which was crushed when Pence suddenly crushed them at the end. Why did Pence do this? To stall until Georgia runoff was done? If you agree, maybe there should be an effort to criticize Pence for deceitful conduct that

led to this chaos. At least Trump was always up front about how he saw things.

Wednesday, Jan 06, 2021 10:42

Ron Johnson

Jim Troupis meet Sean Reilly, my new COS

Wednesday, Jan 06, 2021 10:51

Thank you. Jim

Wednesday, Jan 06, 2021 11:46

Ron Johnson

We have been informed the VP cannot accept any unsealed mail and I cannot hand it to him.

Wednesday, Jan 06, 2021 12:01

At a minimum you could read it into record. I am told he should have a sealed copy as well, but folks could not confirm it.

Sunday, Dec 13, 2020 12:45

Ron Johnson

[REDACTED]@gmail.com

Sunday, Dec 13, 2020 12:46

Ron Johnson

That was quick. Thanks. We've got a fabulous witness from PA. State Rep Frank Ryan, CPA, vet, oversaw elections in Iraq, knows PA election problems inside and out.

Sunday, Dec 13, 2020 18:34

Ron Johnson

Any decision yet, or indication of when one will be announced?

Sunday, Dec 13, 2020 19:37

No

Wednesday, Jan 06, 2021 10:36

We need to get a document on the Wisconsin electors to you for the VP immediately. Is there a staff person I can talk to immediately. Thanks Jim T

Thursday, Jan 07, 2021 17:33

Diana Karge

Hi jim. A call just popped up from earlier today from an independent journalist in Indiana. I will text pics of the whole message.

Thursday, Jan 07, 2021 17:33

Diana Karge



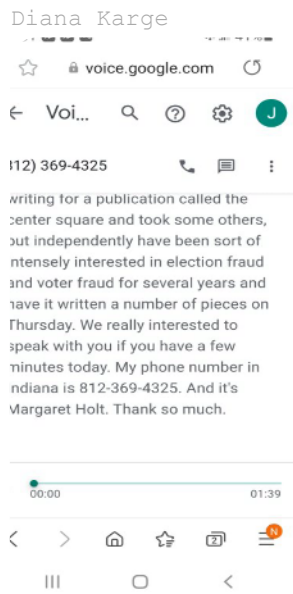
-hi, my name is Margaret McGee. I'm calling from Indiana. I was talking with one of my Senators over the weekend and referring to your suit that you filed for the Trump campaign in Wisconsin. And I found it really really interesting and off with really disappointed that the Wisconsin State Journal didn't cover the claims that you allege in the suit. I also watched part of the hearing that you had before the

Thursday, Jan 07, 2021 17:33



hearing that you had before the Wisconsin Supreme Court. I was interested to ask a couple of questions one is about the total of 170140 absentee ballots that were issued without an application having been first received wanted to find out if those were only in Madison and Milwaukee or if they were in other County jobs. Besides staying in Milwaukee. I'm a Wisconsin native. I work professionally as a journalist writing for a publication called the

Thursday, Jan 07, 2021 17:33



writing for a publication called the center square and took some others, but independently have been sort of intensely interested in election fraud and voter fraud for several years and have it written a number of pieces on Thursday. We really interested to speak with you if you have a few minutes today. My phone number in Indiana is 812-369-4325. And it's Margaret Holt. Thank so much.

Monday, Dec 14, 2020 12:37

Not sure

Mary

This is Mary from Rep. Tiffany's office. The call is set for Monday the 4th at 1pm CT. Call: [REDACTED]; Code: [REDACTED]. If anything changes you can reach me at this number! Thanks!

Wednesday, Jan 06, 2021 10:37

I have texted Ron directly. Will let you know.

Wednesday, Jan 06, 2021 11:00

Mike Roman

Connected with Sean

Wednesday, Jan 06, 2021 11:03

Great. Ron will he expecting something—I did not go into detail with him.

Wednesday, Jan 06, 2021 11:03

Mike Roman

I told Sean what is was

Wednesday, Dec 09, 2020 11:00

Ken Chesebro

Sure, happy to do anything. You mean be on conf call together?

Wednesday, Dec 09, 2020 17:07

Ken Chesebro

Austin, I tried texting Greg Jacob, but texts are blocked, so I left him a voicemail

Wednesday, Dec 09, 2020 17:08

Austin Browning

Yes, texts are blocked on all White House phones

Wednesday, Dec 09, 2020 17:09

Ken Chesebro

I think you should ask Kelly Kunder to call me, so she can then reach out to him to convey my request

Wednesday, Dec 09, 2020 17:20

Ken Chesebro

Just talked to her. Sounds like someone will email us the info, probably by tomorrow

Wednesday, Dec 09, 2020 18:09

Ken Chesebro

Just talked to Greg Jacob, counsel to Pence. They don't have 2016 certificates bc they are in Biden's records. We should check National Archives or state secs of state. Or maybe contact the 2016 electors?

Wednesday, Dec 09, 2020 18:10

Ken Chesebro

We need to get lists of the 2020 electors from the campaign

Wednesday, Dec 09, 2020 18:12

Ken Chesebro

He also gave me a reality check on what is likely to happen under the Electoral Count Act. Let's discuss after Jim's Friday argument

Monday, Dec 14, 2020 12:50

Brian Schimming

Thanks. GOP statement on electors meeting says something about final outcome still in courts. But unclear what else there is to file in state court. And appeal of Ludwig's ruling seems like long shot with SCOTUS not taking Texas case.

From JR Ross

Monday, Dec 21, 2020 07:53

Brian Schimming

<https://redstate.com/slee/2020/12/20/297798-n297798>

Monday, Dec 21, 2020 07:53

Brian Schimming

RedState the latest to pick up the story from your testimony

Wednesday, Dec 30, 2020 11:21

Brian Schimming

Do you have a number for George? I emailed him, trying to get him set with Fox 11 in Green Bay. They may want to have you anyway

TROUPIS 009495

Wednesday, Dec 30, 2020 11:23

[VCARD]

Wednesday, Dec 30, 2020 11:24

I really want it offered first to George. it is his home town.

Wednesday, Dec 30, 2020 11:25

Brian Schimming

She just called back, wants to do you

Wednesday, Dec 30, 2020 11:26

Brian Schimming

Be 2:00 pm Zoom from the state party, Alesha will be there to staff you/do set up.

Wednesday, Dec 30, 2020 15:30

Was that ok?

Wednesday, Dec 30, 2020 16:24

Brian Schimming

It was terrific got good Comments already

Wednesday, Dec 30, 2020 16:25

Brian Schimming

How did Fox 11 go?

Wednesday, Dec 30, 2020 16:26

Good I think

Thursday, Dec 31, 2020 13:26

I gave him Andrew's name and address. You can ignore it

Sunday, Jan 03, 2021 16:33

Call Dan and ask if u may share it

Sunday, Jan 03, 2021 16:45

Brian Schimming

Okay didn't know if you still had reservations about what they're up to

Sunday, Jan 03, 2021 17:13

Not on this.
Send your time. We will bill tomorrow

Thursday, Dec 31, 2020 12:56

Roddy Wittstadt

This is Rod Wittstadt. I'm a lawyer in Mayor Guliani's team. We need the contact information for the #1 pro trump state legislator in Wisconsin. Thanks

Thursday, Dec 31, 2020 13:18

I suggest you call Andrew Hitt. He ran the campaign and would know. I do not know.

Thursday, Dec 31, 2020 13:18

Roddy Wittstadt

Do you have a cell number for him

Thursday, Dec 31, 2020 13:21

Thursday, Dec 31, 2020 13:26



Thank you

2/28/24, 9:51 AM

SUBJECT: RE: Canvas Board

FROM: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>

TO: Judge Troupis <[REDACTED]@gmail.com>, "Boerke, Nicholas J (12767)" <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>, Dan Kelly <[REDACTED]@wisgop.org>, Kenneth Chesebro <[REDACTED]@msn.com>, Chirst Troupis <[REDACTED]@gmail.com>, Joe Voiland <[REDACTED]@yahoo.com>, Stewart Karge <[REDACTED]@gmail.com>

DATE: 11/19/2020 09:15

ATTACHMENTS (20201119-091502-0002105): "[image001.png](#)", "[EL-122 \(ballot envelope\) - 29311638.1.pdf](#)", "[Absentee Ballot Applicaton EL-121 - 29311671.1.pdf](#)"

Here is the EL-122, envelope that attempts to combine the application with the certification. The Title of the Form is Absentee Ballot Application/Certification.

Also attached is the regular absentee ballot application (EL-121).

A notable difference is the actual application has a section(section 6) where the voter checks a box that corresponds to the statement "I request an absentee ballot be sent to me ..."

But, the envelope contains a different statement – an after the fact statement – that says: "I further certify that I requested this ballot."

Joseph L. Olson

Partner

T [redacted] | michaelbest.com



Named 2020 Best Law Firm for Women by Working Mother

From: Judge Troupis <[redacted]@gmail.com>
Sent: Thursday, November 19, 2020 9:01 AM
To: Olson, Joseph L (13465) <[redacted]@michaelbest.com>; Boerke, Nicholas J (12767) <[redacted]@michaelbest.com>; George Burnett <[redacted]@lcojlaw.com>; Dan Kelly <[redacted]@wisgop.org>; Kenneth Chesebro <[redacted]@msn.com>; Chirst Troupis <[redacted]@gmail.com>; Joe Voiland <[redacted]@yahoo.com>; Stewart Karge <[redacted]@gmail.com>
Subject: Fwd: Canvas Board

ALL--IMPORTANT: We now know their argument on ballot request issue at clerk's office. We need a clear and clean response in the record. FYI, It is inconceivable that the the envelope is a request. Why have a website to apply, or call for a written application? And as Ken points out the ballot is already given at the time of the completion. Maybe other arguments as well--need to get this right. JOE--Can you get a copy of this form, carefully look it over and construct the argument for the folks at the canvas table.

Tanks. Jim

----- Forwarded message -----

From: Kenneth Dragotta <[redacted]@syeng.com>
Date: Thu, Nov 19, 2020 at 8:48 AM
Subject: Re: Canvas Board
To: Judge Troupis <[redacted]@gmail.com>
Cc: Kenneth Dragotta <[redacted]@syeng.com>

Jim,

I am very concerned with what is happening. I am not being included in any conversationants and I am just flying by my own intuition. All of my past work for you and President Trump was nearly flawless because of excellent planning and attention to details. The result is proportional to quality of work. Trust that I am only trying to make you aware of the situation on the ground.

YES. Rick will follow our/your instructions. Being that we have not been included thus far in the mission objectives, it would be nice if someone would contact Rick and myself to go over the details.

Issue with petition and WEC position on the ballot request document:

EL-122: As stated on the document "Official Absentee **Ballot Application**/Certification. It was presented last night that this EL122 form is a request form when IPAV voting per the WEC board meeting. I would argue that it can't possibly be a request document because 1) you must have already VOTED the ballot before the witness can certify that the elector voted the ballot AND signed the certification, thus you would have already voted the document before requesting it, and 2) elector signing the document constitutes the request and certification in the presence of the witness would be concurrent with the ballot request and would not require one task to be completed before the issuance of the document. Logically they can't happen simultaneously. The actions, as described in the statutes, are sequential and not simultaneous. The WEC argument is the last sentence "I further certify that I requested this ballot" validates the ballot request. However, the law states a ballot shall be requested.

The last WEC argument is that it is unfair that people completing a ballot request document will be scrutinized more than folks that requested ballots via MY VOTE on-line. The Absentee request LOG does not and will not provide detail

nor does it require any signature. Theoretically, anyone on the MOVERS list could have requested an absentee ballot and could have voted, thereby taking them off of deactivation status until the next ERIC comparison run. They started moving us in this direction 10 years ago.

FYI, I had brought this issue of EL122 up early yesterday in discussions with Madison.

Ken

On 11/19/2020 8:05 AM, Judge Troupis wrote:

Will our guy in Milwaukee Canvas Board side with us on the objections and requirement for applications?
Jim

Sent from my iPhone

Email Disclaimer

The information contained in this communication may be confidential, is intended only for the use of the recipient(s) named above, and may be legally privileged. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please return it to the sender immediately and delete the original message and any copy of it from your computer system. If you have any questions concerning this message, please contact the sender.

	Wisconsin Application for Absentee Ballot				(Municipal Clerk) If in-person voter, check here: <input type="checkbox"/>
	Absentee ballots may also be requested at MyVote.wi.gov				
	Confidential Elector ID# <small>(HINDI - sequential #) (Official Use Only)</small>		WisVote ID # <small>(Official Use Only)</small>		Ward No.

Instructions	<p>Detailed instructions for completion are on the back of this form. Return this form to your municipal clerk when completed.</p> <ul style="list-style-type: none"> You must be registered to vote before you can receive an absentee ballot. You can confirm your voter registration at https://myvote.wi.gov <p>⚠ PHOTO ID REQUIRED, unless you qualify for an exception. See instructions on back for exceptions.</p>
---------------------	---

VOTER INFORMATION					
1	Municipality	<input type="radio"/> Town <input type="radio"/> Village <input type="radio"/> City		County	
2	Last Name		First Name		
	Middle Name		Suffix (e.g. Jr, II, etc.)	Date of Birth <small>(MM/DD/YYYY)</small>	
	Phone		Fax	Email	
3	Residence Address: Street Number & Name				
	Apt. Number		City	State & ZIP	
4	Fill in the appropriate circle – if applicable (see instructions for definitions): <input type="radio"/> Military <input type="radio"/> Permanent Overseas <input type="radio"/> Temporary Overseas				

I PREFER TO RECEIVE MY ABSENTEE BALLOT BY:				(Ballot will be mailed to the address above if no preference is indicated. Absentee ballots may not be forwarded.)		
5	<input type="radio"/> MAIL	Mailing Address: Street Number & Name				
	<input type="radio"/> VOTE IN CLERK'S OFFICE	Apt. Number		City	State & ZIP	
		Care Facility Name (if applicable)				
		C / O (if applicable)				
	<input type="radio"/> FAX	Fax Number	For Military and Overseas Voters Only		Voter must have a computer and printer when receiving a ballot by fax or email. Voted ballots must be returned by mail.	
<input type="radio"/> EMAIL	Email Address	For Military and Overseas Voters Only				

I REQUEST AN ABSENTEE BALLOT BE SENT TO ME FOR: (mark only one)	
6	<input type="radio"/> The election(s) on the following date(s): _____ <input type="radio"/> All elections from today's date through the end of the current calendar year (ending 12/31). <input type="radio"/> For indefinitely-confined voters only: I certify that I am indefinitely confined because of age, illness, infirmity or disability and request absentee ballots be sent to me automatically until I am no longer confined, or I fail to return a ballot. <i>Anyone who makes false statements in order to obtain an absentee ballot may be fined not more than \$1,000 or imprisoned not more than 6 months or both.</i> Wis. Stats. §§ 12.13(3)(i), 12.60(1)(b).

TEMPORARILY HOSPITALIZED VOTERS ONLY (please fill in circle)						
<input type="radio"/> I certify that I cannot appear at the polling place on election day because I am hospitalized, and appoint the following person to serve as my agent, pursuant to Wis. Stat. § 6.86(3).						
7	Agent Last Name		Agent First Name		Agent Middle Name	
	AGENT: I certify that I am the duly appointed agent of the hospitalized absentee elector, that the absentee ballot to be received by me is received solely for the benefit of the above named hospitalized elector, and that such ballot will be promptly transmitted by me to that elector and then returned to the municipal clerk or the proper polling place.					
	Agent Signature	X		Agent Address		

ASSISTANT DECLARATION / CERTIFICATION (if required)			
I certify that the application is made on request and by authorization of the named elector, who is unable to sign the application due to physical disability.			
Agent Signature	X	Today's Date	

VOTER DECLARATION / CERTIFICATION (required for all voters)			
I certify that I am a qualified elector, a U.S. Citizen, at least 18 years old, having resided at the above residential address for at least 28 consecutive days immediately preceding this election, not currently serving a sentence including probation or parole for a felony conviction, and not otherwise disqualified from voting. Please sign below to acknowledge that you have read and understand the above.			
Voter Signature	X	Today's Date	

Wisconsin Application for Absentee Ballot Instructions

General Instructions: This form should be submitted to your municipal clerk, unless directed otherwise.

- This form should only be completed by registered voters; if you are not a registered voter or military elector, please submit a Voter Registration Application (EL-131) with this form.

Photo ID requirement: If you will receive your absentee ballot by mail, and have not previously provided a copy of acceptable photo ID with a prior by-mail absentee ballot request, a copy of photo ID must accompany this application. You may submit your application and a copy of your ID by mail, fax or email. In-person voters must always show acceptable photo ID.

The following documents are acceptable Photo ID (For specific information regarding expired documents visit <http://bringit.wi.gov>.)

State of WI driver license or ID card	Certificate of Naturalization
Military ID card issued by a U.S. uniformed service	WI DOT DL or ID card receipt
Photo ID issued by the federal Dept. of Veterans Affairs	Citation/Notice to revoke or suspend WI DL
University, college or tech college ID and enrollment verification	ID card issued by federally recognized WI tribe
U.S. passport booklet or card	

In lieu of photo ID, the voters listed below may satisfy the voter ID requirement by the following means:

- Electors who are indefinitely confined (see Section 6) – the signature of a witness on the Absentee Certificate Envelope.
- Electors residing in care facilities served by Special Voting Deputies – the signatures of both deputies on the envelope.
- Electors residing in care facilities not served by Special Voting Deputies – the signature of an authorized representative of the facility. If the elector is also indefinitely confined, the elector does not need a representative of the facility to sign.
- Military, Permanent Overseas and Confidential Electors – Exempt from the photo ID requirement.

1	<ul style="list-style-type: none"> • Indicate the municipality and county of residence. Use the municipality's formal name (for example: City of Ashland, Village of Greendale, or Town of Albion).
2	<ul style="list-style-type: none"> • Provide your name as you are registered to vote in Wisconsin. If applicable, please provide your suffix (Jr, Sr, etc.) and/or middle name. If your current name is different than how you are registered to vote, please submit a Voter Registration Application (EL-131) with this form to update your information. • Provide your month, day and year of birth. Remember to use your birth year, not the current year.
3	<ul style="list-style-type: none"> • Provide your home address (legal voting residence) with full house number (including fractions, if any). • Provide your full street name, including the type (eg., Ave.) and any pre- and/or post-directional (N, S, etc.). • Provide the city name and ZIP code as it would appear on mail delivered to the home address. • <u>You may not enter a PO Box as a voting residence.</u> A rural route box without a number may not be used.
4	<ul style="list-style-type: none"> • A "Military elector" is a person, or the spouse or dependent of a person who is a member of a uniformed service or the merchant marines, a civilian employee of the United States, a civilian officially attached to a uniformed service and serving outside the United States, or a Peace Corp volunteer. Military electors do not need to register to vote. • A "Permanent Overseas elector" is a person who is a United States citizen, 18 years old or older, who resided in Wisconsin immediately prior to leaving the United States, who is now living outside the United States <u>and has no present intent to return</u>, who is not registered in any other location, or who is an adult child of a United States citizen who resided in this state prior to establishing residency abroad. Permanent Overseas electors will receive ballots for federal offices only and must be registered to vote prior to receiving a ballot. • A "Temporary Overseas elector" is a person who is a United States citizen, 18 years of age or older, a resident of Wisconsin and is overseas for a temporary purpose and intends to return to their Wisconsin residence.
5	<ul style="list-style-type: none"> • Fill in the circle to indicate your preferred method of receiving your absentee ballot. • Military and Permanent Overseas voters may request and access their ballot directly at https://myvote.wi.gov. • If no preference is indicated, your absentee ballot will be mailed to your residence address listed in Box 3. • You are encouraged to provide a physical mailing address as backup in case of electronic transmission difficulties. Please only fill the circle for your preferred means of transmission. • If you are living in a care facility, please provide the name of the facility. • If someone will be receiving the ballot on your behalf, please list them after C/O. <u>Please note:</u> The absentee elector is still required to vote their own ballot, although they may request assistance in physically marking the ballot.
6	<ul style="list-style-type: none"> • Select the first option if you would like to receive a ballot for a single election or a specific set of elections. • Select the second option if you would like to have a standing absentee request for any and all elections that may occur in a calendar year (ending December 31). • Select the third option only if you are indefinitely confined due to age, illness, infirmity or disability and wish to request absentee ballots for all elections until you are no longer confined or fail to return a ballot for an election.
7	<ul style="list-style-type: none"> • This section is only to be completed by an elector or the agent of an elector who is currently hospitalized. • An agent completing this form for a hospitalized elector must provide his/her name, signature and address on this application.
Assistant Signature:	In the situation where the elector is unable to sign the Voter Declaration / Certification due to a physical disability, the elector may authorize another elector to sign on his or her behalf. Any elector signing an application on another elector's behalf shall attest to a statement that the application is made on request and by authorization of the named elector, who is unable to sign the application due to physical disability.
Voter Signature:	By signing and dating this form, you certify that you are a qualified elector, a U.S. citizen, at least 18 years old, having resided at your residential address for at least 28 consecutive days immediately preceding this election, not currently serving a sentence including probation or parole for a felony conviction, and not otherwise disqualified from voting.

OFFICIAL ABSENTEE BALLOT APPLICATION/CERTIFICATION

(Official Use Only) The voter has met or is exempt from the photo ID requirement. Municipal or Deputy Clerk initial here:

Note: With certain exceptions, an elector who mails or personally delivers an absentee ballot to the municipal clerk at an election is not permitted to vote in person at the same election on Election Day. Wis. Stat. §6.86(6).

Voter: Please complete steps **1** through **5** below, in the presence of your witness.

1 Place your voted ballot inside the envelope and seal it. Do not use tape or glue.

2 Complete the section below if not completed by the clerk.
Provide your VOTING address.

Date of Election (month, day, year) County

Municipality (check type and list name) Town Village City of

Voter's Name (Last, First, Middle) including suffix *(Please print legibly)*

Street Address—Provide house number and street name or fire number and street name. OR

If your rural address does not include a house number/fire number and street name, provide rural route number and box no.

City WI Zip Code

Official use only: Ward # District (if applicable) Voted in clerk's office

3 Sign and date this section.

CERTIFICATION OF VOTER *(Required)*

I certify, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), that I am a resident of the ward of the municipality in the county of the state of Wisconsin indicated hereon, and am entitled to vote in the ward at the election indicated hereon; that I am not voting at any other location in this election; that I am unable or unwilling to appear at the polling place in the ward on election day, or I have changed my residence within the state from one ward to another later than 28 days before the election. I certify that I exhibited the enclosed ballot, unmarked, to the witness, that I then in the presence of the witness and in the presence of no other person marked the ballot and enclosed and sealed the ballot in this envelope in a manner that no one but myself and any person providing assistance under Wis. Stat. § 6.87(5), if I requested assistance, could know how I voted. I further certify that I requested this ballot.

X _____ /_____/_____
▲ Signature of Voter ▲ *(All voters must sign.)* Today's Date

REQUIRED OF MILITARY AND OVERSEAS VOTER ONLY: I further certify my birth date is: _____/_____/_____

4 Have your witness sign and write their address below.

CERTIFICATION OF WITNESS *(signature and address of witness are required)*

I, the undersigned witness, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), certify that I am an adult U.S. Citizen and that the above statements are true and the voting procedure was executed as stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the voter to vote for or against any candidate or measure. I further certify that the name and address of the voter is correct as shown.

1. _____
▲ Signature of ONE adult U.S. citizen witness▲

2. _____
▲ If witnesses are Special Voting Deputies, both must sign. ▲
▼ Address of witness or addresses of both SVDs ▼

1. _____
2. _____

Provide house number and street name or fire number and street name, city, state and zip code. OR
If your rural address does not include a house number/fire number and street name, provide rural route number and box number, city, state and zip code.

CERTIFICATION OF ASSISTANT *(if applicable)* - assistant may also be witness

I certify that the voter named on this certificate is unable to sign his/her name or make his/her mark due to a physical disability and that I signed the voter's name at the direction and request of the voter.

X _____
▲ Signature of Assistant ▲

5 Mail back your ballot. Allow 4-5 days for delivery to ensure your ballot is received by Election Day. Ballots received after Election Day will NOT be counted.

SUBJECT: Re: Canvas Board
FROM: Dan Kelly <[REDACTED]@wisgop.org>
TO: "[REDACTED]@michaelbest.com" <[REDACTED]@michaelbest.com>
CC: Kenneth Chesebro <[REDACTED]@msn.com>, Judge Troupis <[REDACTED]@gmail.com>, "Boerke, Nicholas J (12767)" <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>, Chirst Troupis <[REDACTED]@gmail.com>, "[REDACTED]@yahoo.com" <[REDACTED]@yahoo.com>, Stewart Karge <[REDACTED]@gmail.com>
DATE: 11/19/2020 10:25
ATTACHMENTS (20201119-102534-0002102): "[text.htm](#)"

This is exactly right.

You will also need to be prepared to address requests for absentee ballots submitted through MyVote. Here are the statutorily-approved methods of requesting an absentee ballot:

(a) Any elector of a municipality who is registered to vote whenever required and who qualifies under ss. 6.20 and 6.85 as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods:

1. By mail.
2. In person at the office of the municipal clerk or at an alternate site under s. 6.855, if applicable.
3. By signing a statement and filing a request to receive absentee ballots under sub. (2) or (2m) (a) or s. 6.22 (4), 6.24 (4), or 6.25 (1) (c).
4. By agent as provided in sub. (3).
5. By delivering an application to a special voting deputy under s. 6.875 (6).
6. By electronic mail or facsimile transmission as provided in par. (ac).

Wis. Stat. sec. 6.86(1).

We learned during the WEC meeting last night that the MyVote system originally generated an email to the relevant clerk with the application information, which would keep it in compliance with Wis. Stat. sec. 6.86(1)(a)6. However, we also learned that a subsequent upgrade of the MyVote system eliminated the email to the relevant clerk, and instead simply notes in the database that a request had been made. The MyVote system is obviously convenient and efficient, but there is no statutory warrant for its use.

Here's why that is important. If you argue that the absentee ballots issued during the in-person absentee balloting process should not be counted because they do not have a corresponding application, you will need to be prepared to either (a) explain why MyVote-requested ballots are okay even though not accompanied by a written application of the sort described in sec. 6.86(1)(a), or (b) argue that MyVote-requested ballots may not be counted either.

Dan.

Daniel Kelly
Special Counsel
Republican Party of Wisconsin

On Nov 19, 2020, at 9:53 AM, Olson, Joseph L (13465) <[REDACTED]@michaelbest.com> wrote:

I think the argument against the envelope as the application is:

1. It fails to meet the statutory requirements for absentee balloting.
 - a. The statute clearly requires the application to be submitted before the ballot is issued to the voter. Wis. Stat. sec. 6.86(1)(ar) (“the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefrom from a qualified elector of the municipality.”) The envelope cannot satisfy this because the ballot has already been issued by the time the envelope is given to the voter to fill out.
 - b. And, the timing matters. It is part of the process for ensuring the integrity of the election. Wis. Stat. sec. 6.86(1)(ar) continues: “if a qualified elector applies for an absentee ballot in person at the clerk’s office, the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification. **The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector’s application** and shall verify that any photograph appearing on that document reasonably resembles the elector.
2. The envelope is insufficient as an application:
 - a. There is no affirmative request for an absentee ballot on the envelope (in contrast to the clear statement on the application form)
 - b. The statement on the envelope that says “I further certify that I requested this ballot” is insufficient because it is an after the fact statement that does not certify that the voter submitted a written application.

Joseph L. Olson

Partner

T [redacted] | michaelbest.com

<image001.png>

Michael Best & Friedrich

LLP

Named 2020 Best Law Firm for Women by Working Mother

From: Kenneth Chesebro <[redacted]@msn.com>

Sent: Thursday, November 19, 2020 9:20 AM

To: Olson, Joseph L (13465) <[redacted]@michaelbest.com>; Judge Troupis <[redacted]@gmail.com>

Cc: Boerke, Nicholas J (12767) <[redacted]@michaelbest.com>; George Burnett <[redacted]@lcojlaw.com>; Dan Kelly <[redacted]@wisgop.org>; Chirst Troupis <[redacted]@gmail.com>; Joe Voiland <[redacted]@yahoo.com>; Stewart Karge <[redacted]@gmail.com>

Subject: Re: Canvas Board

I think the substantive concern with reversing the order is the Legislature's concern, set forth in its findings, to guard against voters being pressured to participate when they would prefer not to participate.

To carry out that legislative purpose, it's important for the voter to actually file an application to receive a ballot -- even if doing so in person, and the ballot is then immediately handed to him or her.

It's too easy to pressure people into voting, and too easy to run ballot-harvesting operations, if a Dem operative can say, "hey, we need your vote to defeat Trump," hand the voter the ballot, and then afterwards say, "hey, sign here, where it says you requested the ballot!"

From: Olson, Joseph L (13465) <[redacted]@michaelbest.com>

Sent: Thursday, November 19, 2020 10:16 AM

To: Judge Troupis <[redacted]@gmail.com>; Kenneth Chesebro <[redacted]@msn.com>

Cc: Boerke, Nicholas J (12767) <[redacted]@michaelbest.com>; George Burnett <[redacted]@lcojlaw.com>; Dan Kelly <[redacted]@wisgop.org>; Chirst Troupis <[redacted]@gmail.com>; Joe Voiland <[redacted]@yahoo.com>; Stewart Karge <[redacted]@gmail.com>

Subject: RE: Canvas Board

Ken – I agree. The problem with the envelope being the application is that it comes in out of order. A voter shouldn't have the ballot or the envelope without having first submitted an application.

Joseph L. Olson

Partner

T [redacted] | michaelbest.com

<image001.png>

Michael Best & Friedrich

LLP

TROUPIS 009508

Named 2020 Best Law Firm for Women by Working Mother

From: Judge Troupis <[redacted]@gmail.com>
Sent: Thursday, November 19, 2020 9:14 AM
To: Kenneth Chesebro <[redacted]@msn.com>
Cc: Olson, Joseph L (13465) <[redacted]@michaelbest.com>; Boerke, Nicholas J (12767) <[redacted]@michaelbest.com>; George Burnett <[redacted]@cojlaw.com>; Dan Kelly <[redacted]@wisgop.org>; Chirst Troupis <[redacted]@gmail.com>; Joe Voiland <[redacted]@yahoo.com>; Stewart Karge <[redacted]@gmail.com>
Subject: Re: Canvas Board

Yes Ken--that is why we need to flush this argument out and make a record that it is popcock.
Jim

On Thu, Nov 19, 2020 at 9:06 AM Kenneth Chesebro <[redacted]@msn.com> wrote:

The envelope that the voter is given with the ballot is the request??

I don't have the language handy now, but that can't be squared with the statutory language, right?

Doesn't the statute make it clear that a ballot may not even be issued to a voter unless an application has been filed?

I.e., the application isn't just some sort of formality -- it is the vehicle the voter must use to even get the ballot. Ballots are supposed to be kept securely; they're not supposed to be floating around, and handed out to people who haven't followed the legal procedure for proving an entitlement to receive one!

From: Judge Troupis <[redacted]@gmail.com>
Sent: Thursday, November 19, 2020 10:00 AM
To: Joe Olson <[redacted]@michaelbest.com>; Boerke, Nicholas J (12767) <[redacted]@michaelbest.com>; George Burnett <[redacted]@cojlaw.com>; Dan Kelly <[redacted]@wisgop.org>; Kenneth Chesebro <[redacted]@msn.com>; Chirst Troupis <[redacted]@gmail.com>; Joe Voiland <[redacted]@yahoo.com>; Stewart Karge <[redacted]@gmail.com>
Subject: Fwd: Canvas Board

ALL--IMPORTANT: We now know their argument on ballot request issue at clerk's office. We need a clear and clean response in the record.
FYI, it is inconceivable that the the envelope is a request. Why have a website to apply, or call for a written application? And as Ken points out the ballot is already given at the time of the completion. Maybe other arguments as well--need to get this right. JOE--Can you get a copy of this form, carefully look it over and construct the argument for the folks at the canvas table.
Tanks. Jim

----- Forwarded message -----
From: Kenneth Dragotta <[redacted]@syeng.com>
Date: Thu, Nov 19, 2020 at 8:48 AM
Subject: Re: Canvas Board
To: Judge Troupis <[redacted]@gmail.com>
Cc: Kenneth Dragotta <[redacted]@syeng.com>

Jim,

I am very concerned with what is happening. I am not being included in any conversationants and I am just flying by my own intuition. All of my past work for you and President Trump was nearly flawless because of excellent planning and attention to details. The result is proportional to quality of work. Trust that I am only trying to make you aware of the situation on the ground.

YES. Rick will follow our/your instructions. Being that we have not been included thus far in the mission objectives, it would be nice if someone would contact Rick and myself to go over the details.

Issue with petition and WEC position on the ballot request document:

EL-122: As stated on the document "Official Absentee **Ballot Application**/Certification. It was presented last night that this EL122 form is a request form when IPAV voting per the WEC board meeting. I would argue that it can't possibly be a request document because 1) you must have already VOTED the ballot before the witness can certify that the elector voted the ballot AND signed the certification, thus you would have already voted the document before requesting it, and 2) elector signing the document constitutes the request and certification in the

TROUPIS 009509

presence of the witness would be concurrent with the ballot request and would not require one task to be completed before the issuance of the document. Logically they can't happen simultaneously. The actions, as described in the statutes, are sequential and not simultaneous. The WEC argument is the last sentence "I further certify that I requested this ballot" validates the ballot request. However, the law states a ballot shall be requested.

The last WEC argument is that it is unfair that people completing a ballot request document will be scrutinized more than folks that requested ballots via MY VOTE on-line. The Absentee request LOG does not and will not provide detail nor does it require any signature. Theoretically, anyone on the MOVERS list could have requested an absentee ballot and could have voted, thereby taking them off of deactivation status until the next ERIC comparison run. They started moving us in this direction 10 years ago.

FYI, I had brought this issue of EL122 up early yesterday in discussions with Madison.

Ken

On 11/19/2020 8:05 AM, Judge Troupis wrote:

Will our guy in Milwaukee Canvas Board side with us on the objections and requirement for applications?
Jim

Sent from my iPhone

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<Recount Petition - 29311866.1.pdf><Absentee Ballot Applicaton EL-121 - 29311671.1.pdf>

2/28/24, 9:54 AM

SUBJECT: Amicus
FROM: Daniel Suhr <[REDACTED]@libertyjusticecenter.org>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/01/2020 12:40

Dear Judge Troupis,

Would you please let me know if the Wisconsin Supreme Court orders a response in your petition, and if so, what deadline the Court sets for such a response (which, by rule, is the deadline for amicus briefs as well)?

Thanks
DANIEL

SUBJECT: Fwd: FW: Trump Case No. 2020AP001971-OA

FROM: Judge Troupis <[REDACTED]@gmail.com>

TO: [REDACTED]@gmail.com

DATE: 12/01/2020 12:40

ATTACHMENTS (20201201-124032-0000987): "[image001.gif](#)" , "[File-stamped Petition.pdf](#)" , "[File-stamped memorandum in support of petition.pdf](#)" , "[File-stamped appendix to petition.pdf](#)"

Sorry Reince, I would have included you initially but I had not, I realized, sent you emails before.
Jim

----- Forwarded message -----

From: **Judge Troupis** <[REDACTED]@gmail.com>

Date: Tue, Dec 1, 2020 at 12:39 PM

Subject: Fwd: FW: Trump Case No. 2020AP001971-OA

To: Justin Clark <[REDACTED]@donaldtrump.com>, Matthew Morgan <[REDACTED]@donaldtrump.com>

Cc: Rudy Giuliani <[REDACTED]@gmail.com>, Rudy Giuliani <[REDACTED]@gmail.com>, Hitt, Andrew A (22257) <[REDACTED]@michaelbeststrategies.com>, Jenna Ellis <[REDACTED]@donaldtrump.com>, Courtney Parella <[REDACTED]@donaldtrump.com>

Justin & Matt and ALL,

Attached are the file stamped copies of today's Wisconsin filings. There will be other motions and such along the way, but these are the primary documents raising the issues. Let us know if you have any questions.

Jim Troupis

----- Forwarded message -----

From: **Kurt A. Goehre** <[REDACTED]@lcojlaw.com>

Date: Tue, Dec 1, 2020 at 12:05 PM

Subject: FW: Trump Case No. 2020AP001971-OA

To: Judge Troupis <[REDACTED]@gmail.com>

Attached are the file-stamped documents.

Kindest regards,

KURT A. GOEHRE

Partner/Attorney

Law Firm of Conway, Olejniczak & Jerry, S.C.

231 S. Adams Street | P.O. Box 23200

Green Bay, WI 54305

P: [REDACTED] F: [REDACTED]

E: [REDACTED]@lcojlaw.com | [lcojlaw.com](#)

TROUPIS 009513

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From: [REDACTED] <[REDACTED]@lcojlaw.com>
Sent: Tuesday, December 1, 2020 11:01 AM
To: [REDACTED]@wicourts.gov' <[REDACTED]@wicourts.gov>
Cc: Kurt A. Goehre <[REDACTED]@lcojlaw.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Trump Case No. 2020AP001971-OA

To: Christopher Paulsen, Chief Deputy Clerk

Per your request, attached please find a file-stamped copy of our petition, memorandum in support, and appendix. Let me know if there is anything else you require.

Thank you very much.

[REDACTED]
Legal Assistant to Attorneys George Burnett and Jill J. Ray
Law Firm of Conway, Olejniczak & Jerry, S.C.

231 South Adams Street

P.O. Box 23200

Green Bay, WI 54305-3200

Phone: [REDACTED]

Fax: [REDACTED]

e-mail: [REDACTED]@lcojlaw.com

2/28/24, 9:55 AM

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TROUPIS 009515

RECEIVED

DEC 01 2020

No. _____

CLERK OF SUPREME COURT
OF WISCONSIN

In the Supreme Court of Wisconsin

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

PETITIONERS,

v.

ANTHONY S. EVERS, Governor of Wisconsin in his official capacity, THE
WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, Chair of the
Wisconsin Elections Commission in her official capacity, SCOTT
MCDONELL, Dane County Clerk in his official capacity, ALAN A.
ARNSTEN, Member of the Dane County Board of Canvassers in his
official capacity, JOYCE WALDROP, Member of the Dane County Board of
Canvassers in her official capacity, GEORGE L. CHRISTENSON, Milwaukee
County Clerk in his official capacity, TIMOTHY H. POSNANSKI, Member of
the Milwaukee County Board of Canvassers in his official capacity,
RICHARD BASS, Member of the Milwaukee County Board of Canvassers
in his official capacity, and DAWN MARTIN, Member of the Milwaukee
County Board of Canvassers in her official capacity,

RESPONDENTS.

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Email: rgb@lcojlaw.com

Counsel for Petitioners

TROUPIS 009516

No. _____

In the Supreme Court of Wisconsin

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

PETITIONERS,

v.

ANTHONY S. EVERS, Governor of Wisconsin in his official capacity, THE WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, Chair of the Wisconsin Elections Commission in her official capacity, SCOTT MCDONELL, Dane County Clerk in his official capacity, ALAN A. ARNSTEN, Member of the Dane County Board of Canvassers in his official capacity, JOYCE WALDROP, Member of the Dane County Board of Canvassers in her official capacity, GEORGE L. CHRISTENSON, Milwaukee County Clerk in his official capacity, TIMOTHY H. POSNANSKI, Member of the Milwaukee County Board of Canvassers in his official capacity, RICHARD BASS, Member of the Milwaukee County Board of Canvassers in his official capacity, and DAWN MARTIN, Member of the Milwaukee County Board of Canvassers in her official capacity,

RESPONDENTS.

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Counsel for Petitioners

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2020 PRESIDENTIAL RECOUNT

Location: The Wisconsin Center
400 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Date: November 20, 2020

Time: 9:00 a.m. to 5:30 p.m.

Proceedings Reported By:
Alicia Pabich, CSR

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A P P E A R A N C E S

FOR THE MILWAUKEE ELECTION COMMISSION:
Mr. Tim Posnanski, Chairman
Ms. Dawn Martin, Election Commissioner
Mr. Rick Baas, Election Commissioner
Mr. George Christenson, Milwaukee County Clerk
Ms. Julietta Henry, Milwaukee County Elections
Director
Ms. Michelle Hawley, Milwaukee County Elections
Director
Ms. Margaret Daun, Milwaukee County Corporation
Counsel
Ms. Kathryn M. West, Assistant Milwaukee County
Corporation Counsel

FOR THE TRUMP CAMPAIGN:
Attorney Stewart Karge,
Attorney Joseph Voiland

FOR THE BIDEN CAMPAIGN:
Attorney Christopher Meuler
Attorney Chris Trebatoski
Attorney Stacie Rosenzweig

MUNICIPALITIES:
City of Cudahy, Deputy Clerk Kelly Sobieski
Village of Greendale, Clerk Melanie Pietruszka
City of Milwaukee, Executive Director Claire
Woodall-Vogg

1 that this procedure does not allow them to see
2 and observe the ballots, and I object to that
3 as an inadequate opportunity for us to observe
4 the ballots in this recount. And I ask that
5 we, the Trump observers, be given an
6 opportunity to properly and carefully observe
7 the recount.

8 Given the state of COVID-19 and
9 additional security requirements that are being
10 undertaken, I understand that general viewing
11 is difficult. And it makes it difficult for us
12 to properly observe, therefore, I would like to
13 make certain requests of the Board prior to the
14 start of the recount counting.

15 We first want -- we would like to
16 make sure that we have an observer at each
17 table while counting is ongoing.

18 Two: We want to ensure that all
19 written applications for absentee ballots are
20 present and set aside for observation by the
21 Trump observers.

22 Three: We ask to have all absentee
23 ballot envelopes that do not have a written
24 application set aside for observation by the
25 Trump observers.

1 Four: We ask to have all absentee
2 ballot envelopes with red ink or any color ink
3 different in any way from the witness's name
4 set aside for observation by the Trump
5 observers.

6 Five: We ask that all absentee
7 ballot logs are present and set aside for
8 observation including, but not limited to, any
9 online absentee registration logs.

10 Six: We ask that all absentee
11 envelopes identify indefinitely confined
12 absentee ballot voters are set aside for
13 observation by the Trump observers.

14 Seven: We ask for copies of all IDs
15 relating to any absentee ballot application set
16 aside for observation by the Trump voters.

17 Eight: We ask for data of all the
18 tabulating machines today as well as images of
19 the ballots in a computer code audit trail and
20 error trail from November 2 to November 5,
21 including any and all software updates and
22 changes entered into the software from
23 November 2 through November 5. We ask also in
24 relation to that request for the names of any
25 technicians who performed any of the software

1 back in session, you can bring it before us.

2 OBSERVER RENEE GRAXIRENA: Perfect.

3 So if they continue that behavior, I should
4 just come back? Okay. Got you. Thank you.

5 (Inaudible discussion.)

6 OBSERVER RENEE GRAXIRENA: Renee,
7 R-e-n-e-e, Graxirena, G-r-a-x- like x-ray,
8 i-r-e-n-a. And I'm an observer for Biden
9 Campaign.

10 (General announcement.)

11 (Recess.)

12 MR. BAAS: We are about to reconvene,
13 so I just want to notify those that are
14 interested that we are going to reconvene.

15 Are the Trump representative ready to
16 proceed and the Biden representative,
17 Mr. Meuler, are you prepared, too?

18 MR. MEULER: Yes. Thank you.

19 MR. POSNANSKI: All right. We will
20 reconvene. Thank you for your patience. We, I
21 believe, have now completed the process of
22 going through and hopefully documenting the
23 requests.

24 I think, Ms. Daun, you will go over
25 those requests to make sure that we understand

1 the Trump requests specifically and accurately.

2 MS. DAUN: Mr. Chairman,
3 Commissioners, thank you very much. And thank
4 you to the representatives of both campaigns.

5 I'm going to go slowly. And then I
6 am happy to e-mail this to both of you, and we
7 may, you know, to get as right as rain as we
8 proceed here.

9 So the first request that I have
10 down -- and, again, I conferred with our court
11 reporter to get this quite right -- is that
12 you've been informed by some of your observers
13 that they are unable to see through the
14 Plexiglass, and are concerned about their
15 ability to observe the ballots being recounted,
16 as well as envelopes and any other materials.
17 And you've asked for an observer to be present
18 from your campaign at all moments at all tables
19 when the recount is proceeding.

20 Any corrections thereto, sir?

21 MR. KARGE: The information that I
22 received about the observers was that they --
23 either in a sitting position or in a standing
24 position, they were unable to see the
25 information that was on the table that the

1 election workers were reviewing, thus making
2 that difficult, unless these other requests
3 that I had were granted, that the set-asides be
4 made to observe and determine whether or not
5 objections could be made.

6 MS. DAUN: Again, to summarize, your
7 observers cannot see through the Plexiglass --
8 the Plexiglass adequately to observe the
9 materials being reviewed.

10 MR. KARGE: Correct.

11 MS. DAUN: Thank you.

12 Secondly, you have requested that all
13 written applications for absentee ballots are
14 present and set aside.

15 MR. KARGE: For observation, yes.

16 MS. DAUN: That is correct. So,
17 again, written applications for absentee
18 ballots are present and set aside for
19 observation; is that correct, sir?

20 MR. KARGE: Yes.

21 MS. DAUN: Thank you.

22 Thirdly, all absentee envelopes
23 without a written application shall be set
24 aside for observation; is that correct?

25 MR. KARGE: Yes.

1 MS. DAUN: Fourth, all absentee
2 ballots envelopes with red or any ink that is
3 different from the witness's original ink be
4 set aside for observation; is that correct?

5 MR. KARGE: Yes.

6 MS. DAUN: Thank you.

7 Fifth, that all absentee ballot logs
8 be available for observation, including any
9 online or MyVote.gov [sic] absentee ballot
10 application requests; is that correct?

11 MR. KARGE: Yes.

12 MS. DAUN: Thank you.

13 Seven, make copies of all
14 identification for any absentee ballot requests
15 to be set aside for observation; is that
16 correct?

17 MR. KARGE: If you are going down my
18 list, my sixth one relating specifically to
19 indefinitely confined absentee.

20 MS. DAUN: I did miss one. Thank you
21 so much. We are going to go back to the actual
22 number six.

23 All absentee -- number six then, all
24 absentee ballot envelopes that identified
25 indefinitely confined voters be set aside for

1 With respect to the request made, I'm
2 going to save the issue of the challenge to how
3 the observations are currently being done,
4 presenting the first issue being raised. We
5 will save that for the end, because I want to
6 see if some of what we have or will be making
7 available sufficiently addresses your concerns
8 in this regard.

9 The first request with respect to all
10 written applications for absentee ballots, that
11 they be present during the recount and set
12 aside for observation, all requests are either
13 on site or being brought on site. More to the
14 point, we will be providing a report -- I will
15 get into that in a second -- that will show
16 this data for every single absentee voter in
17 Milwaukee County.

18 With respect to the second requests
19 dealing with all absentee ballot envelopes
20 without a written application, if those can be
21 set aside for observation. Based upon our
22 review and deliberations, there are no
23 documents that are responsive to this request,
24 so there are no documents to be set aside in
25 response to this request.

1 MR. KARGE: I need to clarify
2 something in your discussion about what we are
3 and are not going to be receiving. If it is
4 the position that the envelope is the
5 application for the absentee ballot, which I
6 gather is at least in part with what you are
7 saying, I would request then that the envelope
8 be set aside and segregated. That is the
9 position that we would take.

10 MR. MEULER: The envelopes are all
11 here.

12 MR. POSNANSKI: It's what we will
13 inspected.

14 MS. DAUN: If I may, Mr. Chairman.
15 In other words, they are segregated and you are
16 going to see each one of them. The specific
17 requests for envelopes with different colored
18 inks -- ink, excuse me, will be set aside
19 subject to final determination by the
20 Commission. And, secondly, absentee envelopes
21 that indicate indefinite confinement for your
22 request will also be set aside pending the
23 Commission's final decision.

24 And I just -- for just a procedural
25 clarification. I would suggest after this

1 robust discussion has concluded, that the
2 Commissioners make clear on their votes on
3 exactly how each of these procedures will move
4 forward as Mr. Posnanski, Chairman Posnanski
5 summarized at the outset just to be clear so
6 that vote is preserved on the record.

7 Thank you, Mr. Chairman.

8 MR. POSNANSKI: Thank you. With
9 respect to the, I think, mechanical notion of
10 how these ballots will be set aside and then
11 for observation -- envelopes. Sorry. How
12 these envelopes are going to be set aside for
13 observation and potential objection.
14 Commissioner Baas, I guess I'm open to your
15 thoughts on this.

16 But I think the thing that makes most
17 sense is to set those aside when they are
18 identified, an objection can be raised. I do
19 think that it makes sense to make a standing
20 objection if the issue is exactly the same for
21 those envelopes. They can be brought. The
22 record can be made with respect to each of
23 those ballots that's identified after they have
24 been set aside by the -- after they have been
25 set aside.

1 We can then rule on those objections,
2 and it can be -- if it's not a standing
3 objection, you can reiterate your objection to
4 that ballot, and we can then provide it. If
5 it's not a new or novel issue raised by that
6 specific ballot, address those in time so that
7 we have a consistent position with respect to
8 each of these issues as they arise.

9 MR. BAAS: So I agree that we are
10 talking about having them being segregated in
11 ink or indefinitely confined. And we will deal
12 with them en masse. I think that's an
13 appropriate way to go.

14 MR. POSNANSKI: And I would just note
15 that what we are talking about and why we can't
16 just set aside each and every ballot across the
17 county, is that we are doing this ward by ward
18 and municipality by municipality. And so each
19 of those ballots -- or each of those envelopes
20 or whatever the issue is involved in the one
21 particular category or objection can be set
22 aside. And we can hear each objection for that
23 particular ward or that municipality after all
24 of those envelopes, ballots issued are set
25 aside.

1 MR. BAAS: I would agree.

2 MR. MEULER: And I'm not sure that's
3 entirely necessary going through each one. You
4 have a standing objection to a category. So,
5 you know, it -- I am not sure what you mean.
6 The statute doesn't really apply --

7 MR. POSNANSKI: Well, I don't think
8 those objections are going to take much time
9 after we get through the first one.

10 MR. KARGE: I would just like to
11 clarify that the envelopes that the Board is
12 saying are the applications themselves, those
13 will be segregated from other ballots -- or
14 envelopes; correct?

15 MR. POSNANSKI: Right?

16 MR. BAAS: Yeah, that's what we are
17 saying.

18 MS. DAUN: If I may, Mr. Chairman. I
19 guess I'm confused. A ballot is not an
20 envelope, so I'm not following the question.

21 MR. KARGE: But if the envelope is
22 the application --

23 MS. DAUN: Yes, sir.

24 MR. KARGE: -- those absentee
25 envelopes will be set aside?

1 MS. DAUN: There are envelopes and
2 there are ballots.

3 MR. KARGE: Okay.

4 MS. DAUN: Envelopes are being
5 reviewed. We are setting aside envelopes with
6 differently colored ink and envelopes that
7 indicate indefinite confinement. I'm -- I'm
8 not trying to be obtuse. I generally do not
9 understand the question.

10 And if anybody up here can help me
11 out, please do.

12 MR. KARGE: So every envelope is
13 going to have some sort of certification,
14 supposedly, but there's no other application
15 necessarily for that envelope.

16 MR. CHRISTENSON: We are chasing our
17 tails on this.

18 MS. HENRY: Mr. Chair, that is not
19 correct. Can we show them an envelope, if that
20 would be permissible at this time?

21 MS. DAUN: Yes, that's in order.

22 MS. HENRY: Thank you. I'm going to
23 cover up the voter's name. So on the screen --

24 I don't know if you can all see it.

25 We have the official absentee --

1 Before you, you can see it on the
2 screen. It has the official absentee ballot
3 application certification. Then it has the
4 individual label, the type of voter -- in this
5 case it's a regular voter -- then it lists the
6 certification of voter with the signature of
7 the elector.

8 We will turn on the screen so the
9 Commissioners can view it as well. Everyone
10 else can view it on the screens there.

11 So it states again, official absentee
12 ballot application certification. Then the
13 label that is issued that is placed on the
14 envelope by the clerk was the request had come
15 in -- came in, either in person or by mail.
16 Then you have the certification of the voter.
17 Once they have received the absentee ballot,
18 and then they certify with their name their
19 signature.

20 MR. MEULER: If I could, just a
21 point. We do have a submission on this very
22 issue if we are getting into the substantive
23 area. And then another procedural point.

24 MR. POSNANSKI: I think you can
25 proceed with the procedural point. I think

1 we've addressed this issue, and I think we
2 resolved this issues. I think we've talked all
3 around this issue.

4 MR. MEULER: Fair enough.

5 Procedurally, if we are talking about
6 this standing objection and how to, I think,
7 implement this. And I would just note, in Dane
8 County the -- my understanding is the Trump
9 Campaign, you know, acknowledged the way --
10 they way they are proceeding -- I don't -- I
11 shouldn't say that the Trump Campaign
12 acknowledged it, but the way they are
13 proceeding is that there's a standing
14 objection.

15 They are not separating ballots.
16 They are just, you know, proceeding according
17 to the statute with an acknowledgement that
18 there is a standing objection to these
19 different categories, which I understand we are
20 going to get to. I just wanted to raise that
21 point so that you understand what's going on in
22 both counties.

23 MR. KARGE: Well, what I would like
24 to say that what I understand you to be saying
25 is reaching, in evidence, a substantive

1 decision on what is an application. And,
2 therefore, what I would ask you to do is in
3 addition to segregate ballots that have these
4 other -- or I'm sorry, these envelopes that
5 have these other characteristics we'll also put
6 a separate pile for all other envelopes that
7 are determined by you to be the application.

8 MR. POSNANSKI: I believe that's
9 every envelope.

10 MR. BAAS: By default, that's going
11 to be the other category?

12 MR. KARGE: Yes.

13 MR. POSNANSKI: Well, I mean, I think
14 if you have -- during the observation, if
15 there's a particular objection you wish to make
16 on those grounds, please make it.

17 For purposes of the record, as Ms.
18 Daun advised, I think it is advisable to make a
19 record with respect to the Committee's
20 deliberations and decisions with respect to the
21 requests advanced by the Trump Campaign.

22 Is there a motion or discussion on
23 that point?

24 MS. DAUN: Mr. Chairman, if I could,
25 at the pleasure of the Commissioners, to

1 simplify matters, may I suggest in some
2 phraseology for the motion given that it had
3 multiple parts?

4 The motion would be from Commissioner
5 Baas, if I may, that the eight points in the
6 determinations earlier articulated by Chairman
7 Posnanski be adopted by this Commission, and
8 that the election proceed in accordance with
9 those directives.

10 MR. BAAS: So moved.

11 MS. MARTIN: Second.

12 MR. POSNANSKI: Any further
13 discussion?

14 MR. BAAS: No.

15 MR. POSNANSKI: Mr. Clerk, can we
16 have a roll call? Call the vote on the matter?

17 MR. CHRISTENSON: On the motion that
18 the eight points articulated by
19 Chairman Posnanski be adopted.

20 Commissioner Baas?

21 MR. BAAS: Aye.

22 MR. CHRISTENSON: Martin?

23 MS. MARTIN: Aye.

24 MR. CHRISTEN: Chairman Posnanski?

25 MR. POSNANSKI: Aye.

1 MR. CHRISTENSON: Three ayes, zero
2 nos.

3 MR. POSNANSKI: Ms. Henry, are you
4 now in a position where we can proceed with the
5 count?

6 MS. HENRY: Okay. Election
7 inspectors, you will proceed with your recount.
8 We will start with the reviewing once you
9 reconcile your poll list. We will start by the
10 reviewing of your absentee ballots and
11 materials. You should determine the number of
12 absentee voters by reviewing the poll list, the
13 absentee ballot certificate envelopes, and your
14 inspector statement, along with the absentee
15 ballot log.

16 Once you've determined that, you can
17 go through the next process on reviewing the
18 written applications for absentee ballots,
19 which is the absentee ballot envelope against
20 the poll list. We ask that you set aside any
21 absentee ballot that has a different color on
22 the address versus the actual witness
23 signature, just set it to the side.

24 MS. DAUN: Again, we are all going to
25 have T-shirts made. It's the envelope.

1 MS. HENRY: Yes, the envelope. I'm
2 sorry. Let me restate. The absentee envelope,
3 if it has another color on the witness
4 signature and/or address, we should set that to
5 the side. You should also set to the side if
6 it's identified that it is an indefinite
7 confined ballot envelope. Okay?

8 Once you are done with that process,
9 you will then review your rejected absentee
10 envelopes, and you will examine for any
11 defective absentee envelopes. We are going to
12 stop there before we examine the ballot bags.

13 So we have about another hour of work
14 before we start, and then let us know how you
15 progress. It may take you longer if you are in
16 other parts of the county. So that's what we
17 are going to do.

18 Are there any questions?

19 Mr. Chairman, the City of Milwaukee
20 does have a question that they would like to
21 pose at this point because they do know that is
22 going to be an issue raised throughout the
23 process.

24 Claire, would you like to come
25 forward now?

1 MS. WOODALL-VOGG: Mr. Chair, in
2 Ward 1, we have reviewed our rejected absentee
3 envelopes. We have two envelopes from
4 in-person absentee voting where our staff at
5 the Election Commission failed to witness the
6 envelope. We would like the Board's direction
7 on whether these shouldn't be rejected since it
8 was the clerk's error, not the voter's. We
9 believe there to be 73 total across all of our
10 Boards, but there are two in Ward 1.

11 MR. POSNANSKI: Do you have the
12 envelope?

13 MS. WOODALL-VOGG: And so we do know
14 that these are in-person absentee voting,
15 because our in-person voting absentee envelopes
16 are different. And as you can see, the City of
17 Milwaukee City Hall has our address for the
18 witness, which is further confirmation that
19 these both came from in-person absentee voting,
20 in addition to our absentee box telling us
21 that.

22 MR. BAAS: Excuse me, exactly how are
23 they different?

24 MS. WOODALL-VOGG: When we mail
25 ballots to voters, we pay an additional cost to

1 have our envelopes printed with the
2 highlighting for the signatures, for the
3 signature of the voter, and the signature of
4 the witness. And no witness address would be
5 preprinted for a voter for mailing in the
6 ballot.

7 MR. BAAS: Thank you.

8 MR. POSNANSKI: Any further
9 questions, Mr. Baas?

10 MS. DAUN: Mr. Chairman, again, just
11 for the purposes of making sure that the record
12 is sufficiently clear, Commissioner Baas
13 inquired how is it that you are able to discern
14 an in-person absentee envelope from a mailed-in
15 absentee envelope, and the answer was that for
16 in-person absentee envelopes, the address
17 listed for the witness is the location of the
18 in-person absentee voter. In this case, the
19 address of City Hall in Milwaukee. Thank you,
20 Mr. Chairman.

21 MR. POSNANSKI: Thank you.

22 Either campaigns wish to be heard on
23 these two ballots -- on these two envelopes?
24 My apologies. At least I'm catching myself.

25 MR. MEULER: No, thank you.

1 MR. KARGE: It appears that there is
2 no witness on either of these. So in
3 accordance with the statute both of them should
4 be disqualified.

5 MR. MEULER: Well, we would certainly
6 say, obviously, with the testimony here, that
7 this has happened at City Hall. It was
8 addressed at City Hall. This was an in-person
9 vote with the clerk. So it should be counted.

10 MR. BAAS: Which particular statute
11 states that it shouldn't be counted?

12 MR. KARGE: I believe -- I don't have
13 a specific one. But I believe every absentee
14 witness --

15 MR. BAAS: No, no. I'm asking you
16 for a statute.

17 MR. KARGE: The absentee ballot is
18 defective if it is not witnessed, the witness
19 did not provide the address, it is not signed
20 by the voter or the certificate envelope or the
21 certification language is missing. Wisconsin
22 Statute Section 9 -- Section 9.01(1)(b)2.

23 MR. BAAS: Thank you.

24 MS. DAUN: Mr. Chairman, for the
25 Commission's consideration during the 2016

1 recount, the Wisconsin Election Commission
2 didn't rule that these ballots -- that our past
3 absentee in-person ballots should be counted.
4 That was a ruling from the Wisconsin Election
5 Commission in 2016. Thank you, Mr. Chairman.

6 MR. POSNANSKI: Thank you, Ms. Daun.
7 I -- having served on this Board in the 2016
8 recount, I am quite familiar with that
9 guidance.

10 MR. BAAS: Having served on this
11 Board in 2016, I am familiar with it as well,
12 and I disagree. So --

13 MS. DAUN: I think a motion at this
14 time would be appropriate. But I do believe
15 that Commissioner Martin may have a fact
16 question germane to this issue.

17 MS. MARTIN: What happened to our
18 City of Milwaukee person?

19 You had mentioned there are 73
20 ballots total. Are they all City Hall in
21 person?

22 MS. WOODALL-VOGG: So counter to what
23 Counsel had said, all in-person absentee
24 envelopes listed all at the address, that's our
25 employees' address. We do not have records

1 without using WisVote to tell you which
2 in-person absentee location they came from.

3 MS. DAUN: But, again, I just want to
4 make that clear for the record, because this is
5 a correction. And I am going to thank the city
6 clerk for that.

7 To be clear, the address that's
8 listed on any in-person absentee ballot
9 envelopes for the City of Milwaukee is the City
10 Hall address for all, regardless of the
11 in-person absentee voting location. Did I get
12 that right now?

13 MS. WOODALL-VOGG: Correct.

14 MS. DAUN: Yes, you did. Thank you.

15 And I think the Commissioner's
16 question was, do all 73 indicate the City Hall
17 address?

18 MS. WOODALL-VOGG: Yes. All 73 do.

19 MS. MARTIN: I move that all 73
20 ballots be accepted -- envelopes.

21 MS. DAUN: Ballot and envelope.

22 MS. MARTIN: Ballots and envelopes.

23 MR. POSNANSKI: I second that motion.

24 Any further discussion, Mr. Baas?

25 MR. BAAS: Yes. We've had challenges

1 in this state when WEC has decided that they
2 are going to supersede what the statute is, and
3 the statute as read is pretty clear. Given the
4 fact that this was cast in a building with
5 professionals, the fact that the signature was
6 overlooked, is even more egregious. And so I
7 would urge my fellow Commissioners to reject
8 these ballots, all 73.

9 MR. POSNANSKI: Given the guidance
10 we've received in the past on this exact issue,
11 given our own ruling on this exact issue in the
12 past, including during the 2016 recount, and
13 the guidance that provides that an in-person
14 vote should not be set aside due to the clerk's
15 error. I believe it's appropriate to count and
16 accept all 73 of these ballots and envelopes
17 that present this issue.

18 And with that, unless there's any
19 further discussion, I would call a vote.

20 MR. CHRISTENSON: On the question.
21 Commissioner Baas?

22 MR. BAAS: Restate question the
23 question, please.

24 MR. CHRISTENSON: Should all 73
25 envelopes and ballots of in-person absentee

1 voting at Milwaukee City Hall be counted?

2 MR. BAAS: No.

3 MR. CHRISTENSON: Commission Martin?

4 MS. MARTIN: Yes.

5 MR. CHRISTENSON: Chairman Posnanski?

6 MR. POSNANSKI: Yes.

7 MR. CHRISTENSON: Two ayes, one no.

8 Motion carries.

9 MR. POSNANSKI: Until further issues
10 are brought before the Commission, we stand in
11 recess.

12 MR. KARGE: Excuse me, can I ask for
13 one clarification? I am just trying to --

14 MR. POSNANSKI: If it deals with
15 envelopes and ballots, I don't know.

16 MR. KARGE: It actually does deal
17 with the application forms. I am still trying
18 to get an understanding of whether or not what
19 would be produced here will be the actual form
20 application -- application forms of absentee
21 ballots.

22 MR. BAAS: I am going to try this.
23 The actual documents that were up there, the
24 last two examples, are both the envelope that
25 processes and is the application. I believe

1 point, there's no reason not to include those.
2 And we will reserve any ruling on the validity
3 of those ballots upon further information they
4 need to report back to us.

5 MR. KARGE: And just so my objection
6 is still noted.

7 MR. POSNANSKI: Yes. Your objection
8 was noted twice.

9 MR. KARGE: Thank you.

10 MS. SOBIESKI: Thank you.

11 MS. WOODALL-VOGG: Good afternoon.
12 I'm back from the City of Milwaukee. We have
13 numerous tables that are done sorting through
14 their envelopes and now have our set-asides.
15 So we are seeking guidance on the next step
16 once we have set aside the envelopes.

17 MR. POSNANSKI: Can you -- Claire,
18 can you present to Board an example of the
19 envelopes that you set aside?

20 All right. And can you --

21 MS. WOODALL-VOGG: So this is --

22 MR. POSNANSKI: -- just tell us where
23 we are looking?

24 MS. WOODALL-VOGG: -- an example
25 where the ink and the witness address is of a

1 different color. As you can see, the voter
2 filled -- or the witness filled in their street
3 address, but they didn't put the municipality
4 and state, as the state statute requires. The
5 City of Milwaukee staff will dump the address
6 and fill in that information in red ink,
7 including the zip code.

8 MR. POSNANSKI: Claire, can you
9 please just define, is there any guidance that
10 the Election Commission provides through the
11 city and other similarly situated clerks in
12 this situation?

13 MS. WOODALL-VOGG: Yes. So in
14 October 2016, it was the first -- the
15 Presidential Election of November 2016, it was
16 the first election where witness address was
17 required under State law. In October of 2016,
18 the Wisconsin Election Commission issued
19 guidance to all city clerks. They directed us
20 to complete the witness address information
21 either by contacting the voter, contacting the
22 witness or using any means within our offices
23 to -- if we are able to read the witness's
24 signature, provide their address.

25 So if the City of Milwaukee were able

1 to read the witness signature and they didn't
2 provide an address, if there is only one voter,
3 then the city or the state registered with that
4 name, then we provide the address. If there
5 are multiple, we don't make guesses. We
6 contact the voter, or we mail the ballot back
7 to them.

8 In cases like this, which is very
9 common, the voter will put their street
10 address, but not fill it in completely, which
11 is also really common. In our office, due to
12 our volume, we always do this in red ink. Any
13 time it isn't in red ink, it would be
14 initialled.

15 MR. POSNANSKI: And in 2016, that's
16 consistent with the guidance provided by the
17 WEC, the recount certifying Donald Trump the
18 winner of that election counted several of
19 these ballots that were completed in exactly
20 this fashion; is that right?

21 MS. WOODALL-VOGG: Yes. In 2016, we
22 had thousands of ballots that were completed in
23 this manner because of the newness of the
24 requirement, and there were no objections
25 raised.

1 MR. KARGE: Yes. The statute is
2 clear with respect to this. Section 8 -- or,
3 I'm sorry, Section 6.87(6)(d) states, "If a
4 certificate is missing the address of the
5 witness, the ballot may not be counted." There
6 is further provision that says -- Subsection 9,
7 if a municipal clerk proceeds with an absentee
8 ballot with an improperly completed certificate
9 or with no certificate, the clerk may return
10 the ballot to the elector inside the sealed
11 envelope. When an envelope is received
12 together with a new envelope, if necessary,
13 whenever time permits the elector to correct
14 the defect and return the ballot for the period
15 authorized under the subsection.

16 There is no authorization for the
17 clerk to complete a ballot envelope, a
18 certificate that is missing the address. It's
19 -- the statute specifically states that if a
20 certificate is missing the address of the
21 witness, a ballot may not be counted. That's a
22 mandatory. May not be counted.

23 This process violates the statute.
24 It is in violation of the exception, which
25 allows the ballot to be returned to the

1 elector. And that by testimony we just heard,
2 by the statements we just heard, there is no
3 intent to do so in contravention to the
4 specific statutory provisions which addressed
5 this very issue.

6 The correct process should have been
7 once the missing address was noted, to return
8 the ballot to the elector for the correction.
9 There is no authority in the statute for a
10 clerk to on their own for whatever reason fill
11 in misinformation. And the fact that the
12 Election Commission provided guidance does not
13 contraband or override the statute.

14 MR. MEULER: I would certainly like
15 the be heard.

16 First of all, I do have a submission
17 I would like to make part of the record on this
18 issue, a brief. And if I can come up and hand
19 it over to everybody.

20 MR. POSNANSKI: That would be great.

21 MR. MEULER: And I don't know it's
22 the pleasure of the Commission to look at that
23 for a minute, or if you would like for me to
24 proceed with argument and statements?

25 MR. POSNANSKI: Proceed.

1 MR. MEULER: And just for the record,
2 this can be made part of the record, part of
3 this submission that I just handed in?

4 MR. POSNANSKI: We will make this
5 submission as part of the record.

6 MR. MEULER: Thank you.

7 Let me be clear about what's being
8 argued here. Trump Campaign is trying to
9 rewrite the rules of -- rewrite the rules of
10 the game after it has been played. What
11 happened -- here's what happened here. They
12 are saying that it's illegal for the clerks to
13 have added the witness addresses.

14 Section 6.87(6)(d), which is the
15 statute at issue was enacted in -- by 2015, Act
16 261, which was effective in March of 2016.
17 There's no dispute that the witness's address
18 is required by statute. The question is
19 whether there is discretion for the clerks to
20 enter the information. Now, the Wisconsin
21 Election Commission, which by law is charged by
22 administering these statutes took a look at it,
23 and it's noted in our brief. But after the WEC
24 staff issued some initial guidance telling
25 clerks that voters needed to -- that the voters

1 needed to fix deficiencies. The clerks didn't
2 make any changes.

3 The clerks raised concerns. And the
4 WEC staff met with the staff of then Attorney
5 General Brad Schimmel and advised that the
6 voters -- that office advised that the voters
7 consent wasn't necessary for the clerk if the
8 clerks could obtain the missing witness address
9 information from other reliable sources.

10 Now, the Bipartisan Elections
11 Commission unanimously voted to change the
12 guidance to direct, as Milwaukee -- City of
13 Milwaukee Election Commissioner -- or Deputy
14 Director just noted that clerks must fix the
15 witness address information if they can.

16 So then there is this guidance memo
17 from October 18th of 2018. It's been applied
18 since that time in 11 statewide elections.
19 Everyone has relied on it. Clerks, voters.
20 And even you will see attached to the brief,
21 the Wisconsin Election Commission confirmed
22 this guidance again after the election to
23 respond to issues that have been raised.

24 This hasn't been challenged until
25 now. And what they are basically trying to do

1 is disenfranchise, ultimately statewide,
2 hundreds and thousands of people -- or maybe a
3 hundred -- I don't know the exact number. I
4 shouldn't say hundreds and thousands. But they
5 are trying to disenfranchise, based on the
6 clerk's doing, exactly what they have been told
7 to do.

8 So if you want to change the rules of
9 the game, you can change it for the next -- the
10 next game, but this election has already
11 happened. People relied on this. If the
12 clerks weren't so instructed, maybe they -- you
13 know, chances are they would have tried to
14 contact the voters or find other ways to
15 correct the information prior to election day.
16 But that hasn't happened because of the
17 instructions that they had. So you don't
18 change the rules of the game after it's already
19 been played.

20 MR. KARGE: The rules of the game are
21 the statutes, not what the Election Commissions
22 dictate. That simply gives the Election
23 Commission carte blanche authority to overrule
24 a specific statute enacted by the legislature.
25 The language that I read of the statute cannot

1 be clearer as to what the intent of the
2 legislature is with respect to this specific
3 question.

4 It says that an absentee ballot
5 envelope with a missing witness or incomplete
6 certification may not be counted. It then
7 gives the potential remedy and fix for that,
8 which was not followed here.

9 The rules of the game are set forth
10 by the legislature, and the Election Commission
11 has no right or authority to change that.
12 Regardless of when they did it, the statute is
13 the same. It has not been amended or modified
14 and it cannot be clearer on this point. It's
15 in black and white.

16 MR. MEULER: They are asking for
17 retroactive application of something that has
18 been in place for years. If they want the --
19 if they want, you know, the rules to change, go
20 ahead and try and change it for the next
21 election. But everyone relied on this and
22 behaved to the -- you know, according this --
23 according to these rules in this memo.

24 MR. BAAS: So am I to understand that
25 just following orders is somehow going to be

1 sufficient? Because if last century everybody
2 said they were following orders, that wouldn't
3 have really got it done.

4 MR. MEULER: Well, I don't -- I
5 somewhat disagree. I don't think that's an act
6 of comparison, respectfully. But --

7 MR. BAAS: I just want to get your
8 attention. Obviously I'm not comparing anybody
9 to that group. But what you are saying is we
10 were -- somebody issued defective instructions,
11 but because if they didn't need to be
12 defective, we should just go with it.

13 MR. MEULER: I don't think they are
14 defective. I would disagree with that. I
15 understand your argument. I disagree that they
16 are defective. I think that it, you know --

17 MR. BAAS: How are they not defective
18 if they contradict the statute?

19 MR. MEULER: I don't think that they
20 do contradict the statute.

21 MR. POSNANSKI: I don't think they do
22 contradict the statute. And the guidance of
23 the WEC, which, again, this very body ruled
24 upon consistent with accepting these very
25 ballots under that guidance provided by the WEC

1 in last recount provides what is an address,
2 what is a street address. And in this case in
3 particular, we saw the examples of the exhibit
4 in front of us where the street address is
5 provided. It's there. The address is there.

6 So I don't see there's grounds for
7 invalidating or not accepting this ballot based
8 on the envelope containing the witness, which
9 includes the witness's signature, it includes
10 the witness's street address. The clerk, as
11 instructed by the WEC, was readily able to
12 determine the complete address for this witness
13 and consistent with the guidance of the WEC
14 issues to the clerk, consistent with state law.

15 Again, I do not think that Wisconsin
16 Statute 6.87 Subsection D refutes the guidance
17 or somehow contradicts the guidance given by
18 the WEC. In fact, the guidance from the WEC
19 explains and further elaborates upon the
20 requirements of the statute.

21 So I believe that these ballots in
22 this nature should be accepted, and the
23 objection should be overruled. As to any
24 further objection at the Committee level, I
25 would think it would be fair to have a motion.

1 MR. BAAS: I would just also like to
2 have on the record that at some point some
3 things are law, and after a decision is made,
4 they are no longer law. So the fact that just
5 because perhaps the application has not been
6 accurate doesn't mean that you need keep going.
7 But I understand and respect your opinion.

8 I say that we move to a vote. I'm
9 going to make a motion that we reject the
10 ballots that have been completed by any third
11 person, including the clerk, and -- which is
12 not --

13 Which out of compliance with 6.87?

14 MR. KARGE: Yes.

15 MR. BAAS: You got a subsection for
16 me?

17 MR. MEULER: 6(d).

18 MR. KARGE: 6(d).

19 MR. BAAS: Thank you.

20 MR. POSNANSKI: I think before I call
21 for a second, I think it would actually be
22 easier to make the vote in the affirmative
23 rather than in the negative. Meaning that I
24 would move that we accept these ballots that
25 are completed not just by any third person, but

1 completed by the clerks consistent with
2 specific guidance in the WEC, which I view as
3 consistent with Wisconsin Statute 6.87(6)(d).
4 And if these envelopes, these ballots be
5 counted and included in the recount.

6 MS. WEST: So just a point of
7 clarification. Just to make sure. It's the
8 certification on the envelope and it is the
9 address specifically?

10 MR. POSNANSKI: That is correct.

11 MR. KARGE: May I just --

12 MR. POSNANSKI: With that
13 modification.

14 MR. KARGE: May I make one point
15 before you vote?

16 MR. POSNANSKI: Counsel, I think
17 you've been heard on this subject.

18 MS. MARTIN: I would like to second
19 the motion, please.

20 MR. CHRISTENSON: So the motion -- on
21 the motion to accept -- if can you repeat it
22 for me, I would appreciate it. What was it
23 again?

24 MS. WEST: So to accept the -- and
25 count the ballots that have included in

1 envelopes, forwarded absentee ballots that have
2 been sent in envelopes where the certification
3 on the envelope originally lacked complete
4 address, but then subsequently filled in by the
5 clerk. Accurate?

6 MR. BAAS: The witness.

7 MS. WEST: The witness.

8 MR. CHRISTENSON: Okay. On the
9 motion by Chairman Posnanski.

10 Commissioner Baas?

11 MR. BAAS: No.

12 MR. CHRISTENSON: Commissioner
13 Martin?

14 MS. MARTIN: Yes.

15 MR. CHRISTENSON: Chairman Posnanski?

16 MR. POSNANSKI: Yes.

17 MR. POSNANSKI: Two ayes, one no.

18 MR. KARGE: Mr. Chairman, I've been
19 advised that there are numerous tables with
20 observers hands up raising objections that,
21 obviously as I've been sitting here, I don't
22 know the substance of --

23 MS. WEST: Can we just finish up on
24 this one, please, a directive as to how to
25 handle these?

2020 PRESIDENTIAL RECOUNT

Location: The Wisconsin Center
400 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Date: November 21, 2020

Time: 9:00 a.m. to 8:02 p.m.

Proceedings Reported By:
Alicia Pabich, CSR

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A P P E A R A N C E S

FOR THE MILWAUKEE ELECTION COMMISSION:

Mr. Tim Posnanski, Chairman
Ms. Dawn Martin, Election Commissioner
Mr. Rick Baas, Election Commissioner
Mr. George Christenson, Milwaukee County Clerk
Ms. Julietta Henry, Milwaukee County Elections
Director
Ms. Michelle Hawley, Milwaukee County Elections
Director
Ms. Margaret Daun, Milwaukee County Corporation
Counsel
Mr. Stefan Dostanic, Milwaukee County Deputy Clerk

FOR THE TRUMP CAMPAIGN:

Attorney Stewart Karge
Attorney Joseph Voiland
Mr. Kenneth Dragotta

FOR THE BIDEN CAMPAIGN:

Attorney Christopher Meuler
Attorney Chris Trebatoski
Attorney Stacie Rosenzweig

MUNICIPALITIES:

Village of Bayside, Clerk Lynn Galyardt
Village of Brown Deer, Clerk Jill Kenda-Lubetski
City of Cudahy, Deputy Clerk Kelly Sobieski
Village of Greendale, Clerk Melanie Pietruszka
Village of Hales Corners, Clerk Sandra Kulik
City of Wauwatosa, Clerk Melanie Kollmansberger
City of Franklin, Clerk Sandi Wesolowski
City of Milwaukee, Executive Director Claire
Woodall-Vogg
City of Oak Creek, Clerk Catherine Roeske
Village of Shorewood, Clerk Sara Bruckman

02:15:37 1 MR. KARGE: I'm sorry. Yes, we are
02:15:38 2 objecting to that. If you want to receive the
02:15:42 3 basis for the objection?

02:15:43 4 MR. POSNANSKI: We should proceed
02:15:46 5 with that objection, if that objection has not
02:15:49 6 yet been heard on your side.

02:15:53 7 MR. KARGE: Yes. The statute that
02:15:56 8 creates the category of indefinitely confined
02:16:01 9 electors creates an impermissible
02:16:03 10 classification of electors in violation of the
02:16:06 11 Equal Protection and Due Processes Clauses of
02:16:08 12 the U.S. Constitution. Unlike electors who
02:16:13 13 request an absentee ballot, those who assert
02:16:15 14 they are indefinitely confined are not inclined
02:16:16 15 to present photo ID or proof of legal
02:16:19 16 residence, nor is there any uniform
02:16:24 17 justification of basis required for such
02:16:26 18 clarification, as the Wisconsin absentee ballot
02:16:27 19 application simply allows the purported voter
02:16:32 20 to individually certify that they are
02:16:34 21 indefinitely confined with no discernable
02:16:37 22 objection standing.

02:16:39 23 The statute is also a void for
02:16:43 24 vagueness for those reasons. There is no
02:16:45 25 requirement to determine the valid status of

02:16:45 1 the voter, which is, in essence, an open
02:16:50 2 indication for fraud and abuse.

02:16:52 3 The numbers of those claiming to be
02:16:54 4 indefinitely confined has risen exponentially
02:16:59 5 since the clerk for Milwaukee County put a post
02:16:59 6 on its website encouraging electors to vote
02:17:03 7 indefinitely confined, regardless of their
02:17:07 8 actual status.

02:17:07 9 I am prepared to put into evidence a
02:17:12 10 spreadsheet of the sample of voters who have
02:17:15 11 declined to be indefinitely confined throughout
02:17:19 12 the state of Wisconsin, and have, through a
02:17:23 13 Facebook posting or other social media
02:17:26 14 postings, which are listed as a -- in their
02:17:29 15 minds are clearly not indefinitely confined.
02:17:35 16 And I would be prepared to submit that in
02:17:38 17 writing at the appropriate time.

02:17:39 18 MR. POSNANSKI: So this spreadsheet
02:17:44 19 included indefinitely confined voters
02:17:46 20 throughout the state of Wisconsin?

02:17:50 21 MR. KARGE: Yes. As an example of
02:17:53 22 the type of abuse that this constitutes. It is
02:17:56 23 not directed to show that the number of people
02:17:58 24 on there is the universe of those which fall
02:18:00 25 into this category. We are objecting to this

02:18:03 1 as a classification, which is in violation of
02:18:07 2 the due process equal protection order for
02:18:13 3 vagueness provisions.

02:18:17 4 May I --

02:18:18 5 MR. POSNANSKI: Set the spreadsheet
02:18:21 6 aside for the moment. Do you have any other
02:18:24 7 comments that you would make on this point?

02:18:29 8 MR. KARGE: Well, for each such
02:18:32 9 improperly completed absentee ballot
02:18:33 10 certification for indefinitely confined, and we
02:18:37 11 ask that the poll list reduced by the number of
02:18:39 12 ballot envelopes be set aside. Even if the
02:18:41 13 Board of Canvassers rejects our challenges, we
02:18:46 14 request that the Board determine the total
02:18:47 15 number of eligible voters on the poll list as
02:18:49 16 if the challenge was granted and conducted in
02:18:52 17 an appropriate drawn-down condition.

02:18:55 18 This would prevent the need to
02:18:56 19 conduct an additional, not necessary, recount.
02:18:56 20 But the objection is ultimately made by the
02:19:02 21 Board, as we agreed, nevertheless.

02:19:04 22 MS. DAUN: Mr. Chairman, can I ask a
02:19:04 23 couple follow-up questions?

02:19:07 24 Counsel, so you are proposing to have
02:19:10 25 the Board consider to accept as evidence in the

02:19:12 1 recount a spreadsheet; is that correct?

02:19:17 2 MR. KARGE: I am asking them to take
02:19:19 3 into consideration the spreadsheet which
02:19:22 4 shows --

02:19:23 5 MS. DAUN: But we are talking about a
02:19:25 6 spreadsheet, not the Facebook posts themselves
02:19:27 7 is my question.

02:19:31 8 MR. KARGE: Well, the spreadsheet is
02:19:31 9 an Excel spreadsheet that lists the names of
02:19:34 10 individuals, and at the far end, has a Facebook
02:19:37 11 reference or social media reference, which
02:19:40 12 would open up and identify the reason why we
02:19:45 13 believe this person who claimed to be
02:19:50 14 indefinitely confined is not.

02:19:52 15 MS. DAUN: But this spreadsheet, you
02:19:53 16 are not submitting the actual Facebook posts
02:19:55 17 themselves; is that correct?

02:19:56 18 MR. KARGE: If you wish, I could have
02:19:59 19 that done for purposes of administering these.
02:20:02 20 I have -- you can open up the references
02:20:05 21 themselves, but I have a spreadsheet which has
02:20:08 22 the information and a link to the Facebook
02:20:11 23 page.

02:20:11 24 MS. DAUN: So the reference that you
02:20:13 25 mean is like an HTML hyperlink to a Facebook

02:20:19 1 page to a particular user?

02:20:20 2 MR. KARGE: Yes.

02:20:21 3 MS. DAUN: So my second -- or my next
02:20:23 4 follow-up question is, you have no evidence
02:20:25 5 that goes to whether or not when a witness
02:20:27 6 signed or attested to their indefinite
02:20:30 7 confinement, that they at that time did not
02:20:34 8 hold a general and reasonable good-faith belief
02:20:35 9 that they were indefinitely confined? These
02:20:38 10 are live links today?

02:20:40 11 MR. KARGE: They were at the time of
02:20:42 12 the election --

02:20:42 13 MS. DAUN: Well --

02:20:45 14 MR. KARGE: -- or shortly thereafter.

02:20:45 15 MR. POSNANSKI: So there's --

02:20:47 16 MR. KARGE: Hold on. In close
02:20:48 17 proximity to the time of the election
02:20:51 18 demonstrating that they were not indefinitely
02:20:54 19 confined at that time.

02:20:55 20 MS. DAUN: Is there date-stamped
02:20:57 21 evidence we can see?

02:21:00 22 MR. BAAS: I was going to say, are
02:21:02 23 you talking about posts that they made?

02:21:03 24 MR. KARGE: Yes.

02:21:05 25 MR. BAAS: So those would be time and

02:21:06 1 date stamped?

02:21:06 2 MR. KARGE: Yes.

02:21:06 3 MR. POSNANSKI: At or on the date of
02:21:08 4 the election?

02:21:09 5 MR. KARGE: Yes. Shortly after.

02:21:11 6 MS. DAUN: And have you personally
02:21:13 7 viewed each of these Facebook pages?

02:21:19 8 MR. KARGE: Yes. So if I may present
02:21:21 9 the spreadsheet as an exhibit?

02:21:24 10 MR. POSNANSKI: How many individuals
02:21:25 11 identified in the spreadsheet are residents of
02:21:29 12 Milwaukee County?

02:21:31 13 MR. KARGE: I don't believe any of
02:21:33 14 them are. But they are representative of the
02:21:37 15 type of abuse that is subject to this
02:21:42 16 individual provision.

02:21:43 17 MS. ROSENZWEIG: Members of the
02:21:44 18 Commission, Stacie Rosenzweig, Counsel for
02:21:45 19 Biden for President. I would just like to
02:21:47 20 object to the introduction that that's
02:21:50 21 evidence, as it's hearsay and it's irrelevant
02:21:52 22 to Milwaukee County at that particular time.

02:21:59 23 MR. KARGE: If the objection is
02:22:00 24 sustained, I would like to make an offer of
02:22:03 25 proof by submitting the spreadsheet,

02:22:06 1 nevertheless, as part of the record.

02:22:07 2 MR. POSNANSKI: I think that would be
02:22:09 3 more appropriate to make the offer of proof and
02:22:10 4 allow it to be at least be part of the record.
02:22:12 5 But I would agree that I don't believe it's
02:22:14 6 relevant. I believe it is hearsay. And I
02:22:17 7 don't believe it has any probative value for
02:22:20 8 our purposes here to recertify the recount in
02:22:22 9 Milwaukee County. And by Counsel's own
02:22:24 10 admission the spreadsheet does not include any
02:22:27 11 voters from Milwaukee County who allegedly ran
02:22:31 12 afoul of the statutory requirements as alleged
02:22:34 13 by Counsel.

02:22:36 14 And I would be inclined, and so move,
02:22:38 15 that we do not admit the spreadsheet into
02:22:42 16 evidence, but allow Counsel to make an offer of
02:22:45 17 proof so that this spreadsheet is at least a
02:22:48 18 part of the record.

02:22:49 19 MR. BAAS: Second.

02:22:53 20 MR. CHRISTENSON: On the motion.

02:22:58 21 Commissioner Baas?

02:22:59 22 MR. BAAS: Aye.

02:22:59 23 MR. CHRISTENSON: Commissioner

02:23:03 24 Martin?

02:23:03 25 MS. MARTIN: Aye.

02:23:06 1 MR. CHRISTENSON: Chairman Posnanski?

02:23:08 2 MR. POSNANSKI: Aye.

02:23:09 3 MR. CHRISTENSON: Three ayes, zero

02:23:09 4 noes.

02:23:09 5 MR. KARGE: Can I submit the

02:23:11 6 spreadsheet, Chairman?

02:23:11 7 MR. POSNANSKI: You can submit it to

02:23:13 8 the court reporter, and have her mark it as

02:23:16 9 County Exhibit, whatever the next number is in

02:23:19 10 order.

02:23:19 11 MS. ROSENZWEIG: Counsel, do you have

02:23:21 12 a copy for the Biden Campaign?

02:23:27 13 MR. KARGE: Yes, I do.

02:23:39 14 MR. POSNANSKI: And then,

02:23:40 15 Ms. Rosenzweig, do you wish to be heard on the

02:23:40 16 arguments advanced by Counsel with respect to

02:23:44 17 the indefinitely confined voter?

02:23:44 18 MS. DAUN: I just have one quick

02:23:46 19 question before the representative from either

02:23:49 20 Campaign addresses the Commission as well. Do

02:23:51 21 you have any direct evidence that you would

02:23:53 22 offer today, sir, that any one of those people

02:23:56 23 on the spreadsheet that you just provided

02:24:00 24 relied upon the statement of the Milwaukee

02:24:03 25 County Clerk George Christenson that was out, I

02:24:07 1 believe, for two days before it was retracted
02:24:09 2 and pulled down relating to what "indefinite
02:24:12 3 confinement" means?

02:24:14 4 MR. KARGE: I do not have specific
02:24:16 5 evidence as to those people on the spreadsheet.

02:24:20 6 MS. DAUN: Presuming they are not
02:24:22 7 Milwaukee County residents, none of them would
02:24:22 8 have relied on the statement by Milwaukee
02:24:24 9 County Clerk George Christenson with respect to
02:24:27 10 their absentee voting.

02:24:28 11 MR. KARGE: I would note for the
02:24:30 12 record that a similar statement was put out by
02:24:34 13 the Dane County Clerk's Office at about the
02:24:37 14 same time for the same thing. I would also
02:24:39 15 like to note for the record that the number of
02:24:42 16 people claiming to be indefinitely confined has
02:24:46 17 risen from around 60,000 to over 200,000 only
02:24:51 18 for this election.

02:24:53 19 MS. DAUN: But then no one on that
02:24:56 20 list -- you are not arguing that anyone on the
02:24:58 21 list be provided relied upon Mr. Christenson's
02:25:01 22 statement back in March of 2020.

02:25:03 23 MR. KARGE: I am not saying that they
02:25:05 24 did not. You are asking if I had any proof.
02:25:08 25 It is my belief that that's what he did.

02:25:11 1 MS. DAUN: But you have no evidence
02:25:13 2 that there was any reliance at all?

02:25:15 3 MR. KARGE: I do not have any
02:25:16 4 evidence of those people, but it is my belief
02:25:20 5 and my contention is that notice was a material
02:25:22 6 impact on increasing the number of indefinitely
02:25:26 7 confined electors from approximately 60,000 to
02:25:30 8 over 240,000.

02:25:33 9 MS. DAUN: I understand your
02:25:34 10 contention, but just to be sure the record is
02:25:36 11 clear, you are presenting zero evidence of that
02:25:38 12 contention; correct?

02:25:40 13 MR. KARGE: I am presenting evidence
02:25:42 14 through the spreadsheet, which has not been
02:25:46 15 allowed to be even put into evidence, of people
02:25:48 16 who have claimed to be indefinitely confined,
02:25:52 17 and clearly were not at the time of the
02:25:54 18 election.

02:25:55 19 MS. DAUN: Mr. Chairman, may I let
02:25:57 20 the record reflect that the witness has, in
02:25:59 21 various ways and forms, stated on the record
02:26:03 22 that there is no evidence showing that any of
02:26:04 23 the people on the spreadsheet relied
02:26:07 24 specifically on Mr. Christenson's statements as
02:26:09 25 they are not Milwaukee County residents.

02:26:11 1 MR. POSNANSKI: And I think we
02:26:11 2 understand the record at this point. And I
02:26:13 3 would like to hear briefly from Ms. Rosenzweig
02:26:18 4 before we move forward with this issue.

02:26:19 5 MS. ROSENZWEIG: Thank you,
02:26:20 6 Mr. Chairman.

02:26:21 7 We do have an issue brief on this
02:26:23 8 issue, that I would like introduce into the
02:26:25 9 record and pass around, if that's all right.

02:26:29 10 MR. POSNANSKI: Thank you. Yes.

02:27:02 11 MS. ROSENZWEIG: Would the
02:27:03 12 Commissioners like a few minutes to just
02:27:05 13 briefly review before I give some remarks?
02:27:14 14 Thank you.

02:31:54 15 MR. POSNANSKI: Commissioner Martin,
02:31:56 16 do you need a moment to read the document?

02:32:01 17 You can proceed, Ms. Rosenzweig.

02:32:01 18 MS. ROSENZWEIG: Thank you.

02:32:02 19 The Trump Campaign's objection to
02:32:04 20 these large swathes of ballots is nothing more
02:32:08 21 than bald attempt to disenfranchise tens and
02:32:10 22 thousands of primarily elderly and disabled
02:32:14 23 voters. This was a duly enacted statute. This
02:32:16 24 is not the appropriate time or place for a
02:32:19 25 factual challenge to a statute that was in

02:32:22 1 effect at the time of the election and remains
02:32:24 2 in effect now. This is simply an attempt to
02:32:27 3 knock those voters off the rolls for absolutely
02:32:32 4 no fault of their own.

02:32:34 5 The statute allows electors to
02:32:34 6 determine for themselves whether they meet the
02:32:37 7 criteria of "indefinitely confined." It does
02:32:40 8 not require that they cannot leave their house.
02:32:43 9 It does not require that they are permanently
02:32:46 10 confined and will never be able to leave their
02:32:48 11 house again. This is a determination they make
02:32:51 12 themselves.

02:32:51 13 And the Campaign's objection to these
02:32:55 14 ballots is simply meritless, if these
02:32:58 15 individual electors did decide for themselves
02:32:58 16 that they were indefinitely confined. The
02:33:01 17 Campaign put forth no evidence whatsoever that
02:33:04 18 a single voter did not meet this criteria. And
02:33:08 19 even if they did, that does not justify
02:33:12 20 disqualifying potentially tens of thousands of
02:33:15 21 ballots of elderly, disabled and ill
02:33:17 22 individuals.

02:33:18 23 And I do believe the statistic of --
02:33:19 24 was incorrectly cited due to the other side.
02:33:22 25 Our position is that there were 160,000,

02:33:23 1 approximately, indefinitely confined voters as
02:33:27 2 of April, and that did grow up to 215,000
02:33:32 3 around this time. But that makes sense. We
02:33:34 4 are in the middle of a pandemic.

02:33:37 5 And although the statute does not
02:33:37 6 allow people to declare themselves indefinitely
02:33:41 7 confined for the purpose of people avoiding the
02:33:41 8 photo ID requirement, it makes logical sense
02:33:45 9 that many, many more people will quarantine
02:33:49 10 themselves and be largely unable to leave their
02:33:52 11 house unless it's to get medical attention and
02:33:54 12 groceries.

02:33:56 13 And, again, at this time, with a
02:33:58 14 pandemic raging, it makes sense that people
02:34:03 15 would declare themselves indefinitely confined.
02:34:07 16 That is up to the voters to decide. That is
02:34:09 17 not up to the Trump Campaign to make that
02:34:11 18 decision. They can't substitute their judgment
02:34:14 19 for that of the voter.

02:34:15 20 So we request that this challenge be
02:34:18 21 denied. I will be happy to take other
02:34:20 22 questions, but otherwise I rest on our
02:34:23 23 submission to the Trump Campaign. Thank you.

02:34:24 24 MR. POSNANSKI: Thank you.

02:34:24 25 MR. KARGE: If I may? If I may

02:34:27 1 briefly?

02:34:27 2 MR. POSNANSKI: Briefly. I would
02:34:28 3 like to avoid the colloquy going back and
02:34:33 4 forth.

02:34:33 5 MR. KARGE: I will point out that in
02:34:36 6 Section 6.84 on absentee voters, it states that
02:34:40 7 voting is a Constitutional right, but absentee
02:34:44 8 voting is a privilege. A privilege which
02:34:46 9 should not be abused. Counsel just spoke that
02:34:50 10 it is up to the individuals to determine
02:34:52 11 whether or not they are indefinitely confined.
02:34:54 12 They don't have to meet the regular standards
02:34:58 13 of a government absentee voter. They are
02:35:01 14 created in a separate class of voters without
02:35:05 15 the same safeguards that every other absentee
02:35:08 16 voter is required to meet in this country.

02:35:11 17 And one does not need -- well, it's
02:35:17 18 appropriate at this time to raise that, because
02:35:19 19 these are the votes that are being counted.
02:35:21 20 And that should be more appropriate than a
02:35:24 21 recount to address the issue of this type of
02:35:27 22 provision. For purposes of brevity, I will
02:35:32 23 just stand on my other objections.

02:35:34 24 MR. POSNANSKI: Thank you.

02:35:39 25 So I would note that, as I pointed

02:35:39 1 out with the submission of the brief and
02:35:46 2 Ms. Rosenzweig's comments, I identified a
02:35:47 3 guidance provided by the Milwaukee County
02:35:51 4 Election Commission, which was reviewed and
02:35:53 5 approved by the *Supreme Court in Jefferson*
02:35:57 6 *County versus Dane County*, where it clearly
02:35:57 7 states that a designation of an indefinitely
02:35:58 8 confined status is for each individual voter to
02:36:01 9 make based upon their current circumstances.

02:36:04 10 We've heard from the voters why it is
02:36:07 11 for voters to decide that is consistent with
02:36:09 12 the guidance we were provided, which was
02:36:12 13 particularly reviewed by the Supreme Court.
02:36:14 14 But -- and it is not for the Trump Campaign to
02:36:19 15 decide whether or not that voter was in fact
02:36:22 16 indefinitely confined at the time of that
02:36:24 17 request, nor is it for us to.

02:36:26 18 More importantly, there has been no
02:36:29 19 evidence of any voter in Milwaukee County
02:36:31 20 offered that has abused this process and voted
02:36:34 21 through this status, whether it was -- it's not
02:36:38 22 even an allegation that there was a single
02:36:43 23 voter who abused this process to vote without
02:36:45 24 providing proof of their ID, but eliminating
02:36:49 25 proof that anyone did so. So there's no

02:36:53 1 allegation. There's no proof. There's no
02:36:54 2 evidence.

02:36:54 3 Even in the offer of proof offered by
02:36:57 4 the Counsel for the Trump Campaign did not
02:36:58 5 include any Milwaukee County voters who
02:37:01 6 allegedly abused this process through the proof
02:37:05 7 by Facebook at or near the time of the
02:37:09 8 election.

02:37:09 9 So based upon that, I would vote to
02:37:13 10 overrule any such objections to -- sorry. Yes.
02:37:20 11 I would move to overrule any such objections
02:37:23 12 based upon voter status as "indefinitely
02:37:27 13 confined." And we will allow this motion -- we
02:37:31 14 will certainly allow the Trump Campaign to
02:37:34 15 continue to make a record. But I would vote to
02:37:37 16 overrule the objection, and move that these
02:37:42 17 envelopes be included in the count.

02:37:46 18 MS. MARTIN: I second.

02:37:48 19 MR. BAAS: First of all, I understand
02:37:52 20 and, like a lot of people think like I do,
02:37:57 21 question the huge increase. I understand the
02:38:01 22 pandemic. And I still find the numbers to be
02:38:04 23 kind of impressively large. I would also, from
02:38:08 24 my humble position as commissioner, express my
02:38:11 25 frustration with the state legislature in their

02:38:16 1 inability to make clear election laws, because
02:38:19 2 after all, this is not something you want a lot
02:38:22 3 of ambiguity in.

02:38:24 4 Having said that, the fact that
02:38:26 5 Milwaukee County is not referenced in your
02:38:29 6 materials, sir, I don't believe this to be an
02:38:35 7 appropriate body either.

02:38:36 8 MR. CHRISTENSON: On the motion.
02:38:39 9 Commissioner Baas?

02:38:40 10 MR. BAAS: Present.

02:38:43 11 MS. DAUN: It's an aye or nay.

02:38:54 12 MR. BAAS: It is "present."

02:38:54 13 MR. CHRISTENSON: Commissioner
02:38:54 14 Martin?

02:38:58 15 MS. MARTIN: Aye.

02:38:58 16 MR. CHRISTENSON: Chairman Posnanski?

02:38:59 17 MR. POSNANSKI: Aye.

02:39:00 18 MR. CHRISTENSON: Two ayes, zero
02:39:02 19 noes, one "present."

02:39:03 20 MR. POSNANSKI: And consistent with
02:39:04 21 the motion that just carried, we should set
02:39:04 22 aside those ten envelopes as the City of
02:39:11 23 Milwaukee -- the next City of Milwaukee
02:39:13 24 exhibits going forward. So there were two
02:39:19 25 envelopes present here that have different

03:24:30 1 represented yesterday.

03:24:31 2 They are initially in the log that is
03:24:33 3 contained by the clerk's office. The clerk
03:24:37 4 then goes through the process of entering their
03:24:39 5 information directly into the WisVote system.
03:24:43 6 They are then provided an envelope, which
03:24:44 7 includes at the very top that that is also an
03:24:46 8 application. So they go through that process
03:24:48 9 in detail. Indeed, the declarations that have
03:24:53 10 been submitted by the Biden Campaign are very
03:24:55 11 helpful in this regard in supplementing the
03:24:58 12 record of what those individuals do when they
03:25:00 13 are presented to the clerk's office.

03:25:02 14 Moreover, our Deputy Director was
03:25:03 15 kind enough to give me the total number of
03:25:05 16 absentee voters who voted in person in
03:25:08 17 Milwaukee County, and that's 108,947, which can
03:25:13 18 be determined through the spreadsheet that was
03:25:15 19 provided to both of you. Thanks.

03:25:18 20 So with that, I don't believe we need
03:25:22 21 to further belabor this point. I do accept the
03:25:25 22 submission from the Biden Campaign as evidence.
03:25:26 23 I think at this point we can move to deny the
03:25:30 24 request that absentee voter envelopes of those
03:25:33 25 who voted in person be separately segregated.

03:25:36 1 And I further believe at this point, we can
03:25:39 2 rule on the substance of the objection, and
03:25:42 3 overrule the objection that any such envelopes
03:25:45 4 and ballots contained therein would be
03:25:49 5 rejected.

03:25:49 6 And I so modify my motion.

03:25:54 7 MR. KARGE: Mr. Chairman, page two of
03:25:57 8 the Biden submission says, "The absentee
03:26:01 9 ballots certification envelopes served as a
03:26:02 10 written application for voters who choose to
03:26:05 11 vote early through the absentee process."

03:26:07 12 MR. POSNANSKI: And -- that is not
03:26:09 13 the position. I just reiterated the position
03:26:12 14 of the Board in making my motion, so no.

03:26:14 15 MR. KARGE: Now you are rejecting the
03:26:17 16 Biden submission?

03:26:18 17 MR. POSNANSKI: We have received
03:26:20 18 their submission, but that -- I have not
03:26:22 19 adopted their arguments. I have received their
03:26:26 20 submission, and I have reviewed the
03:26:28 21 declarations that are contained therein that
03:26:31 22 correspond with what we determined yesterday,
03:26:35 23 so that the record is clear. And, again, if
03:26:37 24 there's any doubt, I incorporated my reference
03:26:42 25 to a discussion on this point yesterday.

03:26:44 1 But at this point, I made the motion.

03:26:46 2 And I am waiting to get a second.

03:26:48 3 MR. BAAS: Motion to be called.

03:26:51 4 MR. CHRISTENSON: Commissioner Baas?

03:26:53 5 MR. POSNANSKI: Hold on. I modified

03:26:59 6 the motion. Can I get a second?

03:26:59 7 MS. MARTIN: Second the motion.

03:27:01 8 MR. CHRISTENSON: On the motion.

03:27:02 9 Commissioner Baas?

03:27:05 10 MR. BAAS: The motion, please?

03:27:12 11 MR. POSNANSKI: Hold on. Let me try

03:27:13 12 to state it as clearly as I can. On the motion

03:27:16 13 to reject the Trump Campaign request that all

03:27:21 14 absentee envelopes in-person votes be

03:27:28 15 separately segregated in the recount, that that

03:27:32 16 request be rejected, and that any objection to

03:27:37 17 in-person absentee votes being removed.

03:27:46 18 MR. BAAS: Thank you.

03:27:47 19 MS. DAUN: Just, again, to clarify.

03:27:51 20 It would be an objection that is on the basis

03:27:54 21 that the application is insufficient in some

03:27:58 22 way, that that objection to in-person absentee

03:28:02 23 ballots as evidenced by envelopes be overruled.

03:28:07 24 Is that the Chair's motion?

03:28:09 25 MR. POSNANSKI: Yes. Thank you.

03:28:10 1 MS. DAUN: Thank you.

03:28:12 2 MR. CHRISTENSON: On the motion.

03:28:13 3 Commissioner Baas?

03:28:14 4 MR. BAAS: No.

03:28:16 5 MR. CHRISTENSON: Commissioner

03:28:17 6 Martin?

03:28:17 7 MS. MARTIN: Yes.

03:28:19 8 MR. CHRISTENSON: Chairman Posnanski?

03:28:20 9 MR. POSNANSKI: Yes.

03:28:22 10 MR. CHRISTENSON: Two ayes, one no.

03:28:37 11 MR. KARGE: Point of order.

03:28:39 12 MR. POSNANSKI: We need to move

03:28:41 13 forward with Bayside.

03:28:42 14 MR. KARGE: I just would like to ask

03:28:45 15 one question. How would I have a record as to

03:28:50 16 what the number of -- other than the Board is

03:28:51 17 saying that 108,947 in-person absentee ballots;

03:28:57 18 is that correct?

03:28:58 19 MR. POSNANSKI: That's correct. That

03:29:00 20 spreadsheet is in evidence. The spreadsheet is

03:29:03 21 in the record. We marked it as an exhibit.

03:29:09 22 MR. KARGE: Okay.

03:29:09 23 MS. GALYARDT: Lynn Galyardt from the

03:29:10 24 Village of Bayside. As we were sorting our

03:29:15 25 Wards 2 and 4 ballots, the observer objected to

04:18:15 1 MR. POSNANSKI: Okay. Understood.

04:18:16 2 MS. WOODALL-VOGG: I now have ballots
04:18:30 3 for Ward 10. They appear to be 15 from Ward 10
04:18:36 4 without the clerk's initials that are being
04:18:42 5 challenged.

04:18:43 6 MR. POSNANSKI: Based upon the
04:18:46 7 Court's -- the Board's previous determinations
04:18:48 8 on these specific issues, these will be
04:18:52 9 accepted, but should be separately marked and
04:18:59 10 sequentially numbered as exhibits.

04:19:14 11 MS. DAUN: Mr. Chairman, would it be
04:19:16 12 possible to have our staff assist our court
04:19:18 13 reporter, and simply sit with a stack of
04:19:22 14 Post-it notes, and give her the name of each
04:19:25 15 exhibit, how it should be labeled.

04:19:30 16 MR. POSNANSKI: Well, if either party
04:19:34 17 doesn't has an objection with that, we would
04:19:36 18 have the staff assist with the separate,
04:19:38 19 segregated in marking, so the court reporter
04:19:41 20 can maintain a record as we proceed.

04:19:46 21 MR. VOILAND: We agree.

04:19:46 22 MR. TREBATOSKI: I have no problem
04:19:51 23 with that.

04:19:51 24 MS. WOODALL-VOGG: And additional
04:19:52 25 request with guidance, these are ballots, not

IN RE: 2020 PRESIDENTIAL ELECTION RECOUNT

Location: The Wisconsin Center
400 West Wisconsin Avenue
Milwaukee, Wisconsin

Date: November 22, 2020

Time: 9:49 a.m. to 6:14 p.m.

Reported by: Dawn M. Lahti, RPR/CRR

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A P P E A R A N C E S

FOR THE ELECTION COMMISSION:

Mr. Tim Posnanski, Chairman
Ms. Dawn Martin, Election Commissioner
Mr. Rick Baas, Election Commissioner

Mr. George Christenson, Milwaukee County Clerk
Mr. Stefan Dostanic, Milwaukee County Clerk

Ms. Julietta Henry, Milwaukee County Elections Director

Ms. Michelle Hawley, Milwaukee County Elections Deputy Director

Ms. Margaret Daun, Milwaukee County Corporation Counsel

Ms. Kathryn M. West, Assistant Milwaukee County Corporation Counsel

FOR THE TRUMP CAMPAIGN:

Attorney Stewart Karge
Attorney Joseph Voiland

FOR THE BIDEN CAMPAIGN:

Attorney Christopher Meuler
Attorney Chris Trebatoski
Attorney Stacie Rosenzweig

1 TRANSCRIPT OF PROCEEDINGS

2 CHAIRMAN POSNANSKI: Good morning.

3 We are reconvening at 9:49. Before we get
4 started and before I allow Ms. Henry to turn
5 some instructions over to the inspectors and
6 the observers, I want to make a few
7 announcements.

8 Based upon decisions that have been
9 made by the Board through the course of this
10 recount, I want to make sure that the observers
11 in particular are paying attention so that we
12 can avoid unnecessary objections and
13 unnecessary delay.

14 So I -- as in the past couple days
15 absentee envelopes with different colored ink
16 where the municipal clerk has completed a
17 witness's address should be set aside.
18 Absentee envelopes which identify indefinitely
19 confined voters should be set aside.

20 Any objection on the grounds that
21 there is no separate written application for
22 the absentee envelope should be disregarded
23 based upon the ruling of the Board of
24 Canvassers and the count should continue.

25 Any objection on the grounds that a

1 appropriate time for us to go to that vicinity
2 as well.

3 MR. KARGE: Can we do that now, Mr.
4 Chair?

5 CHAIRMAN POSNANSKI: Yes.

6 MR. KARGE: Okay.

7 (Recess taken from 10:11 a.m. to
8 11:06 a.m.)

9 CHAIRMAN POSNANSKI: I believe Mr.
10 Karge has a matter he'd like to bring to the
11 attention of the Board of Canvassers.

12 MR. KARGE: Thank you, Mr. Chairman.
13 I'd like to make two motions and provide the
14 basis for each.

15 First, I move that the Board
16 review -- or I request that the Board move to
17 review all written applications for absentee
18 ballots and certify that the number of
19 applications corresponds to the number of
20 absentee ballots cast.

21 Second, I ask that you grant the
22 request that I now make to copy the boxes of
23 written applications that have been brought to
24 this recount. No evidence of written
25 applications has yet been produced for

1 in-person absentee applications other than the
2 absentee envelopes.

3 Yesterday there was a long session
4 regarding absentee in-person ballots. A
5 spreadsheet was produced yesterday that the
6 Chair showed 108,947 in-person absentees cast
7 in Milwaukee County.

8 As part of our discussion yesterday
9 as to what the written application was for the
10 in-person absentee ballots, the Chair referred
11 to a discussion from Friday which referenced
12 the absentee ballot envelope and other possible
13 options including actual written applications.

14 We now understand that there are
15 multiple boxes of the absentee ballot
16 applications which have been brought to this
17 recount but which we have not yet been able to
18 see, identify, or inspect.

19 According to the November 2020
20 Election Recount Procedures Manual following
21 the section entitled Review Absentee Ballots,
22 the bottom of page 7 states, Examine Written
23 Absentee Applications.

24 "The Board of Canvassers then reviews
25 the written applications for absentee ballots

1 and the list of absentee voters maintained by
2 the municipal clerk. There should be a written
3 application for each absentee envelope except
4 those issued in person in the clerk's office."

5 I am not aware that the Board
6 has reviewed all written applications for
7 absentee ballots and set forth in the election
8 recount procedure quoted above.

9 But moreover, Wisconsin Statute
10 9.01(1)(b)(11) states "All materials and
11 ballots may be viewed and identified by the
12 candidates, the person demanding the recount,
13 and their authorized representatives."

14 We again state that this right
15 includes the written applications which the
16 Board itself is required to review. The
17 identification of the materials, in this case
18 the written applications, cannot be done
19 practicably without being allowed to match
20 those up to the in-person absentee votes.

21 That could not happen prior to
22 today as we only yesterday received the
23 information as -- on the spreadsheet as to the
24 in-person absentee voters.

25 The items requested are the

1 materials because they are materials referred
2 to throughout the Wisconsin Election Code,
3 Chapters 6 through 11.

4 Given the two prior days'
5 rulings, in order to match up the written
6 applications contained in the box -- in the
7 boxes we have not yet seen to the in-person
8 absentee ballots from the spreadsheet and not
9 to delay or create any undue burden on the
10 Board, we request that we be allowed to make
11 copies of the written applications in those
12 boxes en masse and do so -- and to do so we are
13 prepared to bring in a high-speed copier at our
14 cost and either do the work ourselves under
15 board supervision or that we be allowed to
16 observe staff make the copies and provide
17 whatever assistance would be required or
18 requested to make the process as swift and
19 transparent as possible.

20 This request for transparency is
21 necessary in order to perfect our record as to
22 the number of written applications that can be
23 matched to the in-person absentee ballots.

24 As you know and we previously
25 discussed this morning, we have a standing

1 objection to all in-person absentee ballots.

2 Yesterday I requested a
3 statement from the Board that all in-person
4 absentee applications be created through the
5 checking of the box on the absentee ballot
6 envelope.

7 The Chair rejected that request
8 and referred to the discussion on Friday even
9 though the Biden Campaign submitted a brief
10 stating "The absentee ballot certification
11 envelope serves as the written application for
12 voters who choose to vote early through the
13 absentee process."

14 In order to transparently
15 determine which, if any, of the in-person
16 absentee ballot voters we can now identify from
17 the spreadsheet provided by the Board submitted
18 an application other than by checking a box on
19 the ballot envelope, we must have the
20 information purporting to be the written
21 applications contained in the boxes which have
22 been brought here but which we have not
23 reviewed or inspected.

24 The most efficient and
25 transparent way in which we can verify how many

1 in-person absentee ballots were cast where the
2 application purports to be from the ballot
3 envelope is to review the written applications
4 and boxes present here and match them up to the
5 list of in-person absentee ballots.

6 Finally, for the record, we have
7 made today an open records request to the
8 Milwaukee City Clerk for these records, that
9 that is considered to be a prerequisite for the
10 production. I, therefore, ask that you grant
11 our two requests.

12 CHAIRMAN POSNANSKI: All right.
13 Before I turn it over to the representatives
14 from the Biden Campaign, can I get a
15 clarification on that last point?

16 You have made an open records request
17 to the City of Milwaukee for these materials?

18 MR. KARGE: Yes, Mr. Chairman. There
19 was discussion earlier today. And subsequent
20 to that earlier discussion, an open cities
21 request was made. Mr. Voiland made it. If
22 necessary, he can address the particulars.

23 CHAIRMAN POSNANSKI: I don't need to
24 understand the particulars. I just wanted to
25 confirm the request had been made. I'll accept

1 that representation.

2 MR. KARGE: Thank you, sir.

3 CHAIRMAN POSNANSKI: Mr. Meuler.

4 MR. MUELER: A couple of points.

5 Number one, I guess since we're reiterating
6 things, I also wanted to reiterate that the
7 Trump Campaign is asking to throw out every
8 single absentee vote in Milwaukee County.

9 That aside, we've already ruled and
10 discussed the applications issue. I would also
11 note that in the manual, the manual is also
12 clear that this Board does not reject any
13 absentee envelopes in the absence of an
14 application.

15 It is very specific. It says
16 "Because of the" -- "Do not reject an absentee
17 ballot if there is no separate written
18 application. Because of the variety of reasons
19 that The Board of Canvassers may not be able to
20 locate a specific written application and the
21 likelihood that a voter may be improperly
22 disenfranchised, The Board of Canvassers should
23 not reject an absentee ballot due to the lack
24 of a written application."

25 "The Board of Canvassers records in

1 the minutes the number of written absentee
2 ballot applications on file as well as an
3 explanation of any discrepancy, but any request
4 to reject a ballot on this basis should be
5 determined by a reviewing court rather than The
6 Board of Canvassers."

7 I understand he's making his record,
8 but this Board does not reject any absentee
9 envelopes or ballots on the basis of the lack
10 of an application.

11 I will also just make a comment about
12 my experience in recounts. I've done a few of
13 them and never has this request been made. I'm
14 not saying, you know, they can't make it. I've
15 never seen this request to match up
16 applications with absentee ballot envelopes.

17 It's certainly -- recounts can
18 proceed and be completed in ordinary course,
19 and I think it should do so. This should
20 not -- I would object to this request and,
21 again, I think a lot of this was dealt with
22 yesterday, but I'm making that record as well.

23 MR. KARGE: I'm simply -- I
24 understand your objection. My objection has
25 been overruled. I don't think that precludes

1 me from creating a record.

2 And in fact, counsel just spoke to
3 the fact that even in your own manual, it says
4 a county -- a court is the one to determine
5 whether an in-person ballot and any other
6 application gets counted.

7 I'm not trying to revisit the Board's
8 ruling that you have ruled those -- those
9 ballots -- those ballot applications or those
10 ballots will be struck. I'm simply making a
11 request to copy those boxes of documents.

12 My request to the Board -- my first
13 request to the Board that you review, and you
14 may decide you do not need to do that, but that
15 doesn't affect my request to have access to
16 reasonable and transparent access to those
17 documents, those written applications which are
18 physically present to my knowledge.

19 And just -- we talked about this
20 before but just for the record, the state
21 statute is inconsistent with the
22 recommendations of the Election Commission.

23 CHAIRMAN POSNANSKI: I think --
24 unless there's any request for clarification, I
25 think the Board understands the two requests

1 that have been made.

2 Is that fair, Commissioner Baas and
3 Commissioner Martin?

4 COMMISSIONER BAAS: I do. I still
5 have a clarifying question because --

6 CHAIRMAN POSNANSKI: Let's get
7 clarifying questions out of the way. Then I
8 would open it up for discussion. I think we've
9 heard from both parties. And then I think for
10 our purposes, we can deliberate and come to how
11 the Board wishes to resolve these requests.

12 COMMISSIONER BAAS: This question is
13 to the elections director. I understand we use
14 the envelopes that are typically out there. I
15 understand the ruling of the Commission that
16 that is the application and the certification.
17 I've got all that.

18 Do we do anything to review the
19 applications that are, for example, back there
20 in that corner? Do we marry those up in any
21 way?

22 MS. HENRY: Absolutely -- Mr. Chair,
23 absolutely not, to answer your question,
24 Commissioner Baas.

25 COMMISSIONER BAAS: Interesting.

1 Thank you.

2 CHAIRMAN POSNANSKI: All right. I
3 have one point of clarification before I'd like
4 to make a record based on my review of the
5 governing statutes and my review of the
6 materials that have been cited, and that's a
7 pretty simple one.

8 I think, Mr. Karge, in your
9 recitation, you indicated that the Chair had
10 rejected your request. The Chair has not
11 rejected anything. The Board has acted just
12 for the record.

13 MR. KARGE: I apologize, Mr.
14 Chairman, if I mischaracterized. It's my
15 understanding that that request was denied.

16 CHAIRMAN POSNANSKI: So let's, I
17 guess, deal with the first request.

18 I think we've gone around and around
19 on the written application issue. There's a
20 standing objection to all absentee in-person
21 ballots in the County of Milwaukee, so I don't
22 know that we need to revisit this.

23 But with respect to that -- and I
24 think we can take these in turn. I am not
25 inclined to grant that request for the reasons

1 stated in the election guide, where even if we
2 were to review them all and could not reconcile
3 them, we are not to reject any absentee ballot
4 due to the lack of a written application.

5 So I'm not inclined to grant the
6 request. But, more importantly, I'm not
7 inclined to grant the request -- not just
8 because of the guidance in the election manual;
9 but, more importantly, because of the specific
10 language of the statute upon which the manual
11 relies and that is Wisconsin Statute
12 9.01(1)(b)(2) which reads "The Board of
13 Canvassers shall then examine the absentee
14 ballot envelopes. Any defective absentee
15 ballot envelope shall be laid aside, properly
16 marked, and carefully preserved." The numbers
17 set aside under this --

18 "The number of voters shall be
19 reduced by the number of ballot envelopes set
20 aside under this subdivision. An absentee
21 ballot envelope is defective only if it is not
22 witnessed or if it is not signed by the voter
23 or if the certificate accompanying the absentee
24 ballot that the voter received by facsimile
25 transmission or electronic mail is missing."

1 So the governing statute says nothing
2 about our review of written absentee
3 applications. The guidance that we were
4 provided further instructs that we should not
5 be rejecting any absentee ballot due to lack of
6 a written application.

7 Your record has been made. You've
8 requested these. But for these reasons, it
9 would be my recommendation, and I so move, that
10 the first request be denied.

11 COMMISSIONER MARTIN: Second.

12 COMMISSIONER BAAS: Discussion.

13 Okay. I just want to put it on the record that
14 if we're going to treat the envelopes as the
15 application, then the application by any other
16 person's plain understanding would be the
17 application.

18 And the fact that we haven't looked
19 at them doesn't make it good or bad. It's just
20 something we haven't normally done. And if the
21 campaign is willing to pay for it and staff it,
22 I think that's a reasonable --

23 CHAIRMAN POSNANSKI: Commissioner
24 Bass, that's the second request which has not
25 yet --

1 COMMISSIONER BAAS: I apologize.

2 Then I'm done with the first.

3 CHAIRMAN POSNANSKI: And I would
4 point out to the extent Mr. Bass has raised it,
5 that in some instances where the certificate is
6 the envelope itself, we have seen plenty of
7 envelopes that have been brought before us as
8 part of our review of the materials here today,
9 and have in fact reconciled many objections to
10 those.

11 So I don't think it would be accurate
12 to say that we have not reviewed any of them as
13 part of our process.

14 COMMISSIONER BAAS: No.

15 CHAIRMAN POSNANSKI: So in that sense
16 I think we have -- we have complied with the
17 guidance -- hold on. Hold on.

18 (Inaudible crosstalk.)

19 CHAIRMAN POSNANSKI: To that extent,
20 I think we have complied with the guidance
21 issued by the Wisconsin Election Commission.

22 So unless there's any further
23 discussion --

24 COMMISSIONER BAAS: Well, now I'll
25 clarify. I said we hadn't reviewed the written

1 application in the standard format. I'm not
2 saying you haven't reviewed envelopes because
3 we clearly have. Thank you.

4 CHAIRMAN POSNANSKI: If there's no
5 further discussion, I would ask deputy clerk to
6 call the vote.

7 MR. DOSTANIC: Mr. Chairman, on the
8 motion that the request be denied.

9 Commissioner Baas.

10 COMMISSIONER BAAS: No.

11 MR. DOSTANIC: Commissioner Martin.

12 COMMISSIONER MARTIN: Aye.

13 MR. DOSTANIC: Chairman Posnanski.

14 CHAIRMAN POSNANSKI: Aye.

15 MR. DOSTANIC: Two ayes. One no.

16 The motion passes.

17 CHAIRMAN POSNANSKI: The next group
18 request we have is for the ability to review,
19 inspect, and make copies of the materials that
20 are being -- in the boxes of written
21 applications.

22 Based upon the Trump Campaign's own
23 admission, an open records request has been
24 made to the City of Milwaukee for the
25 materials. Those materials do belong to the

1 City of Milwaukee and the open records request
2 issued to the City is the appropriate mechanism
3 to obtain those records.

4 More importantly, I think an issue
5 that has been overlooked, there's a request or
6 recitation that the campaign be allowed to
7 review materials and ballots.

8 And then there is some suggestion
9 that the campaign be allowed to review
10 materials and ballots, and then there is some
11 suggestion that the campaign nonetheless be
12 allowed to facilitate copying, which I think
13 would clearly run afoul of the exact same
14 statutory subsection that was cited by counsel
15 which mandates the materials cannot be handled
16 by any -- either of the campaigns. So for that
17 reason that request should be rejected out of
18 hand.

19 But I would note that I think what
20 has gone overlooked is that these written
21 applications may well contain applications that
22 identify information that falls within
23 Wisconsin Statute 6.47 which deals with the
24 confidentiality of information relating to
25 victims with domestic abuse, sexual assault, or

1 stalking.

2 And so individuals can request that
3 their information remain confidential. Sitting
4 here today, we have absolutely no way of
5 understanding whether any of the individuals
6 identified in those documents fall in that
7 reference, and that underscores the reason why
8 the open records request is the appropriate
9 mechanism to obtain these records and inspect
10 these records.

11 The City of Milwaukee can handle the
12 open records request in due course, can
13 properly redact information that does fall
14 within that statutory subsection and then can
15 then provide materials that have been
16 requested.

17 And, therefore, I think it's an
18 inappropriate request to this Board of
19 Canvassers to ask us that we turn over for
20 inspection or copying the records of the City
21 of Milwaukee. That has been requested through
22 the proper channels.

23 So it's not as though the campaign
24 does not have a remedy to obtain those
25 documents. And as we have put forth on the

1 record before, we have already produced the
2 spreadsheet which identifies all voters in the
3 county of Milwaukee that requested an absentee
4 ballot.

5 And for that reason, it is my
6 recommendation, and I so move, that the
7 requests -- the second request from the Trump
8 Campaign similarly be denied.

9 COMMISSIONER MARTIN: Second.

10 MR. KARGE: May I speak?

11 CHAIRMAN POSNANSKI: No. You made
12 your record, Mr. Karge.

13 COMMISSIONER BAAS: This is -- I
14 understand that we provided a spreadsheet. I
15 do not, frankly, know what their strategy is or
16 why they made the request.

17 So accordingly, I think that the open
18 records request, while fine in and of itself at
19 any other time, is probably not going to be
20 timely for this particular event, and I have
21 reviewed those documents.

22 I believe fellow commissioners looked
23 at them as well. And they are substantially,
24 to my recollection, the same as the envelopes
25 that we're carrying around here all day. They

1 do have a section that says something about
2 photo ID, but there is no photo attached.

3 So, again, if it's the same
4 application, I think that it's reasonable. I
5 couldn't agree with you more that no one
6 outside authorized staff is going to touch
7 anything that we're doing, and I'll fight
8 everybody tooth and nail on that.

9 I appreciate the offer, and I
10 appreciate that you're trying to bring a remedy
11 to the situation, but I would completely agree
12 with my fellow commissioner that no one can
13 touch our stuff outside of election officials.

14 CHAIRMAN POSNANSKI: Further
15 discussion, Commissioner Baas?

16 COMMISSIONER BAAS: No.

17 MR. DOSTANIC: Mr. Chairman, on the
18 motion for the request to be denied.

19 Commissioner Baas.

20 COMMISSIONER BAAS: No.

21 MR. DOSTANIC: Commissioner Martin.

22 COMMISSIONER MARTIN: Aye.

23 MR. DOSTANIC: Commissioner
24 Posnanski.

25 CHAIRMAN POSNANSKI: Aye.

1 MR. DOSTANIC: Two ayes. One no.

2 The motion carries.

3 MR. KARGE: Mr. Chairman, in light of
4 the fact that the records are physically
5 present, if the City of Milwaukee permits us to
6 make those copies, may we make those copies?

7 CHAIRMAN POSNANSKI: If the City of
8 Milwaukee is willing to allow you to make those
9 copies based upon your open records request,
10 that is an issue, frankly, between you and the
11 City of Milwaukee.

12 MR. KARGE: I just want to make sure
13 that if we start that process of copying, if
14 we're allowed to do so, you won't object on the
15 basis that it's your materials and no one can
16 touch your materials because it seems to be
17 inconsistent to say they're your materials and
18 no one can touch them, but we have to go to the
19 City in order to get permission to do so. I
20 would consider this part of the written
21 materials -- part of the --

22 CHAIRMAN POSNANSKI: Why don't we do
23 this first. It sounds like we're arguing over
24 something that may or may not happen.

25 MS. HENRY: So all of the

1 applications, they are the custodian for them,
2 each municipality.

3 CHAIRMAN POSNANSKI: I understood,
4 Ms. Henry, and that's part of the issue I
5 addressed. And I think solely for the reason
6 of Section 6.47, it's unlikely the City is
7 going to be in a position where they simply
8 allow the photocopying of these materials and
9 the requesting without review of the materials.

10 So if my understanding is wrong and
11 the City is willing to allow you to immediately
12 begin photocopying these materials, we can
13 address this issue at that time. I don't think
14 there's anything to discuss at present. The
15 request has been made, and it's been noted for
16 the record.

17 MR. KARGE: Let me ask a clarifying
18 question. We've also made an open records
19 request for the absentee ballot in-person
20 envelopes of the City, and I don't believe
21 there's any sensitive or proprietary
22 information on those. And as you've indicated,
23 they've been floating around here for the last
24 three days.

25 Understand, again, you are saying

1 those are your materials, but I don't think we
2 have the same issue, so --

3 COMMISSIONER BAAS: Let me clarify.
4 When I say they're our materials -- I'm not an
5 attorney. Let me clarify.

6 What I meant was those materials are
7 here for the purpose of the recount. And in
8 order to maintain the integrity of the recount,
9 I and I believe my fellow Commissioners, are
10 not comfortable with people who are not
11 normally custodial personnel of those records
12 touching them. Just for clarification.

13 And for further clarification, I get
14 casual because I'm not an attorney. They're
15 not floating around. They're being handled
16 appropriately.

17 CHAIRMAN POSNANSKI: Thank you for
18 that clarification, Mr. Bass.

19 COMMISSIONER MARTIN: I'd just like
20 to add that we agreed they're not floating
21 around, but this is in a secure setting. It's
22 not like these envelopes are going out the
23 doors anywhere.

24 We are maintaining them in a secured
25 setting, and we want to continue to maintain it

1 in a secured setting. And we cannot -- we
2 cannot suggest what may or may not be on those
3 envelopes that, again, could be sensitive in
4 some manner.

5 CHAIRMAN POSNANSKI: And for the same
6 reason, it's an open records request directed
7 to the City. That should be resolved with the
8 City.

9 I don't -- to the extent we need to
10 make a motion for the reasons already stated, I
11 would move that that request similarly be
12 denied for the reasons stated, and I so move.

13 COMMISSIONER MARTIN: Second.

14 MR. DOSTANIC: Mr. Chairman, on the
15 motion?

16 COMMISSIONER BAAS: Discussion. I
17 thought it was an interesting way to cloud up
18 an issue. I'm done with discussion.

19 MR. DOSTANIC: Call the roll?
20 On the motion to deny the request.

21 Commissioner Baas.

22 COMMISSIONER BAAS: Nay.

23 MR. DOSTANIC: Commissioner Martin.

24 COMMISSIONER MARTIN: Aye.

25 MR. DOSTANIC: Chairman Posnanski.

1 CHAIRMAN POSNANSKI: Aye.

2 MR. DOSTANIC: Two ayes. One no.

3 Motion carries.

4 CHAIRMAN POSNANSKI: Are you prepared
5 to come before us?

6 MS. ROESKE: Good morning. Catherine
7 Roeske, City Clerk, City of Oak Creek.

8 In processing Wards 7, 8, 9, District
9 3, we have a ballot that will not be read in
10 the machine. The machine won't read it, so we
11 need to be able to confirm voter intent.

12 (Document reviewed.)

13 CHAIRMAN POSNANSKI: Based upon my
14 review, unless there's any further discussion,
15 I believe this ballot should be reconstructed
16 to reflect a vote for Brian Carroll and Amar
17 Patel.

18 MS. ROESKE: Thank you.

19 MS. WOODALL-VOGG: Good morning.
20 Claire Woodall-Vogg, City of Milwaukee Election
21 Commission.

22 I have for Ward 41 a military voter
23 whose ballot was rejected on election day. We
24 believe it is because our military voters have
25 a different color envelope as prescribed by

1 statute and federal law and that our election
2 workers weren't familiar with it. It meets all
3 of the requirements, and this voter did not
4 receive a voter number, so we'd like permission
5 to count it.

6 MR. KARGE: We have no objection.

7 MR. TREBATOSKI: We have no
8 objection.

9 CHAIRMAN POSNANSKI: Ms. Woodall,
10 this voter should be given a voter number, and
11 this should be processed.

12 MS. WOODALL-VOGG: Our next one is
13 being challenged from the Trump Campaign from
14 Ward 45 due to what looks like I'm imagining a
15 toddler getting ahold of the voter's ballot.
16 That's based on my presumptions with a
17 three-year-old.

18 (Document reviewed.)

19 CHAIRMAN POSNANSKI: Mr. Karge, does
20 the Trump Campaign wish to maintain this
21 objection?

22 MR. KARGE: I would like to see the
23 three-year-old.

24 No, sir.

25 MS. WOODALL-VOGG: We have one ballot

1 from Ward 3, one ballot from Ward 18, and two
2 ballots from Ward 47 which have been counted,
3 but with objections due to the lack of witness
4 signature from in-person absentee voting.

5 I believe the Commission has already
6 made a decision on this, but it's still being
7 objected to in order to commit to the record.

8 CHAIRMAN POSNANSKI: On the ballot
9 itself, the Board has already ruled on this
10 issue. Those should be counted. The objection
11 is noted.

12 MR. KARGE: And those should be
13 segregated?

14 CHAIRMAN POSNANSKI: They should be
15 segregated. You segregate those as part of the
16 process, right, Ms. Woodall, without a
17 signature?

18 So there is a standing objection for
19 the record to any such ballots. You don't need
20 to bring them all before us.

21 MS. WOODALL-VOGG: Okay. For Ward 6
22 we have a similar issue but where the witness
23 signed in the wrong spot. I'm assuming we'll
24 just continue to segregate those for the
25 record.

1 MR. KARGE: Subject to our standing
2 objection.

3 CHAIRMAN POSNANSKI: Subject to the
4 standing objection, those should be accepted.

5 MS. WOODALL-VOGG: For Ward 3, I will
6 let the campaign explain the objections. I'm
7 not sure I understand it.

8 MR. KARGE: Yes. We'll maintain the
9 objection. It appears that the signature can't
10 be determined whether it's a signature or an
11 attempt to cross out the name. So we do
12 maintain our objection.

13 MR. TREBATOSKI: Our position is it's
14 quite clear that there's a signature and that's
15 all that's required, and this is not a
16 signature review state, and people's penmanship
17 are not subject for the basis for a rejection
18 of an absentee ballot.

19 COMMISSIONER BAAS: Just on its face,
20 I wouldn't have a problem comparing signatures,
21 period. Having said that, I've seen signatures
22 of some of our former governors and they look
23 like Star Trek symbols so...

24 CHAIRMAN POSNANSKI: Is there a
25 motion, Commissioner Bass?

1 COMMISSIONER BAAS: To accept.

2 COMMISSIONER MARTIN: Second.

3 CHAIRMAN POSNANSKI: Call the vote?

4 MR. DOSTANIC: On the motion to

5 accept the vote.

6 Commissioner Baas.

7 COMMISSIONER BAAS: Aye.

8 MR. DOSTANIC: Commissioner Martin.

9 COMMISSIONER MARTIN: Aye.

10 MR. DOSTANIC: Chairman Posnanski.

11 CHAIRMAN POSNANSKI: Aye.

12 MR. DOSTANIC: Three ayes. No noes.

13 The motion carries.

14 (Recess taken from 11:39 a.m. to

15 12:47 p.m.)

16 CHAIRMAN POSNANSKI: We are back on

17 the record.

18 Mr. Christenson.

19 MR. CHRISTENSON: Mr. Chairman,
20 Commissioners, we are here to just report the
21 results of the finish report and the rerun
22 report for Oak Creek for the -- for the
23 reporting units discussed previously.

24 There is a point of clarification.

25 Earlier we -- I believe it was Reporting Units

1 10 through 12. The clerk had misspoke. She
2 meant to say 7 through 9, and we did clear that
3 with both counsel. So we are talking about 7
4 through 9. And then we are talking about 16
5 through 18. Okay?

6 CHAIRMAN POSNANSKI: 16 through 19?

7 MR. CHRISTENSON: 16 through 19. So
8 the first report that we have is the canvass
9 statement which is -- which I've shown both
10 representatives both of these reports, and
11 we'll make copies immediately thereafter but
12 they've both seen these.

13 So the Wards 7 through 9 represent
14 central count absentee numbers which was what
15 was being run at the time we had to stop last
16 night.

17 The total ballots were 2,444 on
18 the -- on the canvass statement. The finish
19 report, as I'm calling it, when they finished
20 up what they were doing, that number was
21 reported as 2,460, which is clearly more,
22 clearly not correct.

23 So they would have rerun that anyway,
24 and that would be attributed to some type of
25 human error when they were putting ballots

1 away. So they reran the report which is what
2 they were going to do anyway. That number came
3 to 2,441, so that results in a difference of
4 just three from the canvass.

5 And then with respect to Wards 16
6 through 19, that represents the central count
7 absentee and election day at the poll numbers
8 because that was what was being run last night
9 when they stopped.

10 And so we reran all of those. So
11 those numbers -- the numbers of that will be
12 866 for at the polls and 2,072 for absentee in
13 the canvass. That totals up to 2,938. 2,938.

14 The finish report -- so they finished
15 up what they were doing this morning, ran that
16 report. That number was 2,936. Then we reran
17 all of those ballots again, and that number was
18 2,936.

19 Mr. Chairman.

20 CHAIRMAN POSNANSKI: Thank you,
21 Mr. Christenson. I believe the clerk and
22 deputy clerk are here if there are any
23 questions.

24 I do have one question, and I just
25 have to direct to the clerk if she could come

1 forward and that is with respect to the
2 discrepancy where there was three different
3 from canvass on -- of the election.

4 Can you explain just in the customary
5 course of the recount how that will be handled
6 by your office?

7 MS. ROESKE: Certainly. Cathy
8 Roeske, City Clerk, City of Oak Creek.

9 So typically those ballots, the
10 district and the wards in which we're
11 referencing are central count, which are all
12 the in-person and by mail early absentee
13 ballots. Those are all folded. There's a lot
14 that happens to those ballots during the course
15 of election, so we have to plan those all out
16 and run them through the machines.

17 It takes up a lot of time to do that,
18 and it can be troubling in that there is a
19 total of 16,000 ballots that need to go through
20 the process. So it's not unheard of, even for
21 here, watching the ES&S when they're running
22 those ballots through that machine -- they're
23 folded -- it just -- commonly you can be off by
24 a couple ballots.

25 So what we usually do is we'll go

1 back when we do a reconciliation after an
2 election, if we are off on our canvas by a
3 couple of ballots, we'll go back through all of
4 our tape totals. We'll look back at the canvas
5 done by Milwaukee County.

6 We also conduct a canvass in our
7 municipality, and then we'll also check all of
8 the chief inspectors' statements for -- at
9 polls and for central count, and hopefully
10 there is a reason in there for being off by a
11 couple of ballots.

12 It could be that a voter had a number
13 that didn't vote at the polls for central
14 count, you know. It could just be that the
15 machine -- for some reason, that ballot was
16 ripped, torn, remade. So it's not uncommon.

17 And the Election Commission, if you
18 are five ballots or under in reconciliation,
19 typically that's a very acceptable, very minor,
20 small percentage when you're talking about
21 thousands of ballots.

22 CHAIRMAN POSNANSKI: Thank you.

23 MS. ROESKE: You're welcome.

24 COMMISSIONER BAAS: Forgive me if I
25 missed this. Have you come before us to

1 address any of these differences where there --
2 was there a drawdown? Was there a ballot that
3 didn't to be recreated or whatever that will
4 explain these differences?

5 MS. ROESKE: No, we have not because
6 those original numbers that we're comparing
7 these to are election night totals. So those
8 are that very original tape we transfer onto a
9 call-in sheet the night of election. Those are
10 unofficial results until the Milwaukee Election
11 Commission conducts their canvass.

12 So when we're hand counting here
13 during a recount, it's not uncommon for a poll
14 worker or election inspector to be off by a few
15 ballots at the end of the 2,300 or 3,000
16 ballots.

17 So those ballots when they get run
18 through the machine, if that discrepancy
19 applies between running them through here
20 during a recount and looking at that original
21 canvass number, there's nothing that we're
22 pulling out to address. It's just simply that
23 the number does not match by three ballots.

24 COMMISSIONER BAAS: Understood. I
25 just was curious --

1 MS. ROESKE: Yeah. So, no, there was
2 nothing --

3 COMMISSIONER BAAS: -- if this body
4 affected that total.

5 MS. ROESKE: No, we haven't brought
6 anything to you.

7 COMMISSIONER BAAS: Thank you.

8 MS. ROESKE: You're welcome.

9 CHAIRMAN POSNANSKI: Thank you.

10 Mr. Karge.

11 MR. KARGE: Can I ask a question --

12 CHAIRMAN POSNANSKI: Sure.

13 MR. KARGE: -- just on the numbers?
14 I acknowledge I was shown the numbers but not
15 yet given a copy, so which way did the
16 three-ballot difference go?

17 CHAIRMAN POSNANSKI: In terms of --

18 MR. KARGE: Of plus Biden-Harris?
19 Plus Trump?

20 MS. DAUN: Mr. Chair, as a point of
21 fact, you can't really tell, right, because
22 most --

23 MR. KARGE: Yes, you can. It's on
24 the sheets. It showed the sheets. The votes
25 are listed by Trump or Biden.

1 MS. DAUN: Go ahead then. You can
2 observe the totals, but it depends which three
3 you pull out, of course.

4 MR. CHRISTENSON: So let me be clear.
5 You're looking for me to --

6 CHAIRMAN POSNANSKI: I guess which --
7 so it's my understanding the reporting at 16
8 through 19, the count was the same. So you're
9 asking for the difference in the Reporting
10 Units 9 through -- or 7 through 10?

11 MR. KARGE: Yeah. My understanding,
12 without having the paper, is there's a
13 three-ballot difference between the various
14 counts. I'm simply --

15 CHAIRMAN POSNANSKI: You mean the
16 final count, correct?

17 MR. KARGE: Yes. I'm simply asking
18 which way did that go.

19 COMMISSIONER BAAS: You're simply
20 asking which tally changed?

21 MR. KARGE: Yes.

22 MR. CHRISTENSON: So the tally -- the
23 canvass tally totals for Wards 7, 8, 9 from the
24 canvass versus the rerun report is Biden,
25 1,365; 1,365. Trump, 1,035; 1,032.

BROWN & JONES REPORTING, INC.

IN RE: 2020 PRESIDENTIAL RECOUNT

Location: The Wisconsin Center
400 West Wisconsin Avenue
Milwaukee, Wisconsin

Date: November 23, 2020

Time: 9:02 a.m. to 6:32 p.m.

Proceedings Reported By:
Tiffany L. De Bruin, RPR

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A P P E A R A N C E S

FOR THE ELECTION COMMISSION:

Mr. Tim Posnanski, Chairman
Ms. Dawn Martin, Election Commissioner
Mr. Rick Baas, Election Commissioner

Mr. George Christenson, Milwaukee County Clerk
Mr. Stefan Dostanic, Milwaukee County Clerk

Ms. Julietta Henry, Milwaukee County Elections
Director
Ms. Michelle Hawley, Milwaukee County Elections
Deputy Director
Mr. Kyle Weber, Milwaukee County Elections Deputy
Director

Mr. David Farwell, Assistant Milwaukee County
Corporation Counsel
Ms. Kathryn M. West, Assistant Milwaukee County
Corporation Counsel

FOR THE TRUMP CAMPAIGN:
Attorney Stewart Karge
Attorney Joseph Voiland

FOR THE BIDEN CAMPAIGN:
Attorney Christopher Meuler
Attorney Chris Trebatoski
Attorney Stacie Rosenzweig
Attorney Michelle Umberger

* * * * *

03:31:26 1 COMMISSIONER MARTIN: So I would vote
03:31:28 2 that this ballot not be counted.
03:31:33 3 COMMISSIONER BAAS: Second.
03:31:33 4 MR. DOSTANIC: On the motion,
03:31:37 5 Commissioner Baas.
03:31:37 6 COMMISSIONER BAAS: No.
03:31:38 7 MR. DOSTANIC: Commissioner Martin.
03:31:38 8 COMMISSIONER MARTIN: Aye.
03:31:38 9 MR. DOSTANIC: Chairman Posnanski.
03:31:38 10 CHAIRMAN POSNANSKI: Aye.
03:31:41 11 MR. DOSTANIC: Two ayes. One no.
03:31:43 12 The motion carries.
03:31:47 13 MS. HUMITZ: Thank you.
03:51:05 14 (Recess taken from 3:31 p.m. to 3:51 p.m.)
03:51:05 15 CHAIRMAN POSNANSKI: All right.
03:51:05 16 We're going to go back on the record to deal
03:51:11 17 with -- with the set-asides and other issues
03:51:14 18 for Wauwatosa.
03:51:16 19 MS. KOLLMANSBERGER: Thank you.
03:51:19 20 Melanie Kollmansberger, City of Wauwatosa, City
03:51:19 21 Clerk.
03:51:21 22 So for Ward 1, we had eight ballots
03:51:24 23 that had ink issues. We had 76 that were
03:51:29 24 indefinitely confined. For Ward 2, we had 17
03:51:36 25 ballots with ink issues.

03:51:40 1 CHAIRMAN POSNANSKI: And if -- if I
03:51:41 2 can interrupt. When you say "ink issues,"
03:51:44 3 those are the envelopes that include different
03:51:46 4 colored ink where it indicates the poll worker
03:51:46 5 or municipal clerk filled in the address on the
03:51:52 6 absentee envelope, correct?

03:51:53 7 MS. KOLLMANSBERGER: Correct. And
03:51:56 8 then for Ward 2, indefinite, we had 43. For
03:52:04 9 Ward 3, we had ten with ink, 91 indefinite.
03:52:14 10 Ward 4, we had 12 with ink, 145 indefinite.
03:52:25 11 Ward 5, we had 13 with ink, 200 indefinite.
03:52:32 12 Ward 6, we had nine with ink, 75 indefinite.
03:52:40 13 Ward 7, we had six with ink, 107 indefinite.
03:52:48 14 Ward 8, we had six with ink, 310 indefinite.
03:52:57 15 Ward 9, we had nine with ink, 107 indefinite.
03:53:05 16 Ward 10, we had one with ink, 54 indefinite,
03:53:12 17 and we had one ballot that was both an
03:53:15 18 indefinite and had an ink issue.

03:53:20 19 Ward 11, we had 35 with ink, 137
03:53:25 20 indefinite. Ward 12, we had 12 with ink, 96
03:53:33 21 indefinite. Ward 13, two with ink, 100
03:53:40 22 indefinite. Ward 14, we had ten with ink, 76
03:53:47 23 indefinite. Ward 15, we had seven with ink, 82
03:53:55 24 indefinite. Ward 16, we had six with ink, 94
03:54:02 25 indefinite. Ward 17, we had six with ink, 107

03:54:10 1 indefinite. Ward 18, we had three with ink,
03:54:20 2 eight indefinite. Ward 19, there were no ink
03:54:25 3 issues reported. There were 108 indefinite.
03:54:31 4 Ward 20, there were 13 ink, 159 indefinite.
03:54:40 5 21, there were six with ink, 84
03:54:45 6 indefinite. Ward 22, there were five with ink,
03:54:51 7 97 indefinite. Ward 23, there were two with
03:54:57 8 ink, 83 indefinite. And Ward 24, there were
03:55:04 9 five with ink, 150 indefinite.

03:55:04 10 MR. KARGE: Mr. Chairman, if I could,
03:55:04 11 just for the record, restate that the previous
03:55:04 12 objections we had asserted on behalf of these
03:55:04 13 categories are restated in full here as they
03:55:22 14 had been previously for the record.

03:55:24 15 CHAIRMAN POSNANSKI: The record is
03:55:25 16 noted, Mr. Karge. Thank you.

03:55:28 17 The -- the objections have been
03:55:28 18 noted. The objections for the same reasons
03:55:30 19 have been overruled by the Board. These will
03:55:33 20 all be received, although, we -- accepted and
03:55:36 21 received.

03:55:37 22 We have agreed to separately mark
03:55:40 23 these envelopes sequentially, so the next one I
03:55:43 24 believe will be marked City of Wauwatosa
03:55:46 25 Exhibit 85, and we will mark them sequentially

2020 PRESIDENTIAL RECOUNT

Location: The Wisconsin Center
400 West Wisconsin Avenue
Milwaukee, Wisconsin

Date: November 24th, 2020

Time: 9:19 a.m. to 6:28 p.m.

Proceedings Reported by:

Sarah M. Gilkay, RMR, CRR

A P P E A R A N C E S

FOR THE ELECTION COMMISSION:

Mr. Tim Posnanski, Chairman
Ms. Dawn Martin, Election Commissioner
Mr. Rick Baas, Election Commissioner
Ms. Claire Woodall-Vogg - Election Commission
Director

Mr. George Christenson, Milwaukee County Clerk
Mr. Stefan Dostanic, Milwaukee County Deputy Clerk
Ms. Julietta Henry, Milwaukee County Elections
Director
Ms. Michelle Hawley, Milwaukee County Elections
Deputy Director

Mr. David Farwell, Milwaukee County Corporation
Counsel
Ms. Melinda Lawrence, Assistant Milwaukee County
Corporation Counsel

FOR THE TRUMP CAMPAIGN:

Attorney Stewart Karge
Attorney Joseph Voiland

FOR THE BIDEN CAMPAIGN:

Attorney Christopher Meuler
Attorney Chris Trebatoski
Attorney Stacie Rosenzweig

CLERKS:

Village for Fox Point - Ms. Kelly Meyer
City of South Milwaukee - Ms. Karen Kastenson
City of St. Francis - Rebecca Gagnon
City of West Allis - Ms. Gina Gresch
City of Greenfield - Ms. Jennifer Goergen

1 prior stated objections, notwithstanding the
2 clerical issue that was raised here.

3 CHAIRMAN POSNANSKI: Do you wish to
4 maintain a separate objection on the clerical
5 issue that has been explained by Ms. Woodall?

6 MR. KARGE: I don't believe that's
7 necessary since we already have an objection to
8 this ballot, envelope and ballot.

9 CHAIRMAN POSNANSKI: Good. Thank you.
10 I just needed to know if we needed to discuss
11 that.

12 So for the reasons -- the objection is
13 noted. For the reasons previously stated and
14 determined by the Board, this envelope and
15 ballot associated therewith should be counted.

16 MS. WOODALL-VOGG: Lastly, I would
17 like to file an Affidavit with the County Board
18 of Election Commissioners.

19 Because we have been segregating our
20 indefinitely confined certificate envelopes and
21 those where we made corrections to the witness
22 address, we feel it's very important that the
23 Commission have on record the City of Milwaukee
24 policies and procedures related to indefinitely
25 confined voters and for filling in missing

1 information from witness addresses that are
2 missing.

3 CHAIRMAN POSNANSKI: Does either party
4 have any objection to submitting this Affidavit
5 for the record?

6 MR. KARGE: No, sir.

7 MR. MEULER: No.

8 CHAIRMAN POSNANSKI: The Affidavit
9 will be accepted and will be marked. Per
10 previous discussion regarding housekeeping,
11 I'll -- I will announce what exhibit number that
12 Affidavit will be.

13 MS. WOODALL-VOGG: Thank you. That's
14 it.

15 CHAIRMAN POSNANSKI: Thank you.

16 (Recess from 9:36 a.m. to 9:58 a.m.)

17 CHAIRMAN POSNANSKI: Ms. Woodall.

18 MS. WOODALL-VOGG: Good morning.

19 It has been brought to my attention
20 that in Ward 315, as we began to work on it,
21 underneath our opened certificate envelopes,
22 there are 386 unopened envelopes where voters
23 were not processed on election day. 409 voters
24 were processed on election day.

25 The typical process is that a team

1 either campaign that wants to watch the zeroing
2 out of the machines now that the central count
3 has been processed for the City of Milwaukee.

4 MR. KARGE: Mr. Chairman, we'll find
5 the appropriate person to do that.

6 CHAIRMAN POSNANSKI: Thank you.

7 MR. KARGE: It won't be me.

8 CHAIRMAN POSNANSKI: You've had enough
9 of witnessing that process?

10 MR. KARGE: Yes.

11 CHAIRMAN POSNANSKI: Okay. I believe
12 next up is West Allis. City of West Allis.

13 CLERK GRESCH: Good afternoon. My
14 name is Gina Gresch, G-I-N-A, G-R-E-S-C-H. I'm
15 with the City of West Allis.

16 So I bring to you the indefinitely
17 confined voter envelopes and any envelopes that
18 had a different ink. I believe you-all have the
19 exhibits that I completed.

20 CHAIRMAN POSNANSKI: We do, and the
21 exhibit identifies all 25 of your wards and the
22 number of envelopes falling in with each
23 category; is that right?

24 CLERK GRESCH: Correct.

25 CHAIRMAN POSNANSKI: All right. We

1 will accept the form you completed as an
2 exhibit, and we will accept the envelopes that
3 you have brought -- you brought those with you;
4 correct?

5 CLERK GRESCH: They're on the cart.
6 Yep.

7 CHAIRMAN POSNANSKI: We will accept
8 and mark separately each of those envelopes,
9 noting the Trump's campaign's objection to the
10 acceptance of all of these envelopes.

11 MR. KARGE: Thank you.

12 CLERK GRESCH: Thank you.

13 (Recess from 1:48 p.m. to 1:59 p.m.)

14 CHAIRMAN POSNANSKI: All right.

15 St. Francis is here to do the drawdown at random
16 based upon the rejection of the absentee
17 envelope from the third reporting unit.

18 Commissioner Baas, if you would like
19 to do the honor.

20 (Recess from 1:59 p.m. to 2:59 p.m.)

21 CHAIRMAN POSNANSKI: Back on the
22 record. Mr. Karge, I believe you wanted to note
23 an objection.

24 MR. KARGE: Thank you, Mr. Chairman.
25 I understand the Board has previously ruled they

1 will not entertain or sustain, I should say,
2 objections to ballots without the requisite
3 number of initials. I wanted to reiterate that
4 we continue to assert that objection and that at
5 Table 124, Ward 66, I have been informed that
6 there is a significant number of ballots which
7 have no initials.

8 So not only do I object to that in
9 particular, but also just to make sure the
10 record is clear that the Trump campaign is
11 asserting a standing objection to all ballots
12 which do not have the requisite number or sets
13 of initials.

14 CHAIRMAN POSNANSKI: The objection is
15 noted for the record. And to the extent
16 necessary, I would say that with respect to this
17 particular issue, the Board has ruled. As for
18 the previous determinations of the Board, this
19 specific objection is overruled, but the
20 standing objection from the Trump campaign is
21 noted for the record.

22 MR. KARGE: And granted for continuing
23 purposes?

24 CHAIRMAN POSNANSKI: Certainly. We
25 will allow the Trump campaign to assert a

BROWN & JONES REPORTING, INC.

IN RE: 2020 PRESIDENTIAL ELECTION RECOUNT

Location: The Wisconsin Center
 400 West Wisconsin Avenue
 Milwaukee, Wisconsin

Date: November 27, 2020

Time: 9:06 a.m. to 5:31 p.m.

Reported by: Samantha J. Shallue, RPR

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A P P E A R A N C E S

FOR THE ELECTION COMMISSION:

Mr. Tim Posnanski, Chairman
Ms. Dawn Martin, Election Commissioner
Mr. Rick Baas, Election Commissioner
Ms. Claire Woodall-Vogg, Election Commission
Director

Mr. George Christenson, Milwaukee County Clerk
Mr. Stefan Dostanic, Milwaukee County Deputy Clerk
Ms. Julietta Henry, Milwaukee County Elections
Director
Ms. Michelle Hawley, Milwaukee County Elections
Deputy Director

Ms. Margaret Daun, Milwaukee County Corporation
Counsel

FOR THE TRUMP CAMPAIGN:
Attorney Stewart Karge
Attorney Joseph Voiland

FOR THE BIDEN CAMPAIGN:
Attorney Christopher Meuler
Attorney Chris Trebatoski
Attorney Michelle Umberger

* * * * *

12:31:50 1 information for. Have -- are those the ones
12:31:52 2 that haven't been run through, or is that a
12:31:55 3 different subset?

12:31:56 4 CHAIRMAN POSNANSKI: No, those are
12:31:57 5 completely different issues. So, for instance,
12:32:00 6 the request regarding the envelopes that had
12:32:01 7 not yet been set aside for Brown Deer, Brown
12:32:05 8 Deer did not come up and present those numbers
12:32:06 9 to us. We have reviewed the Brown Deer
12:32:10 10 absentee envelope boxes, and they had been set
12:32:12 11 aside as we had instructed. So we have the
12:32:15 12 total number. Those were properly separated by
12:32:18 13 the municipality. The missing piece was the
12:32:19 14 clerk just didn't come up here and identify the
12:32:22 15 number that fell into each category for us.

12:32:25 16 MR. KARGE: Thank you for that
12:32:26 17 clarification.

12:32:30 18 CHAIRMAN POSNANSKI: All right. From
12:32:32 19 our perspective, obviously the work continues.
12:32:34 20 I hope that we are close to verifying the
12:32:37 21 results and will soon be in position where we
12:32:42 22 can certify the recount canvas.

12:32:45 23 MR. KARGE: If I might, Mr. Chairman,
12:32:48 24 I -- I've been advised that I may not have been
12:32:49 25 as clear as I should have been this morning, so

12:32:52 1 I want to not revisit, but just sort of restate
 12:32:55 2 what my -- what I thought I had said earlier on
 12:32:59 3 with regard to the indefinitely confined subset
 12:33:05 4 list that I talked about, the 19,488.

12:33:10 5 What I wanted to make sure was that
 12:33:12 6 we had on the record a separate objection for
 12:33:15 7 that subset list, and it's been reported to me
 12:33:21 8 I may not have gotten that on the record. So I
 12:33:25 9 would ask that that information -- there
 12:33:27 10 clearly be a record of my objection to that
 12:33:29 11 subset of the larger list that we have
 12:33:33 12 previously objected to.

12:33:35 13 CHAIRMAN POSNANSKI: Okay.

12:33:37 14 MR. KARGE: So --

12:33:38 15 CHAIRMAN POSNANSKI: So noted. I
 12:33:39 16 have no issue with you making that record.

12:33:42 17 COMMISSIONER BAAS: Are you looking
 12:33:43 18 for a vote, sir?

12:33:45 19 MR. KARGE: Yes.

12:33:46 20 COMMISSIONER BAAS: Okay.

12:33:46 21 CHAIRMAN POSNANSKI: I see. So to
 12:33:48 22 the extent that it is required, there is now a
 12:33:51 23 separate specific objection to the indefinitely
 12:33:54 24 confined absentee voters that were added to the
 12:33:58 25 indefinitely confined list maintained by the

12:34:00 1 Wisconsin Election Commission since March 25th
12:34:03 2 of 2020; am I understanding that correctly?

12:34:06 3 MR. KARGE: Yes, and that number is
12:34:07 4 19,488 based upon the sort that we did that was
12:34:11 5 part of the information put into the record
12:34:12 6 yesterday.

12:34:13 7 CHAIRMAN POSNANSKI: Okay. And there
12:34:14 8 had previously been an objection which this
12:34:17 9 Board has ruled upon to all indefinitely
12:34:20 10 confined voters in Milwaukee County. That
12:34:22 11 objection was overruled. For the same reasons
12:34:26 12 articulated by the Board when addressing that
12:34:28 13 objection, I would move that we similarly
12:34:32 14 overrule this specific objection to the subset
12:34:34 15 so identified by Mr. Karge.

12:34:37 16 COMMISSIONER MARTIN: Second.

12:34:39 17 CLERK CHRISTENSON: On the motion,
12:34:42 18 Commissioner Baas?

12:34:43 19 COMMISSIONER BAAS: No.

12:34:45 20 CLERK CHRISTENSON: Commissioner
12:34:46 21 Martin?

12:34:46 22 COMMISSIONER MARTIN: Aye.

12:34:48 23 CLERK CHRISTENSON: Chairman
12:34:48 24 Posnanski?

12:34:51 25 CHAIRMAN POSNANSKI: Aye.

12:34:51 1 CLERK CHRISTENSON: Two ayes. One
12:34:54 2 no.

12:34:54 3 MR. KARGE: Thank you, Mr. Chairman.
12:35:00 4 (Brief recess taken.)

05:22:58 5 CHAIRMAN POSNANSKI: Okay. First, we
05:22:59 6 have a few housekeeping matters to attend to.
05:23:03 7 Through the course of the day, county staff has
05:23:06 8 compiled the -- what I'll call the "master
05:23:09 9 exhibit list" which has been distributed to
05:23:11 10 both parties. That has been marked as Exhibit
05:23:14 11 820.

05:23:15 12 As you'll see in that exhibit list,
05:23:17 13 we have included placeholders for Oak Creek.
05:23:21 14 If you recall, Oak Creek did not separately set
05:23:22 15 aside their absentee envelopes. That will be
05:23:25 16 done over the course of the next week.

05:23:28 17 Mr. Karge, we have promised to
05:23:34 18 produce the images that were requested of all
05:23:37 19 ballots over the course of the next week. That
05:23:40 20 process will similarly play out so that we can
05:23:42 21 get those images to you as soon as we can.

05:23:45 22 With respect to the canvas reports,
05:23:49 23 the detailed results, and the tally sheets that
05:23:52 24 we have been providing over the course of the
05:23:54 25 proceedings, those, too, will be made

05:28:05 1 recount proceedings reflect, no instances of
 05:28:07 2 fraud were discovered during this recount.

05:28:09 3 Thank you for this time on the floor.
 05:28:11 4 And we appreciate, again, all of your efforts.
 05:28:14 5 Thank you.

05:28:15 6 CHAIRMAN POSNANSKI: Thank you. At
 05:28:17 7 this time I will turn it over to Ms. Julietta
 05:28:20 8 Henry, the Milwaukee County Elections Director,
 05:28:24 9 to announce what we have found through the
 05:28:26 10 course of these proceedings.

05:28:27 11 MS. HENRY: Thank you, Mr. Chair.
 05:28:32 12 The summary statement of the Board of
 05:28:35 13 Canvassers for the total number of votes cast
 05:28:37 14 for the president of the United States was
 05:28:43 15 459,723, of which Joseph R. Biden/Kamala D.
 05:28:49 16 Harris received 317,527; Donald J.
 05:28:54 17 Trump/Michael R. Pence received 134,482; Don
 05:29:01 18 Blankenship and William Mohr received 624; Jo
 05:29:05 19 Jorgensen and Jeremy Spike Cohen received
 05:29:09 20 4,342; Brian Carroll and Amar Patel received
 05:29:14 21 752; Kasey Wells (write-in) received 3; Jade
 05:29:20 22 Simmons and Claudeliah Roze (write-in) received
 05:29:23 23 6; President R19 Boddie (write-in) received 1;
 05:29:27 24 Howie Hawkins/Angela Walker (write-in) received
 05:29:32 25 214; Gloria La Riva and Sunil Freeman

05:29:36 1 (write-in) received 37; Kanye West and Michelle
05:29:41 2 Tidball received 107; and Mark Charles/Adrian
05:29:44 3 Wallace received 11. Scattering votes received
05:29:47 4 1,617.

05:29:49 5 At this time I would like to ask that
05:29:51 6 the Board sign off on the actual canvas that is
05:29:55 7 before you.

05:31:07 8 (Signing of canvas.)

05:31:07 9 CHAIRMAN POSNANSKI: Ms. Henry,
05:31:09 10 Mr. Clerk, we have now -- the Board has now
05:31:11 11 executed and certified the presidential
05:31:15 12 recount.

05:31:17 13 MS. HENRY: Thank you.

05:31:21 14 COMMISSIONER BAAS: It is my absolute
05:31:27 15 pleasure to move that we adjourn.

05:31:31 16 COMMISSIONER MARTIN: And as I always
05:31:35 17 do, second.

05:31:39 18 CHAIRMAN POSNANSKI: The Milwaukee
05:31:41 19 County Election Commission sitting as the
05:31:43 20 Milwaukee County Board of Canvassers is now in
05:31:46 21 recess.

22 (Exhibit No. 820 was marked.)

23 (Proceedings concluded at 5:31 p.m.)

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= = = = =
IN RE: 2020 PRESIDENTIAL ELECTION RECOUNT
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Madison, Wisconsin

November 20, 2020

Reporter: Jessica Bolanos

Page 2

2020 Presidential Election Recount, 11-20-2020

1 TRANSCRIPT OF 2020 PRESIDENTIAL
 2 ELECTION RECOUNT, taken before Jessica Bolanos, a
 3 notary public in and for the State of Wisconsin, at
 4 the offices of Monona Terrace, 1 John Nolen Drive,
 5 City of Madison, County of Dane, and State of
 6 Wisconsin, on the 20th day of November 2020,
 7 commencing at 8:00 a.m.

A P P E A R A N C E S

9

10 ATTORNEYS FOR JOE BIDEN AND KAMALA HARRIS:
 11 Diane M. Welsh, Christa O. Westerberg, David Anstaett

12

13 ATTORNEYS FOR DONALD J. TRUMP AND JOE BIDEN:
 14 Christ Troupis, Lou Esposito, Mike Dean,
 15 Andy Manchester, James Troupis

16

17 ATTORNEY FOR THE BOARD OF CANVAS:
 18 David Gault

19

20 BOARD OF CANVAS MEMBERS:
 21 Scott McDonell (Chair), Allen Arntsen, Joyce Waldrop,

22
 23
 24
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Page 3

1 MR. MCDONELL: Okay. Welcome,
 2 everybody. Can everyone hear me okay? My
 3 name is Scott McDonell. I'm the Dane County
 4 Clerk. Thank you all for coming today. We
 5 greatly appreciate you being here.
 6 I want to introduce our Board of
 7 Canvass: Allen Arntsen, who represents the
 8 Democratic Party; myself, Scott McDonell;
 9 Joyce Waldrop representing the
 10 Republican Party.
 11 Just so you can understand what's going
 12 on in this area, because I'm sure everyone is
 13 curious, we have our Dane County Corporation
 14 Counsel. We have a court reporter. We have
 15 representatives of Biden and Trump campaign,
 16 and, you know, they'll present them and
 17 object to things.
 18 All of this is being broadcast over the
 19 web. So this right here is a camera.
 20 There's actually several cameras around the
 21 room.
 22 So we're basically operating -- and I
 23 think most of you know this, but we're
 24 operating in four areas. Today we're going
 25 to be using three, which is this -- this

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1 interior area here will be one group that's
 2 going to be tabulating one community, or in
 3 the case of Madison or Fitchburg, one ward,
 4 one reporting unit. The second one, there's
 5 one there. So that's -- that would be a
 6 separate one and a third one here.
 7 And then we have three high-speed
 8 scanners on that side of the room that can
 9 actually tabulate the candidates; so how many
 10 voted for Trump or Biden, or there's actually
 11 several candidates on the ballot. So that
 12 will -- and that -- that won't be happening
 13 today, but it will be starting tomorrow,
 14 because we have to have a public test, and
 15 then going forward for the next few days,
 16 that's where I'll go.
 17 So we'll be counting the -- the number
 18 of ballots only to match against the number
 19 of ballots that were received on election
 20 day, and also there will be maybe a couple of
 21 provisional ballots that were sent later. So
 22 we're going to match -- our goal is to match
 23 the numbers for each one and then not count
 24 for the candidates, and then that would
 25 happen down there.

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1 There'll be opportunities for observing
 2 all of this. So I think we're -- we're all
 3 happy or at least reasonably happy with our
 4 ability to see everything and make sure it's
 5 totally transparent or as transparent as
 6 humanly possible, anyway, in this world we're
 7 in.
 8 So the -- if -- everyone seems to be
 9 able to see everything. And just -- just a
 10 reminder, what's going to happen is one
 11 tabulator will be counting either ballots or
 12 votes, so say 50 ballots. And then the
 13 person next to them will count that to make
 14 sure that's accurate. So you'll be -- either
 15 person observing, each person will see the
 16 ballots once either here or there. So there
 17 should be plenty of opportunity for everyone
 18 to be distanced but also be able to see
 19 everything that's happening.
 20 The -- I think we did that. We tried to
 21 pass out a bunch of purple and green pens.
 22 So I really -- if you have a black pen that
 23 you just brought in, because that's normal,
 24 please get rid of that or put it somewhere
 25 safe. We don't want someone to be accused of

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1 can't -- that's endangering everyone in this
 2 room. Wearing masks above your nose is
 3 really important. All right? We're not
 4 going to make it to Christmas, and if it
 5 continues to be a problem, we're going to
 6 start asking people to leave. Thank you.
 7 (Off the record.)
 8 MR. MCDONELL: Okay. All right,
 9 everyone. Just for transparency, we're going
 10 to have a little Board of Canvass here so we
 11 can try to keep everything moving and
 12 uniform. That was the hope of the attorneys.
 13 So, yeah, we'll -- we'll do that now, and you
 14 won't be able to hear us as well, but if
 15 we're all quiet, you probably could --
 16 Okay. So there's been an objection
 17 to the absentee envelopes that do not have an
 18 application associated with them;
 19 specifically in the City of Edgerton, there
 20 are none at all present. Do you want to come
 21 forward and talk about your objections to
 22 those envelopes? Can you hear me?
 23 MR. TROUPIS: I'm sorry. My name
 24 is Christ Troupis. I'm a designated
 25 representative on behalf of the Petitioners,

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1 which states, quote, "The municipal clerk
 2 shall not issue an absentee ballot unless the
 3 clerk receives a written application from a
 4 qualified elector of the municipality."
 5 The petitioners have previously
 6 requested prior to the beginning of this
 7 recount the written applications for absentee
 8 ballots. I would propose to introduce into
 9 the record a letter from James Troupis dated
 10 November 18, 2020 -- I know he's back at the
 11 table. I'll get there in a second -- that
 12 requested that the written applications be
 13 produced.
 14 I want to thank the clerk,
 15 Scott McDonell, for getting us the written
 16 applications; however, under the present
 17 circumstances, we are unable to -- to verify
 18 that the written applications are for each of
 19 these ballots; and therefore, we're going to
 20 make a standing objection to all of the
 21 absentee ballots that are being counted here
 22 since we cannot determine whether or not a
 23 written application was made.
 24 As a result, there is no evidence that a
 25 written application for an absentee ballot

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1 Donald --
 2 MR. MCDONELL: The mic doesn't go
 3 up because otherwise --
 4 MR. TROUPIS: -- Donald J. Trump
 5 and Mike Pence. We object to absentee --
 6 MR. MCDONELL: Hang on a second.
 7 There is no mic. That mic doesn't work.
 8 (Discussion held off the record.)
 9 MR. TROUPIS: My name is
 10 Christ Troupis. I'm the designated
 11 representative on behalf of Petitioners
 12 Donald J. Trump and Mike Pence.
 13 It's our understanding that we -- while
 14 written applications for ballots are present
 15 in the room, that they cannot be -- they
 16 can't be compared to the absentee ballots
 17 envelopes or the absentee ballots themselves;
 18 and, therefore, we are unable to verify
 19 whether or not a particular absentee ballot
 20 is accompanied by a written application.
 21 We object to the counting of all
 22 absentee ballots that are issued without the
 23 elector first having submitted a written
 24 application to receive an absentee ballot as
 25 required by Wisconsin Statute 6.86(1)(AR)

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1 that's being counted was received by the
 2 municipal clerk prior to the issuance of the
 3 challenged absentee ballot. We're
 4 challenging all absentee ballots as a result
 5 for which there's no written application.
 6 I would also like to enter into the
 7 record a copy of the appellant decision in re
 8 the appeal of ballot recount, Walter V. Lee
 9 versus Dave Paulson, decided December 27,
 10 2000. In this decision, the Court held that
 11 Wisconsin Statute 6.84(2) mandates that
 12 Wisconsin Statute 6.866(1)(AR) be strictly
 13 construed. Wisconsin Statute 6.86(1)(AR)
 14 mandates that absentee ballots cast without a
 15 prior written application in contradiction of
 16 Wisconsin Statute 6.86(1)(AR) may not be
 17 counted.
 18 Finally, I would like to enter into the
 19 record a copy of the Wisconsin application
 20 for absentee ballot as an exemplar, which I
 21 note has, in the upper right-hand corner, a
 22 box the municipal clerk is supposed to check
 23 if the elector presented themselves in person
 24 requesting an absentee ballot. Therefore, we
 25 object to all the absentee ballots that are

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1 going to be submitted during this recount
 2 since none of them have a written application
 3 attached or relating thereto. All such
 4 absentee ballots without written application
 5 should not be counted.
 6 We request that the board order a draw
 7 down equal to the number of all the
 8 challenged absentee ballots. Even if the
 9 board rejects our challenges, we request that
 10 the board either conditionally draw down and
 11 create two vote totals; one, the one with the
 12 challenged ballots included, and one without
 13 the challenged ballots included. Thank you
 14 very much.
 15 MR. MCDONELL: Yeah. Thank
 16 you -- thanks -- thank you very much.
 17 Well --
 18 MS. WELSH: May I respond?
 19 MR. MCDONELL: You want to respond
 20 to that --
 21 MS. WELSH: Does it reach to here
 22 or not?
 23 MR. MCDONELL: Yeah. You're going
 24 to need to use this, and we'll fix this by
 25 tomorrow. So --

Page 20

1 the recount.
 2 Notably, the absent ballot applications
 3 the petition for recount contends are
 4 missing, which are the applications for
 5 voters who voted in person during the early
 6 voting period will be available for review.
 7 That is because the absentee ballot envelope
 8 itself, form EL-122, is the written
 9 application to vote absentee.
 10 UNIDENTIFIED SPEAKER: Could you
 11 speak up a little bit? We can't hear.
 12 MS. WELSH: Okay. And we have
 13 copies of these briefs and exhibits that we
 14 will distribute to you as well.
 15 The Wisconsin Elections Commission
 16 Recount Manual states specifically --
 17 addresses this, and it specifically addresses
 18 that the board should not reject any absentee
 19 ballot due to the lack of a written
 20 application because there are a variety of
 21 reasons the board may not be able to locate a
 22 specific application. The up --
 23 MR. MCDONELL: Take your time.
 24 MS. WELSH: The manual instructs
 25 that while the Board of Canvassers need not

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1 MS. WELSH: Will it reach the
 2 podium? Do we think -- first of all,
 3 thank -- I want to thank the Board of
 4 Canvassers for being here and the County
 5 Clerk Scott McDonell. I'm Diane Welsh with
 6 Pines Bach. I'm counsel for the Biden team.
 7 With me I have Christa Westerberg and
 8 Scott (sic) Anstaett. So in response to this
 9 standing objection to counting -- sorry.
 10 MR. MCDONELL: Take your time.
 11 MS. WELSH: First, the Trump
 12 campaign claims it has a right to review
 13 every absentee ballot application as part of
 14 the review process. This is incorrect.
 15 Wisconsin Statute 9.01(1)(B) does not require
 16 the Board of Canvassers to review absentee
 17 ballot applications during the recount, and
 18 the right of the petitioner to review matters
 19 extends only to the materials and ballots
 20 present at the recount.
 21 To the extent ballot applications are
 22 maintained in the statewide MyVote database
 23 or in the municipal clerk's office, the
 24 statute does not require the Board of
 25 Canvassers to produce the applications during

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1 review every absentee ballot application, it
 2 can turn to such applications for assistance
 3 if it is unable to determine the number of
 4 absentee ballot voters.
 5 Regardless of whether the 2018 or 2020
 6 recount manual is followed, the Trump
 7 campaign does not have the right to demand
 8 its own mini audit of all of the absentee
 9 ballot applications. The Board of Canvassers
 10 controls the recount, not the losing
 11 candidate. This is particularly the case
 12 where the petitioners' only specific
 13 allegations is the frivolous contention that
 14 all early absentee voters, estimated by the
 15 election commission to be 650,237 registered
 16 voters, must be disenfranchised for failing
 17 to submit a separate written application.
 18 The absentee ballot envelope is entitled
 19 Official Absentee Ballot
 20 Application/Certification, and the voter
 21 states, "I further certify that I requested
 22 this ballot."
 23 What that means is that all absentee
 24 ballot applications the petitioner complains
 25 about will be, in fact, available for the

1 statement, because if there's no request --
2 if this envelope is the request, it's saying
3 I already requested it. That's insufficient,
4 because it's an after-the-fact statement. It
5 doesn't certify the voter ever submitted a
6 written application for the ballot.

7 For these reasons, we believe that all
8 absentee ballots can be objected to and that
9 we're entitled to see the materials related
10 thereto, which includes the application.

11 Thank you.

12 MR. MCDONELL: Thank you.
13 Actually -- that's fine. Okay. So we had a
14 request -- an objection made, and you can --

15 MS. WELSH: Could I reply?

16 MR. MCDONELL: Yeah, no problem.
17 Sure.

18 MS. WELSH: The Biden campaign will
19 acknowledge that there's a standing challenge
20 to all of the absentee ballots, including the
21 early absentee ballots. We disagree that
22 there's any validity to the challenge.

23 I -- what the Trump campaign is asking
24 is to ignore the reality of what happens in
25 early voting. We have laid this out in our

1 briefs, which my colleagues will distribute
2 so you have them; but as you know, if I go in
3 to early vote, I say, "I'm here to early
4 vote. Can I have a ballot?" You know, I
5 don't just walk into my town hall and get a
6 ballot thrown at me.

7 So the form that is designed and shared
8 by the Wisconsin Elections Commission is an
9 official absentee ballot application and
10 certification, and it says, "I further
11 certify that I requested this ballot," and
12 that happened when I walked into my town hall
13 and said, "Can I please have a ballot to
14 vote," or "May I please vote early?" Like,
15 there is an actual request there.

16 Again, we firmly object to the requested
17 relief of a drawdown, which seeks to
18 disenfranchise 69,000 Dane County workers. I
19 request that the affidavits and their
20 materials be entered into the record, and
21 again, I want to share -- one example, is a
22 declaration of Megan Spicer, if I may, for
23 the record. She's a registered voter in the
24 City of Madison.

25 It says, "I'm a healthcare director for

1 a healthcare company. I am married and have
2 three children who attend schools in Madison.
3 My husband and I chose to vote in person
4 early because we were worried about putting
5 our absentee ballots in the mail and whether
6 that would lead to them not being counted.
7 We voted in person during the early voting
8 period on Friday, October 30th at
9 approximately 10:00 a.m. at the polling site
10 located at Edgewood College."

11 "The process was very straightforward.
12 It involved the following steps: When we got
13 in line, we were given a clipboard and a
14 piece of paper to fill out our name and
15 registration address. The poll worker in the
16 front of the line looked me up on the
17 computer and confirmed I had registered to
18 vote in the city of Madison. I showed my
19 photo identification to the poll worker upon
20 their request. The poll worker noted that I
21 had requested an absentee ballot and asked me
22 what I had done with it. I told them that I
23 had destroyed it when we decided to vote in
24 person. They reminded me that it would be a
25 felony if I attempt to vote multiple times."

1 "The poll worker gave me an absentee
2 ballot envelope, initialed it, and told me to
3 go fill out the absentee envelope and come
4 back. The top of the absentee envelope was
5 marked "official absentee ballot
6 application/certification." I filled out all
7 of the information in the box for voter
8 information, including my name and address,
9 and the municipality. I returned the
10 envelope to the poll worker who reviewed it,
11 confirmed my proper ward, and gave me a
12 ballot."

13 "Then I took the ballot to the voting
14 booth, and I voted in private. I took my
15 completed ballot and the envelope to the poll
16 worker at the finish table, folded the
17 ballot, placed it in the envelope, and then
18 signed and dated the certification box in
19 front of the poll worker. The poll worker
20 took the completed absentee envelope from me,
21 signed and addressed it as my witness, and
22 placed the ballot into a large red secure
23 bag. The process was professional, secure,
24 and transparent. I am outraged at the
25 thought that a campaign would attempt to

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1 invalidate my vote based on a false
 2 allegation that I did not submit a written
 3 application to vote absentee. The absentee
 4 ballot envelope was my written application,
 5 and I followed all of the instructions given
 6 to me by poll workers."
 7 "I have voted early in person
 8 numerous times before, and I am very familiar
 9 with the process, and I feel that my husband
 10 and I did everything right in the way we were
 11 asked to, in accordance with the law. If our
 12 votes were thrown out, we would know that our
 13 voices are not being represented in this
 14 process." Thank you.
 15 MR. MCDONELL: Thank you. Okay.
 16 If you need to distribute that, that's fine.
 17 I think we need nicer tables. It's turned
 18 into a courtroom.
 19 The -- the -- okay. It seems like we
 20 need to dispose of a few issues here, the
 21 request for a standing objection. And again,
 22 Mr. Troupis, make sure I don't -- I say these
 23 things correctly and that -- I want to make
 24 sure for the -- we're all on the same page,
 25 because I know this is going to get

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1 MR. MCDONELL: All right. But we
 2 need to rule on it, and then -- we'll rule on
 3 those, and then we need to rule on how we can
 4 move forward and have everyone get what they
 5 need to do.
 6 MR. TROUPIS: And I have the
 7 exhibits too. I would hand those to the --
 8 MR. MCDONELL: Put it on the table
 9 here. Is that okay?
 10 MR. TROUPIS: I'll set it here.
 11 MR. MCDONELL: So we can put that
 12 in the record. So did I kind of go over it
 13 correctly?
 14 MR. TROUPIS: Yes, you did.
 15 MR. MCDONELL: Okay. Great. I'm
 16 going to -- So Board of Canvassers, the first
 17 decision that we need to make.
 18 Everyone -- can you guys hear me? All right.
 19 Thanks. Sorry. Even if you're talking
 20 quietly, because it echos, it can be a little
 21 hard.
 22 So the first question is: Do we accept
 23 a standing objection that we can use across
 24 all the wards and allow that to be recorded
 25 in our minutes that to the -- to the absentee

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1 litigated, and we want to make sure everyone
 2 has what they need to do what they need to
 3 do. You and I've talked about that.
 4 MR. TROUPIS: Really appreciate it,
 5 Scott. Thank you.
 6 MR. MCDONELL: And I appreciate
 7 your cooperation a lot too.
 8 So we need to adjudicate whether we're
 9 going to, one -- help me, Dave -- one, that
 10 we're -- yes, you have a standing objection
 11 to the ones that you have mentioned.
 12 MR. TROUPIS: Mm-hmm.
 13 MR. MCDONELL: Two, that you asked
 14 for a drawdown or a conditional drawdown. We
 15 should decide that.
 16 MR. GAULT: You need to rule on the
 17 objection first.
 18 MR. MCDONELL: Right. I know. I'm
 19 just talking -- yes.
 20 MR. GAULT: Well, you asked me to
 21 help you out.
 22 MR. MCDONELL: I'll stop doing
 23 that.
 24 MR. TROUPIS: We're all doing good
 25 so far.

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1 ballots and the fact that they are unable to
 2 then -- that they're not able to review the
 3 applications themselves.
 4 MS. WALDROP: The objection to
 5 the --
 6 MR. MCDONELL: Allow them to have
 7 it be a standing objection that we note in
 8 all of our minutes for every single ward that
 9 comes through, that they're objecting to
 10 those ballots being counted. Is that -- is
 11 that right?
 12 MR. TROUPIS: That's correct.
 13 MR. MCDONELL: Okay.
 14 MR. GAULT: Scott, again, I think
 15 you should rule on your decision on the
 16 objection, and then they can have a standing
 17 objection moving forward.
 18 MS. WALDROP: I just told him
 19 there.
 20 MR. MCDONELL: Oh, I see. He wants
 21 me to reverse the order.
 22 MR. GAULT: I think you rule on the
 23 objection first. Then we --
 24 MR. MCDONELL: All right. That's a
 25 fair point. We'll do both. So the first one

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1 would be: Do we accept the objection to
 2 those ballots, and draw them -- and agree
 3 that we should draw them down either
 4 conditionally or not conditionally based on
 5 the fact that they do not have an attached or
 6 identifiable application? That would be all
 7 in person -- if I'm saying this correctly --
 8 so all in-person absentee voting, two weeks
 9 before the election, that would include --
 10 MR. TROUPIS: All absentee voting,
 11 whether in person or absentee.
 12 MR. MCDONELL: An example would be
 13 everyone two weeks before, because they're
 14 just using the envelope. They don't have
 15 another paper application is an example of
 16 it, but not solely that.
 17 MR. TROUPIS: That's correct. It's
 18 part of it but not all.
 19 MR. MCDONELL: Correct. This is a
 20 good example so we understand what we're
 21 talking about. And so they're asking for
 22 that, and we need to --
 23 MS. WALDROP: They're asking
 24 us -- you're asking us to rule on the
 25 objection, whether we accept it or not?

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1 law. And I'm not willing to just throw that
 2 out and disenfranchise, as the lady said,
 3 voters.
 4 MR. MCDONELL: Okay.
 5 MS. WALDROP: Everybody has a vote,
 6 but it has to be a legal vote. They have to
 7 have submitted an application, or they
 8 don't -- they didn't follow the law;
 9 therefore, not -- not legally able to vote.
 10 MR. MCDONELL: Okay. So -- so
 11 we're going to take this up, and then we'll
 12 take up the issue of -- of whether we allow a
 13 standing objection. So, all right. Let's
 14 vote on whether we're going to agree to the
 15 drawdown and the exclusion of those ballots.
 16 Allen?
 17 MR. ARNTSEN: I vote no.
 18 MR. MCDONELL: I vote no. Joyce?
 19 MS. WALDROP: I don't agree. I
 20 vote no.
 21 MR. MCDONELL: You vote no?
 22 MS. WALDROP: Just --
 23 MR. MCDONELL: You got that down,
 24 3-0 on that? And it's being recorded on
 25 audio too, so we've got it on the recording.

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1 MR. MCDONELL: No. We're going to
 2 do that next. We're ruling on whether we
 3 really -- we want to draw down all of those
 4 ballots --
 5 MS. WALDROP: Oh.
 6 MR. MCDONELL: -- and throw them to
 7 -- not throw them out but not count them.
 8 So discussion on -- on that from you
 9 two?
 10 MR. ARNTSEN: Yeah, I
 11 would -- I -- I don't favor the objection. I
 12 don't think we should have -- I don't think
 13 we should do the drawdown, conditional or
 14 otherwise.
 15 MR. MCDONELL: Okay.
 16 MS. WALDROP: Well, I -- I
 17 have -- I have a problem with not ruling on
 18 the objection first, because I don't -- I
 19 think if they have -- they have the right to
 20 object.
 21 MR. MCDONELL: Yes.
 22 MS. WALDROP: No problem with that.
 23 As to whether requiring us to absolutely
 24 ignore everything and draw down, in my mind,
 25 there is a law, and we have to observe the

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1 Okay. So the second question, I think,
 2 was because we are not in agreement on that.
 3 Can we have a standing objection to all the
 4 ballots that would fall into that category
 5 and use that going forward and record the
 6 objection? Okay? I certainly support that.
 7 I don't know if you guys want to comment
 8 or -- or just vote on that?
 9 MS. WALDROP: I -- I support it
 10 also.
 11 MR. MCDONELL: Can you say that --
 12 MS. WALDROP: I support it also.
 13 MR. MCDONELL: Okay. So let's
 14 vote. Anything else?
 15 MR. ARNTSEN: Yeah, no. As do I.
 16 MR. MCDONELL: All right. So all
 17 those in favor of allowing the Trump campaign
 18 to have a standing objection to the ballots
 19 that they indicate and will indicate in the
 20 minutes, say "aye."
 21 MR. ARNTSEN: And, again, just
 22 being clear, it's essentially a procedural
 23 decision. It's not a sub -- we're not ruling
 24 on any objection. We're just saying --
 25 MR. MCDONELL: Going forward.

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1 MR. TROUPIS: There'll be other
 2 objections.
 3 MR. MCDONELL: Objections happen
 4 all the time. Is that what we're talking
 5 about?
 6 MR. TROUPIS: That's right.
 7 MR. GAULT: Scott, you may want to
 8 recommend that if they are going to make
 9 objections to ballots, they should bring them
 10 to Mr. Troupis and he brings them to you,
 11 rather than do it out there.
 12 MR. MCDONELL: Yeah, and I think
 13 just for -- all of us want to move this
 14 forward. No one's trying to slow this down.
 15 Nobody is. That's not -- actually, that's
 16 not in anyone's interest. So we need to be
 17 able to have a system where we're -- the
 18 objections are not going on. I mean, you can
 19 say I -- I want to have that ballot
 20 separated, but --
 21 MR. TROUPIS: That's --
 22 MR. MCDONELL: Things that need to
 23 come here need to come from you guys. Same
 24 with the Biden campaign.
 25 MR. TROUPIS: So long as we can

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1 to talk practically now instead of legally.
 2 So if you have someone and they -- what we do
 3 is we separate it into in-person at one
 4 table, absentees at another table. Your
 5 table is all absentees, and you're supposed
 6 to object to these. That's fine. We know
 7 that those are all objected to.
 8 MR. TROUPIS: Right. They --
 9 MR. MCDONELL: So now what they
 10 should be doing is looking for other things
 11 that might be going on.
 12 MR. TROUPIS: Got it.
 13 MR. MCDONELL: I'm -- not valid.
 14 An X mark next to Trump that misses the oval,
 15 something like that. There's other
 16 perfectly -- we want to make sure they're
 17 counted properly or objected to properly; but
 18 not just en masse of the absentees. That's
 19 what the point of this was.
 20 MR. TROUPIS: Exactly.
 21 MR. MCDONELL: Thank you.
 22 MR. GAULT: Scott, let me talk to
 23 you first.
 24 (Discussion held off the record.)
 25 MR. MCDONELL: So one -- one

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1 have the objected-to ballots separated, we'll
 2 deal with the objections here.
 3 MR. MCDONELL: Great. That
 4 sounds -- that's all I can ask for. Thank
 5 you. All right. I think we have our
 6 rulings, and I would like the tabulators --
 7 MS. ANDERSON: Can I just ask a
 8 question for the community? (Inaudible.)
 9 MR. MCDONELL: We're not objecting
 10 to all ballots en masse, are we?
 11 MR. TROUPIS: Only the -- we have
 12 the standing objection with respect to all
 13 absentee ballots, and that's all the absentee
 14 ballots. The other ballots we're going to
 15 object to if -- for instance, corrections by
 16 the clerk, those kinds of things.
 17 MR. MCDONELL: Okay. So I just
 18 want to clarify that. So we -- so for
 19 the -- again, I don't want to speak for you,
 20 but please -- you know, so for observers,
 21 your objections to the absentees will be
 22 recorded now.
 23 MR. TROUPIS: Great.
 24 MR. MCDONELL: If you're looking at
 25 a table and it's all absentees -- I'm going

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1 question that Corp. Counsel asked is we know
 2 the -- the ones with the signatures
 3 that -- the addresses that were filled in and
 4 they should be initialled, are you objecting
 5 to those en masse as well? I think you are.
 6 MR. TROUPIS: Yes, we are; and even
 7 if the address has been added by the clerk,
 8 we're objecting.
 9 MR. MCDONELL: The address -- I'll
 10 repeat it just for the microphone. Objecting
 11 to the addresses being added by the clerk,
 12 you know, not the original person who did it.
 13 MR. TROUPIS: Right.
 14 MR. MCDONELL: And I'm -- so we're
 15 going to instruct our tabulators, when they
 16 see that initial -- and, of course,
 17 the -- you know, anyone sees that. Those
 18 will also get separated as well --
 19 MR. TROUPIS: Yes.
 20 MR. MCDONELL: -- into a different
 21 pile.
 22 MR. TROUPIS: Okay.
 23 MR. GAULT: Do they just want to
 24 make their standing objection now to that?
 25 MR. MCDONELL: They don't know how

1 many there are. And that's a standing
 2 objection to all those that we'll carry
 3 forward.
 4 MR. TROUPIS: Okay.
 5 MR. MCDONELL: Is that okay?
 6 MR. TROUPIS: I believe so. We're
 7 still going to have to have specific examples
 8 since that's --
 9 MR. MCDONELL: You need evidence.
 10 MR. TROUPIS: Yeah.
 11 MR. GAULT: You should -- I mean it
 12 makes sense while you're doing this now to
 13 have them state their objection, and you guys
 14 rule on it --
 15 MR. MCDONELL: Right.
 16 MR. GAULT: -- while we're convened
 17 now.
 18 MR. MCDONELL: Yeah, so we're
 19 convened now. So do you want us to rule on
 20 that objection of the --
 21 MR. TROUPIS: I think that's
 22 probably a good idea.
 23 MR. MCDONELL: Yeah. Let's just
 24 knock all this stuff out. We're all standing
 25 here. All right.

1 MR. ARNTSEN: We pointed out
 2 missing a ZIP code.
 3 MR. MCDONELL: So if -- there's a
 4 few things that we can do now, and I'll give
 5 you the mic back. Again, I don't want to
 6 ignore the Biden campaign. I apologize for
 7 that. But if there's a few things we can
 8 knock out, it will make everything go faster.
 9 Everyone -- tabulators will understand. The
 10 observers will understand.
 11 So the first one will be there -- I'm
 12 going to -- there is an objection to the
 13 Clerk filling in the address.
 14 MR. GAULT: Why don't you let him
 15 make the statement.
 16 MR. MCDONELL: Yeah. Why don't you
 17 make it instead of me. You'll do a better
 18 job. If it's okay with you, I just think
 19 that might be easier later, easier on all of
 20 us later.
 21 MR. TROUPIS: I think it's better
 22 if I make my own objection.
 23 MR. MCDONELL: I think that's a
 24 pretty good idea.
 25 MR. TROUPIS: You've got it.

1 So I actually have two objections that
 2 I'm going to state. That way we'll have
 3 these both as standing objections, and then
 4 we can deal with the individual ballots and
 5 exemplars to each of those -- to which those
 6 objections apply as we receive the ballots.
 7 The first is for clerk-supplied information.
 8 Again, my name is Christ Troupis. I'm
 9 the designated representative on behalf of
 10 Petitioners Donald J. Trump and Michael
 11 Pence. I'm challenging and objecting to
 12 ballots to -- to ballots for which the
 13 certification on the envelope was
 14 complete -- was improperly completed, in this
 15 case, because the envelopes lack the required
 16 witness address when received by the clerk.
 17 It should have been rejected pursuant to
 18 Wisconsin Statute 6.87(6D) which states,
 19 quote, "If a certificate is missing the
 20 address of a witness, the ballot may not be
 21 counted." The clerk is not authorized to
 22 supply the address for each such improperly
 23 completed absentee ballot certification.
 24 We ask that the poll thus be reduced by
 25 the number of ballots set aside.

1 I note parenthetically that the
 2 statute -- that the law provides the specific
 3 recourse to correct a problem if an address
 4 is not completed. That is to return the
 5 ballot to the elector and have the elector
 6 complete a new ballot or complete the ballot
 7 and return it back.
 8 Since that procedure was not followed in
 9 all cases in which the clerk supplied
 10 information rather than following the
 11 statutory procedure, we believe that ballot
 12 is invalid and should not be counted.
 13 Again, even if the Board of Canvassers
 14 rejects our challenges, we request that the
 15 board determine the total number of eligible
 16 voters on the poll list as if the challenge
 17 was granted and conduct an appropriate
 18 drawdown. This will prevent the need to
 19 conduct an additional and unnecessary recount
 20 if the objection is ultimately allowed by the
 21 Court, as we believe will happen.
 22 Secondly, we want to make an objection
 23 to all indefinitely confined ballots, all
 24 persons who file ballots as indefinitely
 25 confined. Again, the statute that creates

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1 the category of indefinitely confined
 2 electors creates an impermissible
 3 classification of electors in violation of
 4 equal protection and due process.
 5 Unlike electors who request an absentee
 6 ballot, those who assert they are
 7 indefinitely confined are not required to
 8 present a valid photo ID or proof of legal
 9 residence, nor is there any uniform
 10 justification or basis required for such
 11 classification as the Wisconsin absentee
 12 ballot application simply allows the
 13 purported voter to individually certify that
 14 they are indefinitely confined with no
 15 discernible objective standard. The statute
 16 is, therefore, void for vagueness.
 17 There is no requirement to determine the
 18 valid status of the voter, which is an open
 19 invitation for fraud and abuse. The number
 20 of those claiming to be indefinitely confined
 21 has risen exponentially since the clerk, for
 22 Milwaukee and Dane Counties, posted on their
 23 websites encouraging electors to claim to be
 24 indefinitely confined regardless of their
 25 actual status.

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1 lawyer. On behalf of the Biden for President
 2 Campaign, we oppose both challenges that were
 3 raised by the Trump campaign. Both seek to
 4 disenfranchise tens of thousands of
 5 Dane County voters.
 6 As it relates to the absentee witness
 7 addresses, the votes should stand. In 2016,
 8 the Elections Commission, which has statutory
 9 authority to administer Wisconsin election
 10 laws, ordered municipal clerks to themselves
 11 correct missing witness address information.
 12 If the Clerks could not remedy the error
 13 with information available to them, then they
 14 were to contact the voter to inform the voter
 15 of the error and provide an absentee the
 16 opportunity to correct.
 17 They have -- there have been 11
 18 statewide elections since that time. 11. No
 19 one, including the Trump campaign in the 2016
 20 recount, has objected to this procedure. I
 21 will provide to you the brief -- instead of
 22 reading a brief to you, which I'm sure you
 23 appreciate, but attached will be the WEC
 24 guidance and materials.
 25 So again, we have voters who relied on

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1 We have evidence that purportedly
 2 indefinitely confined electors were not, in
 3 fact, indefinitely confined. I would like to
 4 submit into the record a spreadsheet with
 5 evidence of such electors who asserted they
 6 were indefinitely confined but were not.
 7 For each such improperly completed
 8 absentee ballot certification for
 9 indefinitely confined individuals, we ask
 10 that the poll list be reduced by the number
 11 of ballot envelopes set aside. And again,
 12 even if the board rejects our challenges, we
 13 request that the board determine the total
 14 number of eligible voters on the poll list as
 15 if this challenge was granted and conduct an
 16 appropriate drawdown.
 17 This will prevent the need to conduct an
 18 additional and unnecessary recount if the
 19 objection is ultimately allowed by the Court,
 20 as we believe will happen.
 21 MR. MCDONELL: Okay. Thank you
 22 very much for that. I will -- I guess I
 23 would -- why don't you go next. Thank you.
 24 Sorry.
 25 MR. WELSH: Now I feel like a

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1 the advice of their clerks, the advice of the
 2 Wisconsin Elections Commission, and lawfully
 3 voted.
 4 The request to draw down the vote in
 5 Dane County seeks to disenfranchise tens of
 6 thousands of our votes, and we adamantly
 7 oppose that request.
 8 As it relates to indefinitely confined
 9 voters, we also object to the challenge or
 10 the remedy proposed. The challenge is
 11 without merit and did not justify
 12 disenfranchising valid voters. The issue was
 13 litigated in the spring, and the Wisconsin
 14 Supreme Court ruled that the decision to
 15 claim indefinite confinement is one left to
 16 the voters.
 17 No new directives were issued by any
 18 election officials in advance of the
 19 November 3rd election on this topic. The
 20 election commission's March 29th, 2020,
 21 guidance, which remains in effect, provides,
 22 in pertinent part, designation of
 23 indefinitely confined status is for each
 24 individual voter to make based upon their
 25 current circumstances. It does not require

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1 permanent or total inability to travel
 2 outside of the residence.
 3 The designation is appropriate for
 4 electors who are indefinitely confined
 5 because of age, physical illness, or
 6 infirmity or are disabled for an indefinite
 7 period.
 8 The Elections Commission also provided a
 9 remedy if someone is not deemed to be found
 10 to be indefinitely confined, then the clerk
 11 is to update the roll and remove them as an
 12 indefinitely confined voter. The remedy is
 13 not to draw down a vote or not count that
 14 person's vote.
 15 Again, I will offer into the record our
 16 briefs and exhibits related to both these
 17 topics. We opposed the introduction of the
 18 spreadsheet, which is not evidence and which
 19 is not -- we have not seen. And again, we
 20 ask you to reject the challenges presented
 21 but acknowledge them as standing challenges.
 22 MR. MCDONELL: Thank you.
 23 MR. GAULT: Again, I'm David Gault.
 24 I'm with the Dane County Corporation Counsel
 25 office. I'll deal in reverse order with the

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1 As to the clerks adding addresses to the
 2 witness statements, it is true that the
 3 statute provides that if the certificate is
 4 missing the address of a witness, the ballot
 5 should not be counted. That's what the
 6 statute says.
 7 The statute doesn't expressly state the
 8 clerk can't about it. It doesn't say the
 9 clerk can add it too, but as has been pointed
 10 out, the guidance with the Wisconsin Election
 11 Commission since 2016 has been not only
 12 should -- the clerks should add that
 13 information if they have it, but the
 14 Wisconsin Elections Commission told our
 15 municipal clerks they must add that
 16 information if they have it,
 17 whether -- through any extraneous means.
 18 So if they know personally where
 19 somebody lives or if they have that
 20 information on poll records or other official
 21 records, the Commission specifically told our
 22 municipal clerks they have to add that
 23 information to the absentee ballot envelope.
 24 Thank you.
 25 MR. MCDONELL: Okay. So there's

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1 objections.
 2 The indefinitely confined objection,
 3 what I'd advise the board is indefinitely
 4 confined status provision is part of the
 5 Wisconsin statutes. The legislature has
 6 provided for that. As I understand the Trump
 7 campaign, they are making a facial challenge
 8 to the constitutionality of that statute.
 9 And what I would tell you right now is you
 10 don't have the authority or the jurisdiction
 11 to make such a ruling.
 12 (Interruption.)
 13 MR. MCDONELL: We're in the middle
 14 of a hearing right now. I'm going to have to
 15 ask you to leave.
 16 MR. GAULT: The bottom line is as
 17 far as a facial challenge to the
 18 constitutionality of the statute, that's for
 19 the Court. You've got to follow the statutes
 20 that are on the books, and the indefinitely
 21 confined provision is there. So I understand
 22 they're making the record for court, but it
 23 really isn't appropriate for you to -- you
 24 really can't say that the statute's
 25 unconstitutional.

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1 been two requests; one to take them up and
 2 one to exclude the envelopes that had a
 3 witness address added by the clerk and to
 4 draw down an appropriate number to that.
 5 MR. TROUPIS: I'd like to --
 6 MR. MCDONELL: Respond?
 7 MR. TROUPIS: -- respond a little
 8 bit.
 9 MR. MCDONELL: Oh, I'm sorry.
 10 MR. TROUPIS: Are you going to go
 11 first?
 12 MR. ANSTAETT: Can I just refer
 13 you, for the record, the briefs that the
 14 Biden campaign has on the two issues that
 15 you're discussing.
 16 MR. MCDONELL: Just put it over
 17 there.
 18 I'm sure a lot of you are impatient to
 19 get to your jobs, but if we can resolve
 20 these, then it will make it run much smoother
 21 going forward. I think that is the goal for
 22 all of us here.
 23 You've got copies for everybody?
 24 MR. TROUPIS: This is an additional
 25 exhibit. I just want to clarify.

1 MR. MCDONELL: Absolutely. Please
2 do.

3 MR. TROUPIS: I wanted to add a
4 comment on -- on the indefinitely confined
5 objection, we did raise a constitutional
6 objection. I understand that is -- that's a
7 legal objection that the Court will address
8 at some point, but that was not all inclusive
9 of my objection.

10 I also noted that basically when
11 the -- this exponential increase in
12 indefinite confinement occurred because
13 the -- the Board of Elections dispensed with
14 the statutory requirements that defines
15 indefinite confinement and changed it
16 to -- to simply a requirement that the person
17 declare their status.

18 By doing that, they dispensed with
19 statutory protections that the legislature
20 enacted, including the identification of the
21 voter and determination of -- of their
22 status. That -- and so it's in addition to
23 the constitutional challenge.

24 MR. MCDONELL: Right. And I
25 appreciate that. I know you want that on the

1 record.

2 MR. TROUPIS: I do. Thank you.

3 MR. GAULT: I just want to address
4 that for the board, because the indefinitely
5 confined status statute is under review by
6 the Wisconsin Supreme Court now under certain
7 circumstances. And back on March 31st, the
8 Wisconsin Supreme Court entered an order that
9 the Wisconsin Elections Commission guidance
10 of March 29th, which included the provision
11 that it's a self-certification matter for the
12 individual voter, the Wisconsin Supreme Court
13 has already issued an order that that
14 guidance was sufficient for purposes of
15 application of that statute.

16 MR. MCDONELL: Anything -- anything
17 else from -- all right. Let's try to keep
18 moving here.

19 So the first objection that we need to
20 rule on is on the clerk-supplied information,
21 which is the clerks using WEC -- the
22 Wisconsin Election Commission guidance, if
23 they were able to determine an address and
24 were told to add it. Do we want to exclude
25 or draw down or do a separate drawdown,

1 either one? Joyce?

2 MS. WALDROP: I have a question.
3 Did I understand you to say that the statute
4 includes the requirement that the clerk add
5 that address?

6 MR. GAULT: No. The statute does
7 not say that.

8 MR. MCDONELL: Either way?

9 MR. GAULT: The commission guidance
10 said that the clerks must add -- they said if
11 the clerks have that information, they're
12 required to add it.

13 MS. WALDROP: And they are like a
14 board that creates rules and that kind of
15 thing.

16 MR. GAULT: By statute, the
17 Wisconsin Elections Commission is authorized
18 to interpret and give guidance as to how
19 municipal clerks apply the Wisconsin election
20 laws.

21 MS. WALDROP: Okay. Thank you.

22 MR. MCDONELL: Do you have
23 anything, Allen? Do you have anything?

24 MR. ARNTSEN: I'm all right.

25 MR. MCDONELL: Okay. So on that

1 question, those in favor of -- and we'll get
2 to the issue of whether we'll have a standing
3 objection, which we can get to after
4 the -- but do we want to exclude and draw
5 down those that have the witness address
6 added by the clerk and create a drawdown for
7 that? Are you all in favor?

8 MR. ARNTSEN: I don't think we
9 should.

10 MR. MCDONELL: Okay. So, no. I'm
11 going to vote no on that.

12 MS. WALDROP: I'm going to vote no
13 too.

14 MR. MCDONELL: Okay. So 3-0
15 against that drawdown. We'll get back
16 to -- we'll come back to that issue in a
17 second about a standing objection.

18 The second one is all indefinitely
19 confined. All those who indicated that they
20 were indefinitely confined, should those be
21 separated, drawn down, or drawn down just to
22 create a record, either one? That's the
23 question.

24 MR. ARNTSEN: And I say no. I
25 mean, I think the -- this is a Wisconsin

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1 Supreme Court thing which seems to me like a
 2 rule.
 3 MR. MCDONELL: All right. I vote
 4 no on that.
 5 MS. WALDROP: I'm going to have to
 6 vote yes.
 7 MR. MCDONELL: So Joyce votes yes,
 8 so that's a 2 to 1 on a drawdown on all the
 9 indefinitely confined.
 10 Now, can we go back to the question of
 11 whether we allow these to be standing
 12 objections and that we can add to the -- that
 13 we can have going forward as a process?
 14 MR. ARNTSEN: As we dealt with
 15 earlier, I'm fine with handling this as a
 16 standing objection.
 17 MR. MCDONELL: I'm fine with both
 18 of these being standing objections as well.
 19 MS. WALDROP: As long as it has an
 20 end to it; it doesn't go on forever.
 21 MR. MCDONELL: Well, I think
 22 the -- okay. So we'll say 3-0 on that, but
 23 we will -- the point of all this is to
 24 expedite the process and make sure that the
 25 Trump campaign has what they need to use to

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1 follow along.
 2 And if -- if there are concerns about
 3 that, we can try to address it. Just so
 4 everyone knows, if it's got -- if it's
 5 folded, that's an absentee. You know, if
 6 it -- it also should be marked as an
 7 absentee. Sometimes we have occasionally a
 8 remake of a destroyed ballot that they should
 9 then mark -- but that should be marked
 10 absentee. So we'll try to help everyone
 11 through that as we're going through the
 12 tables.
 13 MR. TROUPIS: Thank you very much.
 14 That'll be helpful.
 15 MR. MCDONELL: Okay. Thank you. I
 16 think we're done for now. And tomorrow
 17 morning, just to remember, we're going to try
 18 to work on the scanner issue and allow for
 19 the evidence that you guys will need, as this
 20 clearly -- hopefully this won't continue as a
 21 courtroom.
 22 Okay. So why don't we resume. And
 23 thanks, everyone, for this time out. Sorry
 24 for the delay, but I think that will be
 25 helpful. Thank you.

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1 go to the Court, which is part of this
 2 process. So -- yes?
 3 MR. TROUPIS: And I just have a
 4 procedural matter that I'd like to try to --
 5 maybe to move things along.
 6 We -- our -- our observers, they have
 7 questions regarding whether or not in a
 8 particular table the votes being counted
 9 or -- and the ballots or the envelopes are
 10 for in-person or absentee, and what
 11 ward -- ward's identified. They're trying to
 12 make notes so that we know what ward it came
 13 from and whether or not we're looking at
 14 absentees or envelopes.
 15 Could we have perhaps have the
 16 tabulators tell them that at the outset,
 17 "We're counting absentee now" or "We're
 18 counting" and what ward?
 19 MR. MCDONELL: Okay. What we want
 20 to avoid is a little bit too much of the
 21 conversation one-on-one here, but the person
 22 who -- the lead tabulator can -- maybe I'll
 23 instruct them to explain what's happening at
 24 each table, what ward we're on, and just
 25 be -- try to explain it so everyone can

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1 (Off the record.)
 2 MR. MCDONELL: Okay. So the
 3 question is: There's -- it's missing an
 4 address for the witness. The ballot was
 5 counted. Should it have been counted, is the
 6 question. There's an objection from the
 7 Trump campaign that it was counted --
 8 MR. TROUPIS: Right.
 9 MR. MCDONELL: -- for this one
 10 reason, which there's no witness address.
 11 We're all following along? Okay. Allen
 12 feels the statute, reading it, doesn't count.
 13 MR. ARNTSEN: Looking at
 14 9.01(1)(b)(2), which says we don't count what
 15 are called defective absentee ballots, and it
 16 is defective only -- the official absentee
 17 ballot envelope is defective only if it is
 18 not witnessed or if it is not signed by the
 19 voter, and then it says "or if certificate
 20 accompanying the absentee ballot the voter
 21 received by facsimile transmission or
 22 electronic mail is missing," which is --
 23 MR. MCDONELL: This isn't a
 24 facsimile.
 25 MR. ARNTSEN: So this ballot has

= = = = =
IN RE: 2020 PRESIDENTIAL ELECTION RECOUNT
= = = = =

Madison, Wisconsin
November 21, 2020

Reporters: Taunia Northouse
Jessica Bolanos

Page 2

1 TRANSCRIPT OF 2020 PRESIDENTIAL
2 ELECTION RECOUNT, taken before Taunia Northouse and
3 Jessica Bolanos, notaries public in and for the State
4 of Wisconsin, at the offices of Monona Terrace,
5 1 John Nolen Drive, City of Madison, County of Dane,
6 and State of Wisconsin, on the 21st day of November
7 2020, commencing at 8:39 a.m.
8 A P P E A R A N C E S
9
10 ATTORNEYS FOR JOE BIDEN AND KAMALA HARRIS:
11 Diane M. Welsh, Christa O. Westerberg, David Anstaett
12
13 ATTORNEYS FOR DONALD J. TRUMP AND MIKE PENCE:
14 Christ Troupis, Lou Esposito, James Troupis,
15 Wren Williams
16
17 ATTORNEY FOR THE BOARD OF CANVASS:
18 David Gault
19
20 BOARD OF CANVAS MEMBERS:
21 Scott McDonell (Chair), Allen Arntsen, Joyce Waldrop
22
23
24
25

Page 4

1 designated spots. It looks really good right now.
2 So I really appreciate that. We really need to
3 keep our social distance.
4 So the way -- masks work really well, but
5 they work in conjunction with distance. They
6 don't work by themselves. If you're standing
7 right next to somebody for 20 minutes who is
8 infected, mask or not, it isn't going to help you.
9 So it really doesn't take an hour. It takes 15,
10 20 minutes. So really protect yourself and your
11 family members who you're going to see over the
12 holidays.
13 Only tabulators, county staff, should touch
14 anything election related. I know it's hard with
15 these screens. You can't hear each other very
16 well sometimes, but don't reach through this
17 little gap and touch anything if you're an
18 observer; okay? Imagine if someone else did that
19 and what you would think of that. So I know it
20 might just be by accident. There should only
21 be -- if you need a pen for any reason, it needs
22 to be a colored pen of green or purple. And
23 there's a bunch out. If you don't have a black, a
24 blue, or a pencil -- we don't want anyone being
25 accused of marking a ballot or something looks

Page 3

1 MR. McDONELL: Okay, everybody. We're
2 going to get started. I appreciate everyone being
3 here and following the rules. I'm just going to
4 go over a couple things. I'm Scott McDonell. I'm
5 the Dane County Clerk. This is Allen Arntsen
6 representing the Democratic Party on the Board of
7 Canvass; Joyce Waldrop representing the Republican
8 Party. We're the three members that make
9 decisions on things like the objections to
10 ballots, et cetera.
11 Just an overview, we're going to be in three
12 -- four areas today. There are two tables
13 anterior here, two over there, two over here,
14 where they'll be counting ballots and looking --
15 and counting envelopes. Those are just counts to
16 see that the numbers match, not to see whether the
17 vote total for Biden and Trump. That will go on
18 on the far end. Jon, way -- Jon, the
19 Sheboygan County Clerk, has been calling or
20 helping me down there. They will -- that total
21 counting will be going on in those high-speed
22 scanners down there. And they will be displaying
23 ballots on the screen, just so you guys understand
24 the process.
25 And then the observers must stay in their

Page 5

1 suspicious, or I don't want to see something on
2 YouTube later. So please, that's for everyone's
3 own protection.
4 And let's see. Try to keep your voices down
5 for a couple of reasons. It gets really hard to
6 hear. We need to be quiet in the Board of Canvass
7 here, but if the sound goes up, then we have to
8 get louder, and it's just really hard on
9 everybody.
10 Also, talking is what spreads the virus. It
11 showed in a classroom if one of the children has
12 COVID, it doesn't spread because they're listening
13 to the teacher. If the teacher has COVID, all the
14 kids are going to get it. So that's where we need
15 to keep our voices down and try to talk low. And
16 if everyone's talking low, that helps. The
17 problem is, is everyone starts talking, you have
18 to talk louder to just be heard on a normal level.
19 And that's it.
20 So we're convening the Board of Canvass.
21 We're calling it to order. And you guys can start
22 opening the bags and get going down there. And
23 then we'll probably meet in a few minutes if
24 that's okay with you guys. All right?
25 Thanks, everybody.

1 ensure that anything where the challenge was
 2 defeated, those materials get in the right place
 3 again?
 4 MR. McDONELL: YEAH.
 5 MS. WELSH: Like, so there just seems to
 6 be the potential for materials being disconnected
 7 with their ward and not reconnected --
 8 MR. McDONELL: I think we can manage
 9 that. Okay? Are we good with this topic?
 10 MR. JAMES TROUPIS: Yes, that's good
 11 with that topic, the first procedural question I
 12 wanted to make sure.
 13 MS. WELSH: Those are the materials
 14 (indicating). So we will provide a separate set
 15 for the record and have them marked.
 16 MR. ARNTSEN: With exhibit numbers.
 17 (Recess)
 18 MR. JAMES TROUPIS: So the next
 19 procedural question has to do with -- because
 20 today we'll be getting to counting ballots. So as
 21 you know, statewide they do an audit of machines.
 22 And Madison and Milwaukee County are excluded from
 23 that audit because we're in recount. It seems to
 24 me to avoid -- there's been a lot of worry, a lot
 25 of conspiracy theories vis-à-vis machines counting

1 ballots.
 2 MR. ARNTSEN: Let Scott.
 3 MR. McDONELL: We're hand counting those
 4 audit votes. Is that your question?
 5 MR. JAMES TROUPIS: No, it wasn't a hand
 6 count question. I was suggesting that you count
 7 out a number of ballots to begin with and
 8 essentially do an audit of the machine. In other
 9 words, you know, here's a hundred ballots.
 10 Everybody's agreed these are a hundred ballots A
 11 or B and then run them through as they would in a
 12 normal audit so that you verify the machine at the
 13 front end that it is an accurate count. It will
 14 assure the public that there's an accurate count.
 15 MR. McDONELL: So we did a public test
 16 of machines where a test deck was run through and
 17 truly counted before --
 18 MR. JAMES TROUPIS: When did you do
 19 that? I'm sorry. I wasn't here.
 20 MR. McDONELL: That was the first thing.
 21 It was noticed for 8 a.m. for today in a public
 22 test.
 23 MR. JAMES TROUPIS: Oh, yesterday?
 24 Yeah.
 25 MR. McDONELL: Today. We had -- that's

1 why we didn't start yesterday because we didn't
 2 have the public test notice 48 hours.
 3 MR. JAMES TROUPIS: Oh, well, I
 4 apologize. I was unaware.
 5 MR. McDONELL: So yeah. So there are
 6 wards that are hand counted for the audit.
 7 MR. JAMES TROUPIS: Right.
 8 MR. McDONELL: So there was a public
 9 test. As we go along, I actually was considering
 10 taking one of the hand counted ones that we did
 11 and running through the tabulator to match it.
 12 But I -- if we could put that issue off, I think I
 13 would want to do that. But we did do a public
 14 test, and it did show the correct tabulation. So
 15 I understand your point.
 16 MR. JAMES TROUPIS: But you understand
 17 -- that's fine. And again this is helpful, you
 18 know, with everybody on this. Apparently you
 19 thought of the same exact thing. So that's fine.
 20 The third item is we've been trying to deal
 21 with -- yesterday we were trying to deal with the
 22 absentee in-person vote. So you provided us with
 23 an Excel spreadsheet late yesterday. And forgive
 24 the timing. You know, I was only able to look at
 25 it early this morning. And what I wanted to tell

1 you is we're looking at that and we'll get back to
 2 you about it.
 3 MR. McDONELL: Sure.
 4 MR. JAMES TROUPIS: So I wanted to let
 5 you know that we're trying to address the
 6 questions from yesterday by looking at that, and I
 7 want to tell you I can't talk about yet because I
 8 just haven't had a chance to look at it carefully.
 9 It appears to be much of the information that
 10 might satisfy a good deal of the problems that
 11 we've been --
 12 MR. McDONELL: So you reserve the rights
 13 to talk about that later? That's fine.
 14 MR. JAMES TROUPIS: That's all. I
 15 didn't want you to think that we had forgotten or
 16 that we had somehow put that off. We just saw it
 17 late last night.
 18 MR. ARNTSEN: You did put it off.
 19 MR. JAMES TROUPIS: That's good. So we
 20 will come back to it sometime today.
 21 MR. McDONELL: Thank you, guys.
 22 Appreciate it. Anything else?
 23 MR. JAMES TROUPIS: I did not have any.
 24 Did we have anything else? No. That's good,
 25 except that please --

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1 MR. McDONELL: If you could focus on
 2 helping us. They're getting kind of slowed down
 3 over here like yesterday. So if you could --
 4 MR. JAMES TROUPIS: I'll talk to our
 5 team leaders.
 6 MR. ARNTSEN: Get them dispersed.
 7 MR. JAMES TROUPIS: Thank you. Our
 8 people were supposed to have hats this morning. I
 9 don't see them.
 10 (Recess)
 11 MR. McDONELL: Put it there. Just one?
 12 MR. WILLIAMS: If we're on the record, I
 13 can do it. This is Blooming Grove Wards 1 through
 14 3. And we have one objection -- or we have an
 15 objection to that ballot because it's missing a
 16 voter signature.
 17 MR. McDONELL: Okay. So Blooming Grove
 18 1 and 3, it is missing --
 19 MR. ARNTSEN: It is, yeah.
 20 MR. McDONELL: So three zero that this
 21 is a drawdown. So you've one drawdown.
 22 MR. ARNTSEN: It's one drawdown.
 23 CLERK: Thank you.
 24 MR. McDONELL: Sorry. I think it's the
 25 double mask.

Page 20

1 There's no initials by the clerk.
 2 MS. WELSH: And we oppose the challenge
 3 because it's a clerk error, and the voter
 4 shouldn't be disenfranchised for a clerk error.
 5 There's not an overcount in the Town of Dunn that
 6 we're aware of, and it doesn't appear to be an
 7 absentee ballot.
 8 MS. WALDROP: So there's no evidence
 9 that we can point to that says -- well, there is
 10 because it went through the counter; right? It
 11 says -- I was looking for evidence that it was
 12 actually a ballot that was submitted by a person.
 13 And other than the fact that it went through the
 14 counter, there's no proof because there's no
 15 initials. It could have been anybody dropped this
 16 in someplace if it hadn't been through the
 17 counter. So this is on the counter as a record;
 18 right?
 19 MR. EXUM: We haven't counted all of the
 20 ballots yet so --
 21 MR. ARNTSEN: But initially. This is
 22 the recount.
 23 MR. EXUM: It came in with everything
 24 else.
 25 MS. WALDROP: So the numbers match is

Page 19

1 CLERK: So how do we do that?
 2 MR. McDONELL: So just take an absentee.
 3 Make sure you can't see through it. Pull one out
 4 and change the vote totals. Segregate that
 5 ballot. Actually put it in that envelope.
 6 MS. WELSH: Does the Board of Canvass
 7 review it?
 8 MR. McDONELL: I'm going to let them do
 9 it unless there's an objection.
 10 SPEAKER: We just want to be able to
 11 watch it.
 12 MR. McDONELL: Yeah. Your observer
 13 should go to watch it over there. Then take that.
 14 And then we're going to do a plastic bag when you
 15 come back up.
 16 (Recess)
 17 MR. ARNTSEN: So it's Town of Dunn, and
 18 there's a ballot that doesn't have the clerk
 19 initials on it. And I believe what we said is
 20 this is okay because it's a clerk error.
 21 MS. WELSH: Oh, wait. We haven't put
 22 our challenge on the record.
 23 MR. WILLIAMS: To restate, this is Town
 24 of Dunn. It says all wards. There's no initials.
 25 This is an official ballot. That's our objection.

Page 21

1 what I'm saying?
 2 MR. EXUM: We don't know yet.
 3 MS. WALDROP: In the initial report and
 4 canvassing, was there an overvote in the Town of
 5 Dunn?
 6 MR. EXUM: I don't know.
 7 MS. WALDROP: I'm not ready to say this
 8 is a legitimate ballot.
 9 MR. McDONELL: Is Baxter the one that's
 10 doing it?
 11 MR. WILLIAMS: I'm objecting to it. He
 12 just brought it forward.
 13 MR. McDONELL: Okay. We can rule on it.
 14 It is the --
 15 MS. WELSH: Baxter's getting the clerk
 16 because Joyce had a concern.
 17 MS. WALDROP: I had a concern.
 18 MR. McDONELL: Okay. Sure.
 19 (Discussion off the record)
 20 MR. EXUM: I don't see the clerk, but I
 21 have the inspector's statement. So the total
 22 number of ballots cast was 3625.
 23 MS. WALDROP: And the count?
 24 MR. EXUM: Optical scan ballots 3625.
 25 MS. WALDROP: Okay. So obviously it

= = = = =
IN RE: 2020 PRESIDENTIAL ELECTION RECOUNT
= = = = =

Madison, Wisconsin
November 22, 2020

Reporters: Taunia Northouse
Jessica Bolanos

Page 2

2020 Presidential Election Recount, 11 22 2020

1 E H I B I T S

2 BOARD E HIBITS

No.	Description	Identified
E h. 1	Order by the Board	59

6 TRUMP ADMINISTRATION E HIBITS

No.	Description	Identified
E h. 6	Affidavit	9
E h. 6 A	Supporting document	9
E h. 6 B	Supporting document	9

12 (Original e hibits retained by Dane County Board of
Canvassers.)

Page 3

1 TRANSCRIPT OF 2020 PRESIDENTIAL

2 ELECTION RECOUNT, taken before Taunia Northouse and

3 Jessica Bolanos, notaries public in and for the State

4 of Wisconsin, at the offices of Monona Terrace,

5 1 John Nolen Drive, City of Madison, County of Dane,

6 and State of Wisconsin, on the 22nd day of November

7 2020, commencing at 8:22 a.m.

8 A P P E A R A N C E S

9 ATTORNEYS FOR JOE BIDEN AND KAMALA HARRIS:

10 Diane M. Welsh, Karen Timberlake, Christa Westerberg,

11 David Pekarek Krohn, Chris Hane ic

12

13 ATTORNEYS FOR DONALD J. TRUMP AND MIKE PENCE:

14 Christ Troupis, Lou Esposito, James Troupis,

15 Wren Williams, Sophia Papandreas T ot os

16

17 ATTORNEY FOR THE BOARD OF CANVASS:

18 David Gault

19

20 BOARD OF CANVASS MEMBERS:

21 Scott McDonell (Chair), Allen Arntsen, Joyce Waldrop

22

23

24

25

Page 4

1 MR. McDONELL: I m Scott McDonell. I m

2 the Dane County Clerk. The Board of Canvass is

3 Allen Arntsen, Joyce Waldrop. I don t kno here

4 Joyce is, but you ve all seen her the past couple

5 days.

6 There are four areas. This is one tabulation

7 area. There s another one. There s another one.

8 And then the actual high speed scanners are

9 counting the votes for the different candidates.

10 Here e re counting the ballots and revie ing the

11 envelopes and counting the envelopes and matching

12 them together.

13 We really need to enforce the social

14 distancing because, you kno , masks help a lot,

15 but the actual si feet separation combined is

16 hat is going to slo COVID or stop it from

17 spreading. So please hen you re asked to

18 separate or keep your mask on, you need to do

19 that.

20 There should be no black or blue pens in this

21 room, you kno , a pencil so that no one can accuse

22 you of filling in an oval. There ill be purple

23 and pink pens. So e ll try to supply you ith

24 those if you need a pen. But please ust for all

25 of our sakes.

Page 5

1 Put your -- excuse me -- cell phones on

2 silent or vibrate. Do that now. We would

3 appreciate it. And then try to keep the noise

4 down because sometimes what happens, you guys know

5 how it is in a restaurant. It gets loud and you

6 get louder, and it gets louder and louder and

7 louder. So let's all try to keep our voices down.

8 And also that helps minimize the spread of COVID.

9 It's the speaking that -- is what pushes the virus

10 out.

11 Okay. So one of the things we're going to

12 try to get doing, and one thing I did want to

13 point out, is that we're not going to start up the

14 high-speed scanners right away. So there's not

15 going to be really any action down there till a

16 little bit later. But maybe I'll make an

17 announcement when that starts, make sure there's

18 observers, obviously, when that starts. But

19 that's how we're starting this morning. Those

20 things can catch up very easily to what's

21 happening out here.

22 All right. So I'll call this to order. And

23 as soon as staff's ready to start the first two

24 communities, and then we'll, as soon as we can,

25 start this bunch.

Page 14

1 that Attorney Troupis presented to us that he
 2 wants us to decide?
 3 MR. JAMES TROUPIS: If it is as I
 4 stated, you will be able to check it. If it's
 5 not, I certainly would agree.
 6 MS. WELSH: Again for purposes of this
 7 recount, I don't think we need to identify the
 8 exact number. But we will review it, yes.
 9 MR. JAMES TROUPIS: Are you agreed that
 10 if my representation is correct, the Board may
 11 accept that as the number?
 12 MS. WELSH: Again, we agree it's
 13 publicly available information, which again may be
 14 subject to change based on what happens today.
 15 MR. McDONELL: If you need -- if you
 16 want to say anything more, that's fine. But I
 17 would say we would just want a little bit of
 18 time --
 19 MR. ARNTSEN: Yeah.
 20 MR. McDONELL: -- to review it
 21 ourselves. I think this is helpful. So -- but we
 22 need to, you know --
 23 MR. JAMES TROUPIS: Oh, no, sure. We're
 24 all trying to solve problems.
 25 MR. McDONELL: If we have a question, we

Page 16

1 MR. ARNTSEN: There we go.
 2 MR. WILLIAMS: Thank you.
 3 (Recess)
 4 MR. WILLIAMS: Village of Cross Plains.
 5 There are four ballots here. If the clerk -- I'm
 6 sorry. The Board of Canvassers could later enter
 7 each --
 8 MR. ARNTSEN: Yeah, numbering.
 9 MR. WILLIAMS: -- number, these are all
 10 four missing the initials at the top. Same
 11 objections. That's why we'd ask for a drawdown.
 12 MS. WELSH: First, we oppose to a
 13 drawdown based on the missing initials. The first
 14 ballot is a military voter. Because that's sent
 15 electronically, clerks can't figure out how to
 16 initial something that's sent via email or fax.
 17 So I want to point out that's a military ballot.
 18 The fourth ballot, AB 936, is an in-person
 19 voting with the clerk's office. This is voted in
 20 person. And again, where there has clerk error --
 21 I'm sorry, there's two military ballots here. I
 22 just want to correct the record. These first two,
 23 AB 1506 and AB 372, are military ballots that the
 24 clerk would have sent electrically and didn't
 25 physically initial the electronic copy. AB 316,

Page 15

1 might pull you back up and try to figure something
 2 out. Does that make sense?
 3 MR. JAMES TROUPIS: Yeah.
 4 MR. McDONELL: And we'll try to get at
 5 this soon.
 6 MR. JAMES TROUPIS: Thank you very much.
 7 (Recess)
 8 MR. WILLIAMS: So my name is
 9 Wren Williams. This is from the Village of
 10 Cross Plains. I'm not sure exactly which wards
 11 they're all out of. But there are six of them,
 12 and they're all missing the top initials. And
 13 that we just restate our objection and challenge
 14 previously stated.
 15 MS. WELSH: Yeah. We oppose the
 16 drawdown based on this clerk error for reasons
 17 previously stated on the record.
 18 MR. McDONELL: Okay. Anything else?
 19 MR. WILLIAMS: No.
 20 MR. McDONELL: Based on our previous
 21 rulings, this would be a two-one vote to not
 22 reject these six, and they will not be drawn down.
 23 And I can give you the numbers if you want:
 24 AB 1618, AB 1615, AB 167, AB 158, AB 1617,
 25 AB 1616.

Page 17

1 AB 936, simply clerk error. The voter shouldn't
 2 lose their vote based on clerk error. So we
 3 oppose the drawdown.
 4 MR. WILLIAMS: Just quick response. I
 5 want to make sure the record understands that
 6 these two that have been identified as military,
 7 they could also just be overseas voters.
 8 MR. ARNTSEN: And just to make sure
 9 everybody's in agreement -- and I can get Scott if
 10 need be, but this is the same issue that has come
 11 up a number of times with the lack of initials
 12 there. And what the ruling has generally been is
 13 two to one to accept that, with Scott and I on the
 14 two and Joyce is the one.
 15 MR. WILLIAMS: I'm okay with that being
 16 accepted.
 17 MR. ARNTSEN: Joyce, are you okay with
 18 just --
 19 MS. WALDROP: Yes.
 20 MR. ARNTSEN: So there will be no
 21 drawdowns on this.
 22 MS. WELSH: I don't know, Joyce, how
 23 you've been ruling on the electronic ones. So I
 24 don't recall.
 25 MR. ARNTSEN: I'm not trying to put

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1 MR. McDONELL: And then don't draw that
 2 down.
 3 And, unfortunately, on this one, even though
 4 I get the point quite clearly that the addresses
 5 are up here and you can actually read their names,
 6 if you couldn't read their names, we would not be
 7 able to figure this out. I -- this is a two-one
 8 vote, Joyce and I, to draw down two ballots.
 9 Allen is a no. Two drawdowns.
 10 MR. CHRIST TROUPIS: Thank you.
 11 (Recess)
 12 MR. WILLIAMS: City of Verona, Ward 1,
 13 two absentee ballot envelopes. Neither have
 14 witness signatures or addresses. We ask for a
 15 drawdown as previously stated in the record.
 16 MS. WELSH: No comment.
 17 MR. McDONELL: No comment? And I just
 18 want to make sure they weren't in person. I just
 19 want to look at it further.
 20 MS. WELSH: Yeah. Can you tell?
 21 MR. McDONELL: They don't have addresses
 22 on the back, but they don't have check marks and
 23 there isn't any stamp. These could have been
 24 easily dropped off like in a dropbox or something.
 25 So it's probably what it was.

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1 Two one to draw this down.
 2 So this is also a drawdown.
 3 MR. WILLIAMS: Okay. So these are two
 4 ballots -- or two envelopes here. They are both
 5 missing the initials at the top. And we would
 6 object to them, ask for a drawdown for the same
 7 reasons as previously stated.
 8 MR. McDONELL: So the only problem is
 9 the lack of a signature at the top?
 10 MR. WILLIAMS: That's correct. The
 11 initials.
 12 MR. ARNTSEN: The initials, clerk's
 13 initials.
 14 MR. McDONELL: Initials.
 15 MS. WELSH: And for reasons previously
 16 stated on the record, we oppose the drawdown.
 17 MR. McDONELL: So this has been I
 18 think --
 19 MS. WELSH: Clerk error, I think.
 20 MR. McDONELL: Two-one vote to not draw
 21 these down just because of the initials. So these
 22 are okay.
 23 Others? Is that it? Four drawdowns.
 24 MR. WILLIAMS: Before we leave, have we
 25 been stating by name or number the ones with the

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1 MS. WELSH: Two from the same household.
 2 MR. McDONELL: So I would say three zero
 3 they need to be drawn down.
 4 MR. ARNTSEN: Wait. Let me look at
 5 something. Oh, because there's no witness
 6 signature.
 7 MR. McDONELL: Three zero these are
 8 drawdowns. Oh, this is really obvious.
 9 MR. WILLIAMS: Do you want to do it for
 10 me? I'm kidding. There's two here. They're from
 11 the City of Verona, Ward 2. They're both missing
 12 signatures -- voter signatures.
 13 MS. WALDROP: Oh, my gracious.
 14 MR. McDONELL: No comment? Okay.
 15 Consistent with our previous, these are two
 16 drawdown, no voter signatures.
 17 MR. WILLIAMS: This is from City of
 18 Verona, Ward 5, and it is missing an address for
 19 the witness signature.
 20 MS. WELSH: For reasons previously
 21 stated on the record -- can you turn it over. For
 22 reasons previously stated on the record, we don't
 23 believe there should be a drawdown.
 24 MR. McDONELL: So this was mailed. It
 25 is missing the address. I can't read the name.

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1 initials? So if those two could be specified, the
 2 ones that were not drawn down that are missing the
 3 initials at the top. That's what we have been
 4 doing?
 5 MR. McDONELL: Okay. Yeah, because we
 6 were doing numbers, but now we don't have numbers.
 7 Do you have these, or you need these?
 8 THE CLERK: City of Verona. These ones
 9 we're not drawing down?
 10 MR. WILLIAMS: If they do not have the
 11 numbers, we've been saying the name; right? Is
 12 that right?
 13 MR. McDONELL: Okay, sure. So the two
 14 that we're not drawing down, Pamela Gust, G-U-S-T,
 15 and Kallie, with a K, Knueppel, K-N-U-E-P-P-E-L.
 16 MR. WILLIAMS: Thank you.
 17 MR. BESANT: Those are now drawdowns?
 18 MR. McDONELL: No.
 19 MR. WILLIAMS: So what was the total
 20 drawdowns?
 21 MR. BESANT: Five drawdowns.
 22 (Recess)
 23 MR. ARNTSEN: An issue had arisen
 24 earlier concerning ballot applications and the
 25 absentee ballot envelope and separate applications

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1 and requests to look at applications. And the way
 2 that we have resolved it is that the Board by a
 3 two-to-one vote, with Chairman McDonell and I,
 4 Allen Arntsen, yes, and Joyce Waldrop no, are
 5 making the following order. And it is my
 6 understanding that the parties have no objection
 7 to the order. And the order is as follows: The
 8 WEC identifies, through publicly available
 9 information, that 61,193 electors cast absentee
 10 ballots in person in Dane County. This
 11 constitutes the beginning total of in-person
 12 absentee voters. A final total may be determined
 13 after the recount to account for drawdowns and
 14 in-person voters for which a ballot may not have
 15 been submitted.

16 2. Each of the in-person ballots delivered
 17 in person were accompanied by a signed EL-122
 18 language.

19 3. The Board concludes that the EL-122 is
 20 legally sufficient to satisfy Wis Stat
 21 Section 6.86(1)(ar) and 9.01(1)(b)(2).

22 No. 4. On November 20, 2020, the Board
 23 determined that a review of all absentee ballot
 24 applications is not required by the recount
 25 statute, Wis Stat Section 9.01(1)(b). The Board

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1 MR. McDONELL: Their concern is that
 2 that looks a lot like this. Of course this could
 3 be -- I don't know that a husband or wife's
 4 signature would look similar so I'm not -- I think
 5 it's okay if this address doesn't match this
 6 because that's not an issue.

7 MR. WILLIAMS: That wasn't the issue.

8 MR. McDONELL: I know. What you're
 9 saying is that looks a lot like that is your
 10 problem.

11 MR. WILLIAMS: Yeah. And a lot of times
 12 when they did look the same and they're in the
 13 same household, that usually isn't that
 14 questionable. This is a little more questionable.

15 MR. PEKAREK KROHN: So what it seems
 16 like I think what they're saying is the same
 17 person signed as both the voter and the witness,
 18 which if the address was the same, there might be
 19 some support for that. But here the addresses
 20 aren't even the same, so it looks like there's a
 21 separate witness that signed that happens to
 22 have --

23 MR. McDONELL: Kind of, yeah, a similar
 24 way of signing but --

25 MS. WALDROP: I think it's okay.

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1 granted the Trump Campaign a standing objection as
 2 to all absentee ballots.

3 5. The Board concludes as to in-person
 4 absentee voters, it is not necessary to make
 5 additional written absentee applications available
 6 at this time for further inspection. That's the
 7 order.

8 MR. JAMES TROUPIS: That is consistent
 9 with the language.

10 MR. McDONELL: Okay. Any comments? Are
 11 we good on that? Thank you.

12 (Board Exhibit No. 1 marked for
 13 identification)
 14 (Recess)

15 MR. WILLIAMS: This is Village of
 16 Cottage Grove, Ward 3, envelope 3906. And so the
 17 issue with this one is that those two signatures
 18 are very similar and then they have different
 19 addresses. That's a different address and this is
 20 a different address. So we didn't feel like they
 21 were in the same household.

22 MR. PEKAREK KROHN: So there's no
 23 signature matching requirement. We'd object to a
 24 drawdown. Two different people signed it.
 25 There's nothing wrong with this ballot.

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1 MR. McDONELL: Three zero.

2 MR. ARNTSEN: We don't signature match.

3 MR. WILLIAMS: All right. This is 1047,
 4 and the issue with this one is that it is an
 5 overseas or military ballot, but it wasn't
 6 initialed which we have a standing -- or we've
 7 already made our arguments on that one. So that's
 8 why we continue to object.

9 MR. McDONELL: Do you want to say
 10 something on that one?

11 MR. PEKAREK KROHN: Just that we object
 12 to a drawdown for the same reasons we stated on
 13 the record; especially this appears to be overseas
 14 likely military.

15 MS. WALDROP: It's military -- I think
 16 it's okay.

17 MR. McDONELL: She's talking to herself.

18 MR. ARNTSEN: Three zero it's good.

19 MR. PEKAREK KROHN: Three zero to not
 20 draw down?

21 MR. McDONELL: Yeah. No drawdown. Is
 22 there another one?

23 MR. WILLIAMS: Yeah. There's three
 24 more. This one's missing a signature of the
 25 witness and of the address, 3183.

= = = = =
IN RE: 2020 PRESIDENTIAL ELECTION RECOUNT
= = = = =

Madison, Wisconsin
November 24, 2020

Reporters: Taunia Northouse
Jessica Bolanos

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E H I B I T S

No.	Description	Identified
E h. 1	Affidavit from City Attorney Haas and City Clerk Wit el Behl in support of Democracy in the Parks	50
E h. 2	Affidavit from City Attorney Haas and City Clerk Wit el Behl in support of Democracy in the Parks	50
TRUMP ADMINISTRATION E HIBITS		
No.	Description	Identified
E h. 10	List of ob ected to ballots	37
E h. 11	List of ob ected to ballots	43
E h. 12	Affidavits RE Democracy in the Parks	50
E h. 13	Photo of 75 non ob ected to To n of Westport Ballots ith clerk initials and an affidavit cover sheet	79
(Original e hibits retained by Dane County Board of Canvassers.)		

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1 MR. McDONELL: Okay, everybody. I'm Scott
 2 McDonell. Let's get going this morning. I want
 3 to just introduce the Board of Canvass again:
 4 Joyce Waldrop representing the Republican Party,
 5 Allen Arntsen representing the Democratic Party,
 6 and myself, the Dane County Clerk.
 7 Let's go over the -- first I just want
 8 to mention that my friend, Wren, here from
 9 Virginia came in to -- I want you to describe the
 10 weather today. Locally, we would describe this as
 11 partly cloudy. This would shut down schools for a
 12 week in Virginia.
 13 MR. WILLIAMS: It would.
 14 MR. McDONELL: I know. I grew up in
 15 Maryland.
 16 The plan for today, we're going to
 17 finish Middleton. We're going to start and finish
 18 Fitchburg. And Sun Prairie is a big one. We're
 19 going to make sure -- hopefully we're done with
 20 Sun Prairie. They use one large reporting unit.
 21 It will be a little bit different, but we should
 22 be able to follow it fine. And if we can also
 23 hopefully get done -- almost done with the massive
 24 sorting. We're already far enough ahead to make
 25 sure Madison rolls when we get to it. So it would

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TRANSCRIPT OF 2020 PRESIDENTIAL

1 ELECTION RECOUNT, taken before Taunia Northouse and
 2 Jessica Bolanos, notaries public in and for the State
 3 of Wisconsin, at the offices of Monona Terrace,
 4 1 John Nolen Drive, City of Madison, County of Dane,
 5 and State of Wisconsin, on the 24th day of November
 6 2020, commencing at 8:19 a.m.

A P P E A R A N C E S

7 ATTORNEYS FOR JOE BIDEN AND KAMALA HARRIS:
 8 Diane M. Welsh, Christa Westerberg,
 9 David Pekarek Krohn
 10
 11 ATTORNEYS FOR DONALD J. TRUMP AND MIKE PENCE:
 12 Jim Troupis, Christ Troupis, Sophia Papandreas
 13 T ot os, Wren Williams, Megan Revis Frederick,
 14 Lou Esposito, Kyle Hudson
 15
 16 ATTORNEY FOR THE BOARD OF CANVASS:
 17 David Gault
 18
 19 ATTORNEY FOR THE CITY OF MADISON:
 20 Michael Haas
 21
 22 BOARD OF CANVASS MEMBERS:
 23 Scott McDonell (Chair), Allen Arntsen, Joyce Waldrop

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1 be nice to get that one. We'll be doing really
 2 well if we get into Madison later. If not, we'll
 3 start it tomorrow morning. Hopefully we can get a
 4 few of those wards done later tonight.
 5 Just a reminder about the social
 6 distancing, masks. You know, it is really
 7 important to combine those two together. And try
 8 to limit your conversations because really if you
 9 are next to someone talking, like me and Allen,
 10 for 15 minutes, that's even with masks. So maybe
 11 just switch up who you're even talking to and
 12 stuff so you're not in that tightness. And keep
 13 your -- when you're eating or drinking, you know,
 14 pull down your mask. You put it back up. If
 15 you've got a whole bag of chips or something, you
 16 need to go in the hall just for your own sake and
 17 everyone else's. We appreciate that. I always
 18 say it's like if were Klingons and Romulans, the
 19 virus is the Borg. And if you don't know what I
 20 said, just Google that when you're waiting around
 21 later.
 22 All right. I'm going to try to work on
 23 some thank yous, not all of them at once. I
 24 really want to thank my own staff, Patty and
 25 Rachel, and all of the IT and Human Resources, Sam

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1 while. So you can take a break. You can sit and
 2 watch, whatever you want to do. But then you'll
 3 get to see all those ballots; okay? I wanted
 4 everyone to just be on the same page. So great.
 5 And that's it. Thanks, everybody.
 6 Actually, one last thing. What I'll do
 7 is I'll get back on the mic and give you a
 8 heads-up we're switching to inspection, get back
 9 in your seat so you know that you can see the
 10 ballots. So you're walking around now. I'll let
 11 you know. Okay. Thanks.
 12 (Recess)
 13 MR. McDONELL: Hey, everyone. I promised
 14 that I would announce when Sun Prairie ballot
 15 count was done and a ballot review would begin.
 16 If you want to be part of the observation or
 17 looking at the Sun Prairie ballots, that will
 18 begin in a couple minutes. Thanks.
 19 (City Exhibit Nos. 1 and 2 and
 20 Trump Exhibit No. 12 marked for
 21 identification)
 22 MR. WILLIAMS: This is City of Fitchburg.
 23 There are nine envelopes here. Each of them
 24 appears to have a corrected address because
 25 they're different from the handwriting and

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1 two one. This one's fine. So no drawdown.
 2 (Off the record)
 3 MR. McDONELL: We're going to get to some
 4 arguments about Madison and Democracy in the Park
 5 in a minute.
 6 MR. JAMES TROUPIS: So for the record, I'm
 7 Jim Troupis from the Trump Campaign. And we are
 8 today objecting to those votes that were cast and
 9 those ballots that were received, all ballots
 10 received in the Democracy in the Park process here
 11 in the City of Madison.
 12 To begin with, I'd like to have Mike
 13 Haas, who is the city attorney, if he could, he's
 14 got some affidavits to introduce about the event
 15 as well as to address the number. So Mike?
 16 MR. HAAS: Good afternoon. My name is
 17 Michael Haas, H-A-A-S. I'm the city attorney for
 18 the City of Madison. And hopefully that's better.
 19 I have entered a couple of affidavits in the
 20 record: One from me and one from the City clerk,
 21 Maribeth Witzel-Behl, to address the Democracy in
 22 the Park event and the ballots that were collected
 23 through that process. So my affidavit basically
 24 recounts correspondence I had with an attorney
 25 representing the leadership in the state assembly

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1 penmanship on each of those.
 2 MR. PEKAREK KROHN: And we'd say that these
 3 shouldn't be drawn down for the reasons previously
 4 stated.
 5 MR. McDONELL: Yeah, so three zero. These
 6 are all fine.
 7 MR. WILLIAMS: And then I've got another
 8 envelope here that's missing a city, state, and
 9 ZIP and does not match up there.
 10 MR. McDONELL: Right. I understand what
 11 you're saying. You couldn't just quickly
 12 ascertain.
 13 MS. WALDROP: What's the address? It doesn't
 14 say Fitchburg?
 15 MR. McDONELL: Then three zero.
 16 MR. ARNTSEN: We're good. You're okay.
 17 MR. McDONELL: Don't leave us. There you go.
 18 That's fine.
 19 MR. WILLIAMS: And then this one is missing a
 20 witness signature.
 21 MR. McDONELL: Okay, two one. This one is
 22 fine since it's clerk error.
 23 MR. WILLIAMS: And finally, this one is --
 24 I'm sorry, oh, missing the initials at the top.
 25 MR. McDONELL: Initials at the top. I think

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1 and the state senate, the Republican leaders,
 2 those bodies who were objecting to the event that
 3 was provided the day before the first Saturday
 4 that it was held.
 5 My affidavit also includes my response
 6 the following day to the attorneys. The gist of
 7 it is that that attorney was claiming that the
 8 Democracy in the Park event did not comply with
 9 Wisconsin law. It cited some statutes but not
 10 really any reason under those statutes that I
 11 could tell that the event would not be valid and
 12 those ballots would not be valid.
 13 So I responded to him to that effect and
 14 said that, as far as I could tell, the event
 15 complied with all laws because ballots would not
 16 be issued in the parks. Only ballots would be
 17 collected that had already been mailed out to
 18 voters. Sworn election officials would be
 19 collecting the ballots. And the ballots would be
 20 secured and then delivered to the clerk's office.
 21 And we thought that that was valid under
 22 Wisconsin Statute 6.87(6), which only requires
 23 returning the ballot to the clerk. It does not
 24 require the individual voter to return their
 25 ballot.

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1 I can sit in the park all day long and
 2 collect a hundred ballots from my friends and turn
 3 them in to the clerk, and that would be a valid
 4 process. This was actually a more secure process
 5 than that.
 6 And, in fact, I visited the parks. And
 7 at the end of the day, the clerks sent couriers to
 8 the parks to pick up the ballots. The couriers
 9 were required to have a photo ID. And they
 10 actually had to have a password to pick up the
 11 ballots.
 12 I witnessed in one case a courier
 13 arrived, got out of her car, did not have her ID.
 14 The worker sent her back to her car to get her
 15 license so they can match it up with who was
 16 supposed to collect the ballots. She did not know
 17 the password at that point, so they actually had
 18 to contact the clerk's office to verify her
 19 identity and that it was okay to send the ballots
 20 with her.
 21 The election officials could also serve
 22 as witnesses. There were two ways that voters
 23 could submit their ballots. They could bring
 24 their completed ballot in a sealed envelope with
 25 their signature and the witness signature and

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1 Those were considered to be absentee ballots just
 2 as any mailed-in ballots. They were assembled and
 3 then divided into the wards that they belonged to.
 4 So those ballots are no longer
 5 segregated. They cannot be identified at this
 6 point because anybody from anywhere in the city
 7 could go to any park in the city. It was not
 8 divided up by ward. And so when the ballots were
 9 received, they were put in the ballot boxes with
 10 the ballots from the appropriate wards.
 11 So I would just ask the -- and also the
 12 total number of ballots collected at Democracy in
 13 the Park was 17,271 ballots.
 14 So thank you. I'd be happy to answer
 15 any questions.
 16 MR. McDONELL: Thank you.
 17 MR. JAMES TROUPIS: No, I have no questions.
 18 I have no questions. Thank you, Mike.
 19 So as we look at this situation with
 20 Democracy in the Park, it appears to us -- and I
 21 think it is a fairly obvious attempt to get around
 22 Wisconsin's requirements for absentee votes that
 23 in fact what this was was an attempt to have
 24 something other than the absentee voting that we
 25 have in our state. In effect, it was in-person

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1 address. And that would merely be collected by
 2 the election officials. Or they could bring their
 3 blank ballot and fill it out in front of a witness
 4 at the park, and the witness would then sign the
 5 envelope and list their address as any other
 6 absentee ballot.
 7 That event took place on the last
 8 Saturday of October and the first -- I'm sorry,
 9 the last Saturday of September, September 26th,
 10 and the first Saturday of October.
 11 My letter to the attorney was delivered
 12 on September 26th, obviously several weeks before
 13 the election. We did not receive any response.
 14 There is a process permitting individuals to file
 15 a complaint with the Wisconsin Elections
 16 Commissions if they think a clerk is acting
 17 outside of the law and asking the Wisconsin
 18 Elections Commission to rule on the complaint.
 19 There was no complaint filed with the Wisconsin
 20 Elections Commission. There was no lawsuit filed.
 21 In fact, I had a conversation with the
 22 administrator and the chair of the Wisconsin
 23 Elections Commission on September 26th to ensure
 24 that we were in compliance with the law. Those
 25 ballots were collected at the end of the day.

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1 voting going on during two days well in advance of
 2 the deadline that is set by the statute.
 3 Now, if you look at what happened here,
 4 the details are really fairly well known. I don't
 5 think there's a lot of debate about that. There
 6 were over 200 sites around the city. And we've
 7 submitted an affidavit of Mr. Hudson, which just
 8 attaches a number of documents which are readily
 9 available out there on the Internet, about the
 10 event.
 11 For example, to the Biden Campaign there
 12 was little doubt that this was in fact simply an
 13 opportunity to have advanced voting, not some sort
 14 of specific absentee as required. Here's the ad
 15 which is in fact attached too.
 16 (Audio played as follows)
 17 SPEAKER: Hey, Madison. This year, voting
 18 early is a walk in the park, literally. On
 19 Saturday, September 26th and Saturday, October 3rd
 20 from 9:00 a.m. to 3:00 p.m., City of Madison poll
 21 workers will be in over 200 City parks registering
 22 voters, answering questions about voting, and
 23 accepting your completed absentee ballot.
 24 Absentee voters who still need to find a
 25 witness can just bring their blank ballot with

1 them and have a poll worker serve as their
2 witness. Poll workers will be wearing bright
3 yellow vests and can be found by one of the "vote"
4 yard signs you're used to seeing at your polling
5 place. So make your plan now to return your
6 ballot.

7 Democracy in the Park, Saturday,
8 September 26th or Saturday, October 3rd, 9:00 a.m.
9 to 3:00 p.m. at any of the 200-plus City parks in
10 Madison. Visit CityofMadison.com to learn more.
11 That's CityofMadison.com.

12 MR. BIDEN: I'm Joe Biden, candidate for
13 president, and I approve this message.

14 SPEAKER: Paid for by Biden for President.
15 This event is hosted by the City of Madison and is
16 nonpartisan. All are welcome.

17 MR. JAMES TROUPIS: So the question -- and
18 you're taking ballots. You're registering voters.
19 You're helping them complete envelopes. You're
20 instructing them on ballot processes. You're
21 witnessing those who vote. All of those are
22 attributes of in-person voting. But the exhibits
23 that are attached to the affidavit of Mr. Hudson
24 simply illustrate that fact.

25 And I don't think again that there's

1 much debate about what in fact went on there. The
2 whole question for the Board, and ultimately for
3 all of us, is whether or not they could do that.
4 And we heard from Michael, a fine attorney, about
5 this.

6 But if this is in-person voting, then
7 it's governed by Section 6.855(1) of the statutes.
8 That statute provides quite explicitly that if
9 you're going to have multiple voting -- if you're
10 going to have a voting location with clerks, with
11 the clerks' offices, you must have the governing
12 body, for example, authorizing. That did not
13 happen here. The City of Madison did not
14 authorize it. There was no vote by the Madison
15 City Council.

16 You have to be as near as practicable to
17 the clerk's office. That didn't happen here. You
18 had 200 sites. That certainly wouldn't be the
19 case. And the statute requires in fact that you
20 can only have one site. So 200 sites doesn't
21 comply. So I think it can be accepted that if
22 this is in-person voting, if this satisfies those
23 requirements -- and certainly the Biden Campaign
24 thought it was that -- then it cannot comply with
25 the statute.

1 So the only question for the Board is
2 whether or not that section applies, that is
3 Section 6.855. It does. It does. Let's look at
4 the exact wording of that statute.

5 It provides, "The governing body of a
6 municipality may elect to designate a site other
7 than the office of the municipal clerk or Board of
8 Election Commissioners as the location from which
9 electors of the municipality may request and vote
10 absentee ballots and to which voted absentee
11 ballots shall be returned by electors for any
12 election."

13 Well, electors. It says "electors."
14 Why does it use the plural "electors"? Because
15 it's an invitation for anyone from the public to
16 come to this place. That's dramatically different
17 than the explanation we just heard, which is that
18 somehow a single witness could accept these.
19 That's not what happened here. They invited all
20 electors to come. This was a move of the office
21 of the municipal clerk to 200 separate locations,
22 when this statutory provision says you can't do
23 that. Doesn't seem to be a debate you can't do
24 that under the statute.

25 So then the second question you ask,

1 well, obviously there was an attempt to move the
2 entire office there. But what activities qualify?
3 What activities make it subject to the statute?

4 Again, it's fairly obvious. It says
5 quite specifically that it's an activity covered
6 by the statute when it is a place "to which voted
7 absentee ballots shall be returned by electors for
8 any election." Well, everybody agrees that's
9 exactly what this did. You could return your
10 absentee ballot to this location sponsored by the
11 City for these. So it clearly met the statutory
12 obligation.

13 But we don't have to rely just on that
14 statute. If we look deeper and ask the question
15 "How do we vote absentee in Wisconsin?" There's a
16 specific statute again on that. It's 6.87(4)(b).
17 That's a provision of the statute that provides
18 how you return ballots. And here's what it says:
19 It says, "There are two ways to return ballots.
20 The envelope shall be mailed by the elector or
21 delivered in person to the municipal clerk issuing
22 the ballot or ballots."

23 That's exactly what you did here. At
24 most, you had the second item delivering it to the
25 clerk. But you couldn't do that because then

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1 you're governed -- if it's a clerk's office and
 2 you're delivering it to the clerks, they could not
 3 receive it at 200 locations. The statute said you
 4 can only have one. Or, alternatively, if you
 5 think about the statute, it's consistent with the
 6 overall view of absentee voting. That absentee
 7 voting is done in advance, independently of the
 8 clerk's office, independently of those events, so
 9 as to avoid undue influence and the like. So if
 10 this was the municipal clerks, it violates the
 11 provision that restricts you to one office. If
 12 it's not to the municipal clerk, if it's something
 13 like what Mr. Haas said is delivered to anybody,
 14 well, that's not even allowed. There's no
 15 provision in the statute that allows it. There's
 16 only two ways you can bring these. It's not one
 17 of those. So it's either the municipal clerk's
 18 office, and therefore invalid, or it's otherwise.
 19 And that's not even authorized in the statute.
 20 So it all makes sense if you consider
 21 that we are not an advanced voting state. That is
 22 not what we are. We are a absentee voting state.
 23 One last comment I think I would make at
 24 this point, which is the commingling of the
 25 ballots from that day with all of the other

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1 discern that today or at a future date by simply
 2 looking for clerks and their signatures on them.
 3 And we could ultimately determine the number that
 4 were in fact witnessed on those dates.
 5 As to the secondary group, I have no
 6 method by which they can be identified. So we're
 7 left with relief to the whole city at least as to
 8 regard those. And again, those are the statutory
 9 methods. I'm not predicting -- there might be
 10 others. I just don't have any for you.
 11 MS. WELSH: Good evening. The Biden Campaign
 12 disputes that 17,271 ballots dropped off with
 13 election officials during Madison's Democracy in
 14 the Park event should found to be invalid.
 15 According to public reports, while the
 16 City of Madison clerk, Maribeth Witzel-Behl, was
 17 figuring out how to hold a presidential election
 18 during a once-in-a-century pandemic, she took her
 19 dog to the dog park, and she had the idea that we
 20 could use the parks to facilitate voting in a safe
 21 way. In an outdoor setting, her election
 22 officials could safely register voters, could
 23 serve as witnesses for absentee voters who needed
 24 a witness, and could serve as a staffed drop box
 25 for completed ballots. This idea reduced exposure

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1 ballots was extraordinarily inappropriate. Now, I
 2 don't have evidence as I stand here that this was
 3 a coordinated effort to avoid our ability to
 4 identify the ballots that were cast on that day.
 5 But everyone knew this was controversial. Counsel
 6 already said that. And yet they did nothing to
 7 allow us to be able to identify these ballots for
 8 later consideration.
 9 Under those circumstances, it seems to
 10 me the City's at fault. And the relief eventually
 11 that we ought to get for this has to be directed
 12 at the entire city. That's unfortunate, but it's
 13 a consequence of the City's own behavior.
 14 Thank you.
 15 MR. ARNTSEN: Attorney Troupis, just a quick
 16 question. For this court, what relief are you
 17 asking?
 18 MR. JAMES TROUPIS: I'm asking that those --
 19 that 17,271 ballots be drawn down in the city, or
 20 that we come up with some other form of relief if
 21 we can identify those ballots that were passed
 22 that day. You have two separate sets of ballots.
 23 You have those ballots that are I think readily
 24 identifiable as having been witnessed by the
 25 clerks. And for that group we could in fact

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1 to COVID-19 for the absentee voters, for her
 2 staff, and for voters who voted on election day by
 3 reducing the number of voters who would feel
 4 compelled to show up in person and vote on
 5 November 3rd.
 6 This effort also addressed concerns that
 7 many voters had about mail delays or reliability.
 8 Election officials were -- as indicated in their
 9 materials, election officials had processes in
 10 place to secure all of the envelopes that were
 11 submitted those days, and they were tracked and
 12 voters could look back to see the ways -- to see
 13 that their vote had arrived.
 14 Again, the officials acted as mobile
 15 staffed drop boxes.
 16 Attorney Troupis would have you believe
 17 that this was in-person voting. I have voted in
 18 person. Attorney Troupis has voted in person.
 19 There's one critical difference here. You could
 20 not get a ballot at the parks.
 21 I observed a couple of the parks. I saw
 22 a couple come up and ask for a ballot. When the
 23 workers explained that they don't have any ballots
 24 there to hand out, the people kind of prodded a
 25 little bit to kind of test the workers. And they

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1 the proper time. The proper time was when they
 2 admittedly knew what was happening and could have
 3 brought a challenge to the Elections Commission or
 4 to a court and simply did not.
 5 And to be clear, the Biden Campaign
 6 recognized it for what it was. You could ask
 7 questions. You could register to vote if you had
 8 the proper ID. And you could have a valid witness
 9 or drop it off. They made it clear they never
 10 called it early in-person voting.
 11 The Trump Campaign could have also
 12 encouraged their voters to drop off ballots; or if
 13 they thought it was an illegal event, they could
 14 have tried to shut it down. But they can't be
 15 heard now to try to punish Madison voters for
 16 relying on the actions of their officials. Thank
 17 you.
 18 MR. McDONELL: Thank you.
 19 MR. HAAS: Can I just briefly --
 20 MR. McDONELL: Yeah, Mike. Do you want to
 21 follow up?
 22 MR. HAAS: Just because the City's actions
 23 have been mentioned here, just a couple brief
 24 points. We had every reason to believe that this
 25 was no longer controversial after I sent my letter

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1 you change the statute.
 2 There's no requirement that a ballot be
 3 personally submitted from the voter to the clerk.
 4 Thank you.
 5 MR. McDONELL: Thank you. Any questions from
 6 Board of Canvass members? Do you have any
 7 questions, Joyce? Okay.
 8 Well, thank you for your arguments.
 9 We'll take it up now. One thing I do want to say,
 10 Mr. Troupis, I want to defend the clerk's office
 11 in the sense that since there was no legal
 12 challenge or complaint with the Elections
 13 Commission, and as you guys have been able to see
 14 for the last several days, they would have to take
 15 those ballots and put them in the correct wards to
 16 be processed on election day. So maybe right away
 17 something could have been done. Legally they
 18 would have to get them in the right wards. So I
 19 just want to defend any clerk, you know, to have
 20 to do that part of the job at some point.
 21 And to me, you know, really what was
 22 happening in the parks were human drop boxes. You
 23 mentioned that this was an obvious attempt, when
 24 you first -- first thing you said this was an
 25 obvious attempt to get around the early voting

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1 because we received no response. There was a
 2 second -- given that the attorney sent us a letter
 3 the day before the evening before the first event,
 4 there's still a second event seven days later.
 5 There was no objection raised in that entire time.
 6 Not only that, as I said, there was no
 7 complaint filed with the Wisconsin Elections
 8 Commission. Not only that, there was a lawsuit
 9 filed in the Dane County Circuit Court to try to
 10 have a judge confirm that these ballots would be
 11 valid. The Republican leadership was essentially
 12 invited into that lawsuit. They had notice of
 13 that lawsuit. That would have been an opportunity
 14 for them to bring their arguments to the court, to
 15 have a court rule on them.
 16 And as Attorney Welsh said, these voters
 17 for six weeks or whatever it was, they were under
 18 the understanding that those ballots were valid.
 19 And if an objection had been brought at the
 20 appropriate time and it was ruled that they were
 21 not valid, those voters would have had an
 22 opportunity to vote. Now they have no more
 23 opportunity to vote. This court cannot
 24 disenfranchise 17,000 voters because you don't
 25 like the statute. If you don't like the statute,

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1 law. And I view that as an obvious attempt to get
 2 around the postal service slow-down. And I don't
 3 see any -- you know, there should be a high bar to
 4 disqualify someone's vote.
 5 We've been doing it here when we haven't
 6 had a witness signature, when they haven't had
 7 a -- when the voter didn't sign it, and we're
 8 willing to do it in those situations. But those
 9 are cited in law.
 10 This is speculative. So I think we
 11 should move on. We'll rule on it. So two-one we
 12 are not going to draw down or do --
 13 MR. JAMES TROUPIS: Deny the objection?
 14 MR. McDONELL: Yeah, we're going to deny your
 15 objection on that. So Al and myself, and Joyce is
 16 the one. Okay?
 17 MR. JAMES TROUPIS: Mr. Chairman, may I say
 18 something else?
 19 MR. McDONELL: Yeah, sure.
 20 MR. JAMES TROUPIS: So this is one of the
 21 rare occasions when everybody's sort of listening
 22 in. And on behalf of the Trump Campaign, I want
 23 to thank the Board -- but even more, I want to
 24 thank all the tabulators and others who have given
 25 of their time this week to come in here, and thank

= = = = =
IN RE: 2020 PRESIDENTIAL ELECTION RECOUNT
= = = = =

Madison, Wisconsin
November 28, 2020

Reporters: Taunia Northouse
Jessica Bolanos

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1	E H I B I T S	
2	TRUMP ADMINISTRATION E HIBITS	
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8		E hibits 1 through 6, supporting documents to the affidavits above
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TRANSCRIPT OF 2020 PRESIDENTIAL

ELECTION RECOUNT, taken before Taunia Northouse and Jessica Bolanos, notaries public in and for the State of Wisconsin, at the offices of Monona Terrace, 1 John Nolen Drive, City of Madison, County of Dane, and State of Wisconsin, on the 28th day of November 2020, commencing at 8:01 a.m.

A P P E A R A N C E S

ATTORNEYS FOR JOE BIDEN AND KAMALA HARRIS:
Diane M. Welsh, Ellen Campbell, Christa Westerberg, Melissa Schult

ATTORNEYS FOR DONALD J. TRUMP AND MIKE PENCE:
Jim Troupis, Christ Troupis, Lou Esposito, Wren Williams, Sophia Papandreas T ot os, Megan Revis Frederick

ATTORNEY FOR THE BOARD OF CANVASS:
Marcia MacKen ie, Sue Rauti, Assistant Corporation Counsel

ATTORNEY FOR THE CITY OF MADISON:
Michael Haas, City Attorney

BOARD OF CANVASS MEMBERS:

Page 4

1 Scott McDonell (Chair), Allen Arntsen, Joyce Waldrop

2 MR. McDONELL: Okay. I'm going to call this

3 Board of Canvass to order. And so the technician,

4 you guys can get started down on that end. I will

5 say yesterday was amazing. We got through so

6 much, and everyone in this room did a great job.

7 And what I would ask is whatever you were doing

8 yesterday, do that today. I don't know what it

9 was. I'm not a superstitious ballplayer.

10 Whatever it was, do that again. We're down --

11 we're now up to 83 percent complete. So that's

12 amazing. It really is.

13 One thing I wanted to let you guys know

14 is we sort of bumped out that end table and pushed

15 things down a little bit. So hopefully later

16 today we're going to open one more table. If you

17 guys -- anyone here who's working this morning and

18 not this afternoon and is interested in continuing

19 to work to try to help push this through, let your

20 table captains know so we can make sure we make

21 that up later.

22 Obviously I just want to reiterate the

23 social distancing which has been great the last

24 few days, so six feet plus masks plus this air

25 handling system should work really well. So

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1 really they all work together. Again, no --

2 silence your cell phones. I haven't heard one in

3 a while, but it's on my list. And pens, obviously

4 we want to see no black or blue pens. Purple,

5 green, I guess you could use red but I hate red

6 ink.

7 So -- and then we have some -- we have

8 some procedural stuff we're going to be doing up

9 here, but it doesn't affect anything you're

10 looking for at all. So try not to get distracted.

11 Fortunately the Packers don't play till

12 7:20 tonight, so that's an added distraction you

13 don't have. Again it's just the bears so --

14 they're starting Trubisky at quarterback. So I

15 think that's -- all right. Oh, is it tomorrow

16 night? I thought it was tonight. Anyway, not

17 right now. Thank you all. I really appreciate

18 it.

19 (Recess)

20 (Trump Exhibit Nos. 16 through 18 marked

21 for identification)

22 MS. HILBY: City of Madison Ward 82 squeezing

23 in here.

24 MR. ARNTSEN: Clerk filled in.

25 MS. REVIS FREDERICK: City of Madison Ward

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1 82. We have an absentee envelope. We have a
 2 clerk cured address, different colored ink to show
 3 that with no initials or signatures on it but
 4 different colored ink. Therefore, we object on
 5 that basis.
 6 MR. ARNTSEN: Three-zero. It's good.
 7 MR. JAMES TROUPIS: So on the record, I'm
 8 Jim Troupis, and I'm here on behalf of the
 9 Trump Campaign to address a number of issues this
 10 morning. The first of those issues is a response
 11 to the -- in part, a response to the Kennedy
 12 affidavit that was supplied several days ago in
 13 here. For the Board's benefit, I -- for the
 14 Board's benefit, we have obtained and are
 15 submitting an affidavit of Lori Opitz, who's the
 16 town clerk in the Town of Hartford in
 17 Washington County. This is an affidavit that
 18 indicates that outside of Dane and
 19 Milwaukee County, in fact, applications were
 20 required in order to complete an EL-122 form; that
 21 the ballot envelope was not considered sufficient
 22 elsewhere in the state, and that this town clerk
 23 is attesting to that fact in the Town of Hartford.
 24 And we want to submit that to the record, ask that
 25 it be admitted.

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1 defining the question, which is failure to present
 2 identification. Indefinite confinement itself is
 3 a statutory right, an important one for certain
 4 individuals. And so we understand that. But
 5 because of the lack of identification it's a
 6 unique -- it's a unique one. And so we have
 7 attempted to determine an amount that would more
 8 accurately reflect the failure to prevent
 9 identification in a way that triggered an
 10 obligation from the clerks to inquire further and
 11 to disqualify those individuals that ought to have
 12 been disqualified.
 13 And so this is an objection to counting
 14 in Dane County of 8,907 individuals designated as
 15 those individuals added to the list of indefinite
 16 confined after March 25th, which is the date on
 17 which a Facebook post from Scott McDonell was
 18 submitted.
 19 I'm going to discuss that in a second
 20 because I do not mean to imply that Scott acted on
 21 the 25th with some evil motive but, rather, during
 22 the COVID crisis people were reacting in many
 23 different ways and attempting to accommodate
 24 voters. The statutes, however, obligated that
 25 certain steps be taken after that that were not

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1 MR. ARNTSEN: Exhibit 16 is admitted.
 2 MR. JAMES TROUPIS: Exhibit 16. We'd like
 3 that submitted to complete the record on that.
 4 The next issue this morning that we'd
 5 like to raise and I'm submitting -- that, by the
 6 way, was Trump Exhibit 16 previously. This is
 7 Trump Exhibit 17 and Trump Exhibit 18.
 8 Exhibit 17 is an affidavit of
 9 Jordan Moskowitz, and Exhibit 18 is an affidavit
 10 of Kyle Hudson. I'll discuss those in context,
 11 but I will offer those for admission.
 12 The question of indefinite confinement
 13 has arisen before in these proceedings. I'll give
 14 additional copies so that -- so you can reference
 15 that while I'm talking and you can see what I'm
 16 talking about.
 17 So we've previously objected to the
 18 indefinite confinement. Those are individuals who
 19 claimed indefinite confinement status and asked
 20 that those ballots be withdrawn or those envelopes
 21 be turned down. This board declined to do that.
 22 And that was as to all.
 23 In the process of the recount, we have
 24 been able to determine that a subset of that that
 25 we believe is potentially more accurate in

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1 undertaken.
 2 So if one looks at the Jordan Moskowitz
 3 declaration -- and there are two -- I apologize.
 4 These are the spreadsheets that would also go with
 5 those two exhibits which I must submit to you.
 6 Those are Exhibits 2 and 3. There's a
 7 placeholder. When you look at your
 8 Jordan Moskowitz declaration, what you'll see is
 9 it says spreadsheets. These are the actual
 10 spreadsheets.
 11 MR. ARNTSEN: These are part of Exhibit 18?
 12 MR. JAMES TROUPIS: That is correct. That is
 13 correct. Exhibit 17. Exhibit 17 is the Moskowitz
 14 declaration -- affidavit. It's the actual
 15 spreadsheets with the actual names.
 16 So what we did is we took the absentee
 17 information supplied by the Board and we broke
 18 that down in a number of ways. We took the
 19 absentee list and we asked -- we queried the
 20 application type and the date of the request and
 21 we asked only for indefinite confinement, which
 22 the list gave us. And then we took that and we
 23 asked further to eliminate anybody who had in fact
 24 an identification on file because some people
 25 actually had IDs on file, even though they were on

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1 the list.

2 We also asked if they were in special

3 voting units, that is at nursing homes and the

4 like. Obviously, they were the ones that were

5 intended, and that's shown on the list, so we were

6 able to take all of those people out. And if

7 there was any other comment that indicated that

8 the identification would have reasonably been

9 expected to occur, they were taken off the list.

10 That yielded, as Exhibit 2, 15,102

11 individuals. We started with 23,000. We got it

12 down to 15,102. We then organized it by date. We

13 asked what you can do from the data. In no sense

14 did we change any data. It was simply an Excel

15 spreadsheet, and we just broke it up that way.

16 And we asked how many occurred after March 25th.

17 Of that, 8,907 individuals following March 25th

18 claimed the status.

19 Attached to the affidavit if you look,

20 Exhibit No. 3 -- why don't you go ahead and put up

21 Exhibit No. 3. Let me show you. It's easier to

22 see, frankly. I can put it up on the Board. I

23 can show you this way.

24 So what we asked here of the data is how

25 many people claimed the status subsequent to the

Page 12

1 absentee -- all the absentees within our

2 subcategory occurred after March 25th. And we

3 know that number did not go down. That's what

4 this cumulative affidavit tells us.

5 Now, that's not the whole story of

6 course.

7 MR. McDONELL: Are you done with this chart?

8 Are you done with these charts now?

9 MR. JAMES TROUPIS: No. I'm done with the

10 charts. Take the charts down.

11 MR. McDONELL: It's creating a crowd.

12 MR. JAMES TROUPIS: No, I understand. Take

13 them down.

14 So as we know, the matter went to the

15 state Supreme Court, and the state Supreme Court

16 held that the Wisconsin Elections Commission

17 needed to do something to correct it and that they

18 felt that they had to some degree. I'm not going

19 to try to interpret what the Supreme Court said.

20 I'll only say that there was a subsequent post.

21 Now, this is when -- and I am pleased to

22 say the clerk of Dane County -- and we wanted to

23 make the record complete here so we included this

24 in our affidavit -- that the Dane County clerk in

25 fact put a second post out, withdrew the first

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1 Facebook post of March 25th. And you can see from

2 Exhibit 3 that we can identify exactly how many

3 occurred during that period. So we wanted to make

4 sure that we -- that what happened after that, you

5 can see there's a low level after that, but that

6 was the primary period. That's not unexpected

7 because people are claiming it just before the

8 election. We can understand that.

9 Now let me see Exhibit No. 4. And you

10 can see that it matches the numbers that I've just

11 told you with the 15,000 total. But then we ask

12 the question of the data, and this is

13 Exhibit No. 4. Did people remove themselves from

14 those lists? Did in fact people take the steps or

15 the clerks take the steps that we believe they're

16 required by statute to do to examine the number

17 and just simply find out? And what we see is that

18 did not happen. This is the cumulative number, in

19 other words, how many absentee indefinite

20 confinement status on any given day, the total.

21 And if in fact people had removed their names from

22 the list, it would go down. It does not. It

23 continues to rise into the election. And again,

24 not unexpected but disappointing because what we

25 know then is that 59 percent of all the

Page 13

1 post and put a second post up and pointed out a

2 number of things in that second post, including --

3 and this is Exhibit No. -- final exhibit to this,

4 Exhibit No. 6.

5 There will need to be a review of the

6 voter rolls after the election." Now that doesn't

7 fall on the county clerk. That falls on the

8 municipal clerks. So he was doing this so that

9 they can argue, so that they understood, you

10 better look over your rolls.

11 Also, in that post it was stated, "We

12 understand the concern over the use of

13 indefinitely confined status and do not condone

14 abuse of that option as it is an invaluable

15 accommodation for many voters in Wisconsin."

16 And finally, "There may be a need to do

17 some review of the absentee voting rolls after

18 this election to confirm voters who met the

19 definition of indefinitely confined during the

20 public health crisis who would like to continue

21 the status. And I believe that post exists to

22 today. I think that it's still up. But we

23 provided that post.

24 And I do that, not the least of which is

25 because I want the record to be completed. But

1 more importantly, I think the statutes -- the
 2 statutes of the state of Wisconsin anticipated
 3 this very kind of situation. They provide the
 4 municipal clerks are expressly charged with the
 5 responsibility to review and expunge from the
 6 voter rolls those claiming to be indefinitely
 7 confined voters when the clerk has, and I quote
 8 the statute, "reliable information that the
 9 elector no longer qualifies for the service."
 10 That's Wisconsin Statute 6.86(2).
 11 We know of no evidence that any
 12 municipal clerk in Dane County took any steps to
 13 do any of that. And of course the data strongly
 14 suggests it. And I understand that there are
 15 discussions of what they could or couldn't do and
 16 what the Wisconsin Elections Commission suggested
 17 or not suggested. But the statute to us is clear.
 18 They needed to take steps.
 19 And in that regard, we submit a second
 20 affidavit, the affidavit of Kyle Hudson.
 21 Kyle Hudson provides just a selection of about
 22 eight or nine Facebook posts from people who are
 23 in that list, in that list of 8,000, who went to
 24 weddings, went to birthday parties, spray painted
 25 on State Street during protests and other

1 activities. All of this suggests those people
 2 were not entitled, and they abused the status in
 3 violation of law. But equally important is that
 4 it was the clerk's obligation, who after all at
 5 least in Milwaukee County -- we had some in
 6 Dane County -- found all they had to do was go to
 7 the Internet and change names on voter envelopes,
 8 altered the addresses and fill in stuff, which
 9 they could do, and yet took no steps to examine
 10 these rolls and remove the people who a simple
 11 Google search would have indicated were improperly
 12 claiming this kind of status.
 13 MR. McDONELL: Can I ask a question?
 14 MR. JAMES TROUPIS: Yes, you may, of course.
 15 MR. McDONELL: So I know that Madison did
 16 send out a letter to all indefinitely confined
 17 after the April election. So did you query the
 18 clerks to see whether they had done that as per
 19 the advice of the Elections Commission to do that?
 20 Because I know that many or all of them did.
 21 MR. JAMES TROUPIS: I do not know.
 22 MR. McDONELL: I'm not sure. I just think
 23 that that would be something to follow up on to
 24 say -- because I know Madison, the largest
 25 municipality, did do that, follow up on it.

1 MR. JAMES TROUPIS: Unfortunately I don't
 2 have access to that information. And in a recount
 3 I only have a certain amount of information that I
 4 can get.
 5 MR. McDONELL: That's fair. I'm just telling
 6 you that I couldn't tell you whether Monona or
 7 Verona -- I just know that Madison did.
 8 MR. JAMES TROUPIS: As I said, to my
 9 knowledge, and we can tell from the data, whatever
 10 they did it was inadequate because we know that
 11 people continue to claim this status and in fact
 12 voted on election day.
 13 MR. McDONELL: One thing I would say is if
 14 you had COVID, that would be a reason why you
 15 would decide to self-quarantine. And in that
 16 moment if you were 35 years old, in that exact
 17 moment you could be in that situation.
 18 MR. JAMES TROUPIS: But, of course, that's
 19 not indefinitely confined. It's simply they kept
 20 COVID in our home, and they could in fact complete
 21 the identification requirements. I don't accept
 22 that simply having COVID would be the basis on
 23 which indefinite confinement -- indefinite
 24 confinement implies something quite different than
 25 a transitory illness.

1 MR. McDONELL: The court could decide that I
 2 think.
 3 MR. JAMES TROUPIS: Of course. All I'm
 4 suggesting is our reasoning as well.
 5 So we've asked now with this subset, as
 6 an additional objection, that the voter rolls be
 7 reduced by 8,907. We've provided an exact list of
 8 the names and ward numbers for you.
 9 MR. McDONELL: Thank you very much.
 10 MR. JAMES TROUPIS: Thank you very much.
 11 Thank you.
 12 MS. WELSH: Good morning. I'm Diane Welsh,
 13 legal counsel for President Elect Joe Biden's
 14 Campaign. The petition for recount filed by the
 15 Trump Campaign alleged mistakes and fraud were
 16 committed throughout the state, particularly in
 17 Dane and Milwaukee Counties.
 18 Yesterday -- or on Thanksgiving,
 19 President Trump reiterated his claims of fraud.
 20 We've now been here for more than a week.
 21 Hundreds of Trump observers and dozens of
 22 attorneys have traveled from across the country to
 23 Dane County in search of fraud. The
 24 Trump Campaign has failed to show the Board of
 25 Canvassers any actual instances of fraud, let

1 alone the widespread fraud it alleges. Instead,
2 the Trump Campaign has repeatedly requested the
3 wholesale disenfranchisement of Dane County voters
4 because the Trump Campaign believes the Wisconsin
5 Statutes were wrongly interpreted by the clerk,
6 the Elections Commission, or both.

7 Their campaign has made numerous
8 challenges based on misunderstandings about
9 Wisconsin election law. And their campaign has
10 made frequent challenges based on technicalities
11 that do not call into question the legal status of
12 the voter or the integrity of the vote. The
13 technicalities may be an error by the voter, a
14 witness, or election officials, but they are not
15 fraud.

16 It is important to remember that
17 Dane County election officials were doing their
18 level best to conduct a presidential election
19 during a pandemic. We have clerks and other
20 election workers who were out sick due to
21 COVID-19. Many long-time workers did not work
22 this election to avoid exposure. Due to the
23 pandemic, there were a lot of first-time workers
24 and there were a lot of first-time absentee
25 voters. I applaud the Board for rejecting so many

1 baseless challenges.

2 On behalf of President Elect Biden's
3 Campaign, I want to thank you for continuing to
4 apply the long recognized constitutional principle
5 that voters should not be disenfranchised based on
6 errors of their clerk or their government. We
7 appreciate that.

8 As it relates to the early voting
9 complaint, we have Biden Exhibit 33 to share with
10 the Board. Here President Trump himself
11 encouraged people to early vote on October 20th,
12 the first day of early voting in Wisconsin. They
13 cannot be heard to now complain that people early
14 voted using the form developed by WEC in place for
15 ten years, a form that passed Republican votes and
16 democratic votes and independent votes, you know,
17 a form that was used to get President Trump
18 elected four years ago. You know, President Trump
19 is stopped from that argument and I know that you
20 have already ruled on it and would urge you to --
21 not to reconsider that issue.

22 As it relates to indefinite confinement,
23 indefinite means we don't know how long. It
24 doesn't mean permanent confinement, total
25 disability. I wholeheartedly dispute that having

1 COVID is not indefinite confinement. I don't know
2 if I get COVID if I will be quarantined in that
3 home just for ten days and feel fine, or if I will
4 be in the hospital on a respirator. I don't know
5 that I will be able to make it to the election.

6 So it's entirely appropriate for someone
7 who has COVID to use that designation of
8 indefinite confinement. It also means that if
9 someone is -- has been advised by their doctor to
10 not go out because of underlying health conditions
11 to avoid exposure, for them to use that definition
12 now.

13 What the Supreme Court made clear, what
14 the statute makes clear, what WEC guidance makes
15 clear is if someone is in fact not indefinitely
16 confined, the remedy is that they get removed from
17 the list of indefinitely confined voters, not that
18 their vote gets taken away from them after the
19 fact.

20 On March 31st, the Supreme Court issued
21 the order. If the Trump Campaign believed that
22 there were people who were not properly identified
23 as indefinite confined, they could have been doing
24 their like Facebook search, Google search, and
25 bringing those names to the attention of clerks

1 around the state. They didn't do so.

2 Like, there's no affirmative duty of the
3 clerks to do Google searches on all of the voters
4 who are identified as indefinite confined.

5 As Scott McDonell pointed out, the City
6 of Madison clerk did send out a letter to those
7 voters. That was not an obligation she had, but
8 she went above and beyond her responsibilities.

9 We don't know if -- their exhibit is
10 worthless. We don't know if the people pictured
11 in those Facebook posts are in fact the voters.
12 You know, some people have the same name. Some
13 people have similar names. But again, we don't
14 know their health histories. We don't know their
15 circumstances. But what we do know is that under
16 statute, constitutional principles, WEC guidance,
17 there's no provision that means we do a drawdown
18 of over 8,000 votes because some individuals
19 during a pandemic identified themselves as
20 indefinitely confined. That's a ridiculous
21 position. The Board has rejected those positions
22 in the past. And I urge you not to reconsider
23 your ruling on that.

24 Then as just a final procedural matter,
25 we are submitting an affidavit. We submitted a

1 declaration earlier. And so this is -- we're
2 submitting as Biden Exhibit 34 just to finish our
3 record. If the Board has any questions for me, I
4 would be happy to answer them.

5 MR. ARNTSEN: I don't.

6 MR. McDONELL: Thank you very much.

7 MR. ARNTSEN: Okay.

8 MR. JAMES TROUPIS: I'd like to respond to a
9 couple things. First of all, let me be
10 extraordinarily clear. One, we appreciate this
11 Board's civility and civility to everyone here.
12 I've said that publicly, and I meant it. But it
13 is not correct that we have not submitted evidence
14 with regard to fraud. We did that this morning.
15 We submitted no fewer than seven affidavits of
16 people who clearly are fraudulent, at least in our
17 view. And you may debate it, but don't say we
18 didn't do it.

19 Secondly, we've identified both here and
20 in Milwaukee hundreds and hundreds of
21 ballot evidence for which clerks inserted
22 information. We believe that's also evidence of
23 fraudulent.

24 It's ironic that we just were -- we just
25 heard Biden's counsel say that, well, maybe those

1 are different people. Maybe those are different
2 names. Yeah. Maybe that's true. Maybe that's
3 also true with regard to the envelopes that people
4 filled out which were directed by the
5 Wisconsin Elections Commission, people could just
6 go out to the Internet and fill in names and
7 addresses, which apparently they did by the
8 hundreds. And yet she says we can't do it. It's
9 wrong here, but it's right there.

10 Bottom line is that you have to have
11 clear and unequivocal integrity in an absentee
12 voting process, precisely because our statutes are
13 obligatory. They do provide that when it comes to
14 absentee voting it's a privilege, not a right and
15 that there must -- you must take corrective action
16 when they have been violated and they must follow
17 the rules specifically, precisely to avoid the
18 very thing that the Biden Campaign now accuses us
19 of which is, gee, we can't find enough fraud.

20 Of course it's difficult after the fact.
21 That's precisely why in Wisconsin Statute 6.84(1)
22 it provides that the legislature finds that the
23 privilege of voting by absentee ballot must be
24 carefully regulated to prevent the potential for
25 fraud or abuse, to prevent overzealous

1 solicitation of absentee electors who may prefer
2 not to participate in election, to prevent undue
3 influence on an absent elector to vote for or
4 against the candidate and other similar abuses.

5 It's precisely that problem that makes
6 absentee voting such a difficult undertaking and
7 one that is regulated so carefully.

8 So when we don't follow the rules, the
9 presumption of the statute is there was fraud and
10 abuse. Was there? In some cases we will never
11 know. That's why the statute makes it mandatory.
12 That's precisely the reason.

13 And I also want to thank -- because I
14 may not speak again publicly -- counsel for the
15 Biden Campaign also, who has been equally civil in
16 our undertakings here. I want to put that on the
17 record while I still have a chance. Thank you.

18 MR. McDONELL: Great.

19 MS. WELSH: I have a short sur reply. So
20 under Wisconsin Statute 5.01 of the statutes, the
21 constructions of Chapters 5 through 12, which are
22 the election statutes, indicate that
23 Chapters 5 through 12 shall be construed to give
24 effect to the will of the electors if that can be
25 ascertained from the proceedings, notwithstanding

1 informality or failure to fully comply with some
2 of their provisions. That supersedes the
3 provision that Attorney Troupis cited.

4 With respect to the indefinitely
5 confined electors, what I want to be clear is,
6 there's zero evidence before us that any of the
7 electors are not Wisconsin citizens who are
8 otherwise eligible to vote. There is zero
9 evidence that any of these voters did so to avoid
10 the ID requirement. And that is what I think is
11 important here.

12 The remedy -- if there's a suggestion
13 that anyone votes improperly in Wisconsin, we have
14 criminal statutes that allow for the
15 investigation, full fact finding and prosecution
16 of those people. It's not this second-guessing
17 that because procedures weren't applied as
18 interpreted by the campaign after the fact. We
19 can't hypothesize that maybe some votes slipped
20 through the cracks.

21 There is a definite way to find out if
22 every voter who is on the voter log and turned in
23 a vote is an actual voter. And we have procedures
24 in place. And that's not the procedure followed
25 here. Thank you.

Page 26

1 MR. McDONELL: Okay. I think we -- do you
 2 have any questions, Joyce?
 3 MS. WALDROP: No, I don't.
 4 MR. McDONELL: We're going to talk to our
 5 counsel and maybe we can bring this stuff in a few
 6 minutes. Is that okay?
 7 MR. JAMES TROUPIS: Sure. We'll stick
 8 around.
 9 MR. McDONELL: Thank you. Appreciate it.
 10 (Recess)
 11 MS. REVIS FREDERICK: So we have one ballot
 12 from Ward 80 that has no initials on it, so we
 13 place objection on no clerk initials.
 14 MS. WALDROP: It will be two for, one
 15 against. My vote's against.
 16 MS. REVIS FREDERICK: Thank you.
 17 (Off the record)
 18 MR. WILLIAMS: Scott, do you mind reading out
 19 that ballot number -- or envelope number?
 20 MR. McDONELL: 1144 A.
 21 MR. WILLIAMS: And your contest would be that
 22 all three signatures, which includes the voter's,
 23 witness, and the certification of assistance, are
 24 all identical.
 25 MR. McDONELL: But this name is different.

Page 28


1 objection, no clerk initials.
 2 MR. ARNTSEN: Two-one. They're good.
 3 MR. McDONELL: So just for the record, on the
 4 request to draw down the new list of indefinite
 5 confined voters, the vote of the Board of Canvass
 6 is two-one to not -- to deny that request.
 7 MR. JAMES TROUPIS: Thank you.
 8 MR. McDONELL: Thank you.
 9 (Off the record)
 10 MS. TJOTJOS: This is a ballot from City of
 11 Madison Ward 83. Objection, missing clerk's
 12 initials.
 13 MR. ARNTSEN: Two-one. Count it.
 14 MS. LINZENMEYER: Two-one?
 15 MR. ARNTSEN: The vote is two to one to count
 16 it.
 17 MS. LINZENMEYER: Thank you.
 18 MS. TJOTJOS: This is an express vote,
 19 absentee ballot from City of Madison Ward 83.
 20 Objection, no clerk initials.
 21 MR. ARNTSEN: Two-one. Count it.
 22 (Recess)
 23 MS. TJOTJOS: So the first one is an
 24 envelope, City of Madison Ward 85, 1712 A.
 25 Objection, no voter signature.

Page 27

1 MS. WALDROP: Who wrote this?
 2 MR. McDONELL: I don't know. A.S.
 3 MS. WALDROP: This one is exactly like that.
 4 MR. McDONELL: No. I'm going to -- I hear
 5 you.
 6 MR. WILLIAMS: I know you do. I know you do,
 7 Scott.
 8 MR. McDONELL: But let me just suggest
 9 something to you guys. And that is this is an
 10 indefinitely confined voter. And I bet that
 11 someone was helping them with this, like this
 12 voter --
 13 MR. WILLIAMS: Okay. Like on behalf of?
 14 MR. McDONELL: Right. This person is the
 15 witness.
 16 MR. WILLIAMS: Fair enough.
 17 MR. McDONELL: And she can't write.
 18 MR. WILLIAMS: Fair enough.
 19 MR. McDONELL: Because who would do something
 20 that's so obvious other than if you -- and so the
 21 witness is helping them -- the person --
 22 MR. WILLIAMS: Scott, I withdraw. Fair
 23 enough. Good job.
 24 MS. REVIS FREDERICK: We have Ward 78, two
 25 absentee ballots with no initials. And that's our

Page 29

1 MS. WESTERBERG: That one it appears that the
 2 voter may have signed the witness area, and the
 3 same address is --
 4 MR. McDONELL: Well, but if the voter signed
 5 down here, then we'd be missing a witness. So it
 6 kind of doesn't matter. It was mailed in. This
 7 is a drawdown.
 8 MR. ARNTSEN: Three-zero.
 9 MS. TJOTJOS: This one also Ward 85, City of
 10 Madison, No. 770 A. Objection, no voter signature
 11 because whoever signed this is not the name
 12 Michael Cahill, which is the voter designated on
 13 the form.
 14 MS. WESTERBERG: There's no signature match
 15 requirement. All the required information is
 16 there.
 17 MR. ARNTSEN: I have no idea.
 18 MR. McDONELL: I mean, you could be right,
 19 but I can't really tell. So knowing Joyce, that's
 20 two-one. Leave it alone. That's fine.
 21 MR. ARNTSEN: One drawdown, one okay.
 22 MR. WILLIAMS: Ward 77, two express ballots,
 23 two regular ballots. None of these have the
 24 required initial signatures. Same objection. Ask
 25 for a drawdown. Previously stated.

	Wisconsin Application for Absentee Ballot				(Municipal Clerk) If in-person voter, check here: <input type="checkbox"/>
	Absentee ballots may also be requested at MyVote.wi.gov				
	Confidential Elector ID# (HINDI - sequential #) (Official Use Only)		WisVote ID # (Official Use Only)		Ward No.

Instructions	<p>Detailed instructions for completion are on the back of this form. Return this form to your municipal clerk when completed.</p> <ul style="list-style-type: none"> You must be registered to vote before you can receive an absentee ballot. You can confirm your voter registration at https://myvote.wi.gov <p>⚠️ PHOTO ID REQUIRED, unless you qualify for an exception. See instructions on back for exceptions.</p>
---------------------	--

VOTER INFORMATION

1	Municipality	<input type="radio"/> Town <input type="radio"/> Village <input type="radio"/> City		County	
2	Last Name		First Name		
	Middle Name		Suffix (e.g. Jr, II, etc.)		Date of Birth <small>(MM/DD/YYYY)</small>
	Phone		Fax		Email
3	Residence Address: Street Number & Name				
	Apt. Number		City		State & ZIP
4	Fill in the appropriate circle – if applicable (see instructions for definitions): <input type="radio"/> Military <input type="radio"/> Permanent Overseas <input type="radio"/> Temporary Overseas				

I PREFER TO RECEIVE MY ABSENTEE BALLOT BY: (Ballot will be mailed to the address above if no preference is indicated. Absentee ballots may not be forwarded.)

5	<input type="radio"/> MAIL	Mailing Address: Street Number & Name				
	<input type="radio"/> VOTE IN CLERK'S OFFICE	Apt. Number		City		State & ZIP
		Care Facility Name (if applicable)				
		C / O (if applicable)				
	<input type="radio"/> FAX	Fax Number			Voter must have a computer and printer when receiving a ballot by fax or email. Voted ballots must be returned by mail.	
<input type="radio"/> EMAIL	Email Address					

I REQUEST AN ABSENTEE BALLOT BE SENT TO ME FOR: (mark only one)

6	<input type="radio"/> The election(s) on the following date(s): _____ <input type="radio"/> All elections from today's date through the end of the current calendar year (ending 12/31). <input type="radio"/> For indefinitely-confined voters only: I certify that I am indefinitely confined because of age, illness, infirmity or disability and request absentee ballots be sent to me automatically until I am no longer confined, or I fail to return a ballot. <i>Anyone who makes false statements in order to obtain an absentee ballot may be fined not more than \$1,000 or imprisoned not more than 6 months or both.</i> Wis. Stats. §§ 12.13(3)(i), 12.60(1)(b).
----------	--

TEMPORARILY HOSPITALIZED VOTERS ONLY (please fill in circle)

7	<input type="radio"/> I certify that I cannot appear at the polling place on election day because I am hospitalized, and appoint the following person to serve as my agent, pursuant to Wis. Stat. § 6.86(3).				
	Agent Last Name		Agent First Name		Agent Middle Name
	AGENT: I certify that I am the duly appointed agent of the hospitalized absentee elector, that the absentee ballot to be received by me is received solely for the benefit of the above named hospitalized elector, and that such ballot will be promptly transmitted by me to that elector and then returned to the municipal clerk or the proper polling place.				
	Agent Signature	X	Agent Address		

ASSISTANT DECLARATION / CERTIFICATION (if required)

I certify that the application is made on request and by authorization of the named elector, who is unable to sign the application due to physical disability.

Agent Signature	X	Today's Date	
-----------------	---	--------------	--

VOTER DECLARATION / CERTIFICATION (required for all voters)

I certify that I am a qualified elector, a U.S. Citizen, at least 18 years old, having resided at the above residential address for at least 28 consecutive days immediately preceding this election, not currently serving a sentence including probation or parole for a felony conviction, and not otherwise disqualified from voting. **Please sign below to acknowledge that you have read and understand the above.**

Voter Signature	X	Today's Date	
-----------------	---	--------------	--

Wisconsin Application for Absentee Ballot Instructions

General Instructions: This form should be submitted to your municipal clerk, unless directed otherwise.

- This form should only be completed by registered voters; if you are not a registered voter or military elector, please submit a Voter Registration Application (EL-131) with this form.

Photo ID requirement: If you will receive your absentee ballot by mail, and have not previously provided a copy of acceptable photo ID with a prior by-mail absentee ballot request, a copy of photo ID must accompany this application. You may submit your application and a copy of your ID by mail, fax or email. In-person voters must always show acceptable photo ID.

The following documents are acceptable Photo ID (For specific information regarding expired documents visit <http://bringit.wi.gov>.)

State of WI driver license or ID card	Certificate of Naturalization
Military ID card issued by a U.S. uniformed service	WI DOT DL or ID card receipt
Photo ID issued by the federal Dept. of Veterans Affairs	Citation/Notice to revoke or suspend WI DL
University, college or tech college ID and enrollment verification	ID card issued by federally recognized WI tribe
U.S. passport booklet or card	

In lieu of photo ID, the voters listed below may satisfy the voter ID requirement by the following means:

- Electors who are indefinitely confined (see Section 6) – the signature of a witness on the Absentee Certificate Envelope.
- Electors residing in care facilities served by Special Voting Deputies – the signatures of both deputies on the envelope.
- Electors residing in care facilities not served by Special Voting Deputies – the signature of an authorized representative of the facility. If the elector is also indefinitely confined, the elector does not need a representative of the facility to sign.
- Military, Permanent Overseas and Confidential Electors – Exempt from the photo ID requirement.

1	<ul style="list-style-type: none"> • Indicate the municipality and county of residence. Use the municipality's formal name (for example: City of Ashland, Village of Greendale, or Town of Albion).
2	<ul style="list-style-type: none"> • Provide your name as you are registered to vote in Wisconsin. If applicable, please provide your suffix (Jr, Sr, etc.) and/or middle name. If your current name is different than how you are registered to vote, please submit a Voter Registration Application (EL-131) with this form to update your information. • Provide your month, day and year of birth. Remember to use your birth year, not the current year.
3	<ul style="list-style-type: none"> • Provide your home address (legal voting residence) with full house number (including fractions, if any). • Provide your full street name, including the type (eg., Ave.) and any pre- and/or post-directional (N, S, etc.). • Provide the city name and ZIP code as it would appear on mail delivered to the home address. • <u>You may not enter a PO Box as a voting residence.</u> A rural route box without a number may not be used.
4	<ul style="list-style-type: none"> • A "Military elector" is a person, or the spouse or dependent of a person who is a member of a uniformed service or the merchant marines, a civilian employee of the United States, a civilian officially attached to a uniformed service and serving outside the United States, or a Peace Corp volunteer. Military electors do not need to register to vote. • A "Permanent Overseas elector" is a person who is a United States citizen, 18 years old or older, who resided in Wisconsin immediately prior to leaving the United States, who is now living outside the United States <u>and has no present intent to return</u>, who is not registered in any other location, or who is an adult child of a United States citizen who resided in this state prior to establishing residency abroad. Permanent Overseas electors will receive ballots for federal offices only and must be registered to vote prior to receiving a ballot. • A "Temporary Overseas elector" is a person who is a United States citizen, 18 years of age or older, a resident of Wisconsin and is overseas for a temporary purpose and intends to return to their Wisconsin residence.
5	<ul style="list-style-type: none"> • Fill in the circle to indicate your preferred method of receiving your absentee ballot. • Military and Permanent Overseas voters may request and access their ballot directly at https://myvote.wi.gov. • If no preference is indicated, your absentee ballot will be mailed to your residence address listed in Box 3. • You are encouraged to provide a physical mailing address as backup in case of electronic transmission difficulties. Please only fill the circle for your preferred means of transmission. • If you are living in a care facility, please provide the name of the facility. • If someone will be receiving the ballot on your behalf, please list them after C/O. <u>Please note:</u> The absentee elector is still required to vote their own ballot, although they may request assistance in physically marking the ballot.
6	<ul style="list-style-type: none"> • Select the first option if you would like to receive a ballot for a single election or a specific set of elections. • Select the second option if you would like to have a standing absentee request for any and all elections that may occur in a calendar year (ending December 31). • Select the third option only if you are indefinitely confined due to age, illness, infirmity or disability and wish to request absentee ballots for all elections until you are no longer confined or fail to return a ballot for an election.
7	<ul style="list-style-type: none"> • This section is only to be completed by an elector or the agent of an elector who is currently hospitalized. • An agent completing this form for a hospitalized elector must provide his/her name, signature and address on this application.
Assistant Signature:	In the situation where the elector is unable to sign the Voter Declaration / Certification due to a physical disability, the elector may authorize another elector to sign on his or her behalf. Any elector signing an application on another elector's behalf shall attest to a statement that the application is made on request and by authorization of the named elector, who is unable to sign the application due to physical disability.
Voter Signature:	By signing and dating this form, you certify that you are a qualified elector, a U.S. citizen, at least 18 years old, having resided at your residential address for at least 28 consecutive days immediately preceding this election, not currently serving a sentence including probation or parole for a felony conviction, and not otherwise disqualified from voting.

STATE OF WISCONSIN

IN RE: THE 2020 ELECTION FOR PRESIDENT AND VICE PRESIDENT OF THE
UNITED STATES

AFFIDAVIT OF KYLE J. HUDSON

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

I, Kyle J. Hudson, being first duly sworn on oath, state as follows:

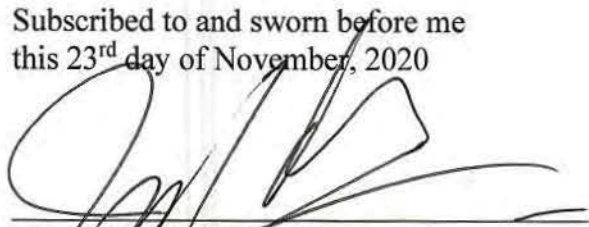
1. I am an adult resident of the state of Wisconsin. I am also a representative of President Donald J. Trump and Vice-President Michael R. Pence and their respective campaigns for the purposes of this recount.
2. Attached hereto as Exhibit A is a true and correct copy of a written transcript of a Biden for President funded radio advertisement for “Democracy in the Park” that was publicly broadcast in a Madison area media market that I personally heard.
3. Attached hereto as Exhibit B is a true and correct copy of a “Democracy in the Park” event advertisement as publicized under the following website link <https://www.cityofmadison.com/calendar/democracy-in-the-park>.
4. Attached hereto as Exhibit C is a true and correct copy of a public tweet from the official twitter of the Madison WI Clerk advertising “Democracy in the Park” in a computer generated event flyer. It is publicly available on twitter.
5. Attached hereto as Exhibit D is a true and correct copy of a tweet from the official Madison WI Clerk twitter for a “Democracy in the Park” event location map displaying the 200+ city parks where the event was to be held. It is publicly available on twitter.
6. Attached hereto as Exhibit E is a true and correct copy of a retweet by the City of Madison official twitter of a “Democracy in the Park” promotion from the official twitter of the Madison WI Clerk. It is publicly available on twitter.

[signature page follows]

Dated at this 23rd day of November, 2020.


Name: _____

Subscribed to and sworn before me
this 23rd day of November, 2020



Notary Public, State of Wisconsin
My Commission: Perpetual

EXHIBIT

A

Transcript of Democracy in America Biden Campaign AD

Hey Madison, this year voting early is a walk in the park...literally, On Saturday, September 26th and Saturday, October 3rd, from 9 am to 3 pm, City of Madison poll workers will be in over 200 city parks; registering voters, answering questions about voting, and accepting your completed absentee ballot. Absentee voters who still need to find a witness can just bring their blank ballot with them and have a poll worker serve as their witness, poll workers will be wearing bright yellow vests and can be found by one of the vote yard signs you are used to seeing at your polling place; so make your plan now to return your ballot. Democracy in the Park, Saturday, September 26th or Saturday, October 3rd 9am to 3pm at any of the 200+ city parks in Madison. Visit cityofmadison.com to learn more. That's cityofmadison.com. I'm Joe Biden, candidate for President and I approve this message. Paid for by Biden for President, this event is hosted by the City of Madison and is non-partisan, all are welcome.

EXHIBIT

B

Coronavirus (COVID-19)

[City Services \(/coronavirus\)](#) [Public Health \(https://www.publichealthmdc.com/coronavirus\)](https://www.publichealthmdc.com/coronavirus)

[Get Alerts \(/health-safety/coronavirus/updates\)](/health-safety/coronavirus/updates) [Español \(/es/health-safety/coronavirus\)](/es/health-safety/coronavirus) [\[Home \\(/\\)\]\(#\) / \[Calendar \\(/calendar\\)\]\(/calendar\) / \[Democracy in the Park\]\(#\)](/hmoob (/hmn/health-safety/coronavirus)</p></div><div data-bbox=)

Democracy in the Park

[Events - City \(/calendar?type=1\)](/calendar?type=1)

Date & Time:

Saturday, September 26, 2020 - 9:00am to 3:00pm

Location(s):

City of Madison Parks

Madison, WI

[Directions](https://maps.google.com?daddr=+Madison+WI+) [🚲 Bike](https://maps.google.com/maps?daddr=+Madison+WI+&dirflg=b&mra=itm&t=m&z=8)

[🚌 Bus](https://maps.google.com/maps?daddr=+Madison+WI+&dirflg=r&mra=itm&t=m&z=8)



City of Madison poll workers will be in every City of Madison community park, neighborhood park, and mini park to register voters, answer questions about the voting process, and accept the delivery of absentee ballots (see map <https://smex12-5-en-ctp.trendmicro.com:443/wis/clicktime/v1/query?url=https%3a%2f%2furldefense.proofpoint.com%2fv2%2furl%3fu%3dhttps%2d3A%5f%5fwww.google.com%5fmaps%5fd%5fv%5fviewer%2d3Fmid%2d3D1o5tDkjJ8%2d5FjwanfpTvj471a55-4a40-bce1-d051895cb729&auth=f3d996c83dbc92895b11b4f2a0b957cbc0712333-d145e0573ceff3bd6e200a4c3422b488e07ba037f>). Poll workers will be wearing bright yellow vests and can be found by one of the Vote yard signs you are used to seeing at your polling place. The poll workers will be wearing face masks, disinfecting pens and clipboards after each use, and frequently sanitizing their hands.

Voters who need to register should bring [proof of address \(https://www.cityofmadison.com/clerk/elections-voting/voter-registration/proof-of-residence\)](https://www.cityofmadison.com/clerk/elections-voting/voter-registration/proof-of-residence). Absentee voters who still need to find a witness could have a poll worker serve as their witness.

At the end of the event, absentee envelopes will be secured with a tamper-evident seal. Poll workers will document the seal number and the number of absentee ballots. They will immediately take the ballots to the City Clerk's Office, where both the seal number and the number of absentee ballots will be verified. The Clerk's Office will scan the barcode on each returned absentee envelope the following day, so voters will be able to check <https://MyVote.wi.gov> <https://MyVote.wi.gov> on Monday to verify that their ballot is ready to be counted at the polls.

In the case of inclement weather, the event will be held on Sunday instead.

Event Cost: Free

Handicapped Accessible: Yes

Pre-Registration?: No

American Sign Language (ASL) Provided?: No

Last Updated: 09/22/2020

[Skip to main content](#)

[Agency: Clerk's Office \(/clerk\)](#)

[Category: City Hall \(/city-hall\)](/city-hall)

[Event Type: Elections & Voting \(/event-type-city/elections-voting\)](/event-type-city/elections-voting)

[Tags: Presidential Election 2020 \(/tags/presidential-election-2020\)](/tags/presidential-election-2020)



(https://www.cityofmadison.com/sites/default/files/events/images/img_6135.jpg)

Attachments:

- Democracy in the Park Map PDF https://www.cityofmadison.com/sites/default/files/events-city/attachments/democracy_in_the_park.pdf
- Democracy in the Park Locations PDF https://www.cityofmadison.com/sites/default/files/events-city/attachments/democracy_in_the_park_locations.pdf



Was this page helpful to you? * required Yes No

Why or why not?

SUBMIT

City-County Building

210 Martin Luther King Jr. Blvd
Madison, WI 53703

Madison Municipal Building

215 Martin Luther King Jr. Blvd
Madison, WI 53703

Monday – Friday, 8:00 am – 4:30 pm

WI Relay Service (</civil-rights/programs/disability-rights-services-program/assistive-communication/wisconsin-relay>)

Connect with Us

(<https://www.facebook.com/cityofmadison>) (<http://twitter.com/cityofmadison>) (<https://www.instagram.com/cityofmadisonwi>)

(<https://www.youtube.com/cityofmadison>) (<https://my.cityofmadison.com>)

Contact Directory (</contact>)

Report a Problem (</reportaproblem>)

All Social Media (</outreach>)

Services

Make a Payment (</epayment>)

Apply for a Job (</jobs>)

Property Lookup (</assessor/property>)

Refuse & Recycling (<https://www.cityofmadison.com/streets/refuse/collectionlookup.cfm>)

EXHIBIT

C

Tweet



Madison WI Clerk

@MadisonWIClerk

Have we mentioned how great our poll workers are? One of our poll worker all stars designed this image to promote Democracy in the Park Sept 26 & Oct 3 when they learned we hadn't had time in the office to create a flyer.



6:35 PM · 23 Sep 20 · Twitter Web App

23 Retweets 1 Quote Tweet 48 Likes

Tweet your reply



EXHIBIT

D

Tweet



Madison WI Clerk

@MadisonWIClerk

Democracy in the Park is happening this Saturday!

Drop your absentee ballot or update your voter reg if you need to at one of over 200 @madisonparkswi.

Full list of parks can be found on our website: cityofmadison.com/sites/default/...

#MadisonVotes2020 #VoteByMail #vote #elections2020



2:55 PM · 24 Sep 20 · Twitter Web App

Tweet your reply



EXHIBIT

E

City of Madison, Wisconsin

15.5K Tweets

Tweets

Tweets & replies

Media

Likes

- cityofmadison.com
- online bus schedules
- online payments
- reporting services

Thank you for your patience while we improve our services!



City of Madison, Wisconsin Retweeted



Madison WI Clerk @MadisonWIClerk · 02 Oct
 Tomorrow is our 2nd Democracy in the Park! Visit one of your fave @madisonparkswi & drop your completed absentee ballot w/ a @CityofMadison election official. You can also update your registration if you need to!

#MadisonVotes2020 #vote #elections2020



City of Madison, Wisconsin Retweeted



@publichealthmdc @PublicHealthMDC · 02 Oct
 This week's Data Snapshot is live! Dane Co 14-day average has declined from last wk. UW students/staff made up 38% of Dane Co cases. There was a significant ↓ in the # of cases from UW during this period and a significant ↑ in the number of non-UW cases. bit.ly/3na7DUk



Coronavirus (COVID-19)

[City Services \(/coronavirus\)](#)

[Public Health \(https://www.publichealthmdc.com/coronavirus\)](https://www.publichealthmdc.com/coronavirus)

[Get Alerts \(/health-safety/coronavirus/updates\)](#) [Español \(/es/health-safety/coronavirus\)](#)

[Hmoob \(/hmn/health-safety/coronavirus\)](#)

[Home \(/\)](#) / [News & Updates \(/news\)](#) / Democracy in the Park Event Planned for September 26 & October 3

Democracy in the Park Event Planned for September 26 & October 3

Monday, August 31, 2020 - 8:46am

Over 70,000 City of Madison residents have absentee ballot requests on file for the November 3 General Election. Ballots will be mailed by September 17.

Many City of Madison voters have been contacting the City Clerk's Office to ask about options for returning their absentee ballots in person. In response to these questions, the Clerk's Office is partnering with the City of Madison Parks Division to allow City of Madison voters to return their absentee ballots to poll workers stationed in more than 200 City of Madison parks.

The Democracy in the Park event will be held 9:00 AM – 3:00 PM, Saturday, September 26 and Saturday, October 3. In the case of inclement weather, the event will be held Sunday, September 27 and Sunday, October 4 instead.

[Skip to main content](#)
Poll workers wearing high visibility vests and face masks will be available next to a "Vote" yard sign in 206 city parks to register voters and to accept the delivery of absentee ballots. The poll workers will be available to serve as a witness, if needed (the voter would need to bring their blank ballot and absentee envelope from home).

Poll workers will practice social distancing and will sanitize materials after each use. When the event ends at 3:00 PM, an election official courier will bring the ballots back to the Clerk's Office. The courier and the poll workers on-site will count the number of absentee ballots

being returned to the Clerk's Office, and will seal them in a delivery package with a tamper evident seal that has a unique serial number. The number of ballots and the seal number will be documented on a chain-of-custody form that will be signed by the poll workers in the park and by the courier.

Ballots will be taken directly to the City Clerk's Office where seal numbers and the number of absentee ballots delivered will be verified by Clerk's Office staff.

Ballot drop boxes are on order. Locations will be announced once they are installed.

The following parks will be part of Democracy in the Park:

Park	Address	Type
Acewood Park	1402 Acewood Blvd	Neighborhood
Aldo Leopold Park	2906 Traceway Dr	Neighborhood
Allied Park	2730 Revival Ridge	Mini
Arbor Hills Park	3109 Pelham Rd	Neighborhood
B. B. Clarke Beach Park	835 Spaight St	Mini
Badger Park	418 Burdette Ct	Mini
Baxter Park	777 Englehart Dr	Neighborhood
Beld Triangle Park	1402 Beld St	Mini
Berkley Park	1730 Browning Rd	Mini
Bernie's Beach Park	901 Gilson St	Mini
Blackhawk Park	741 Bear Claw Way	Neighborhood
Bordner Park	5610 Elder Pl	Neighborhood
Breese Stevens Field	917 E Mifflin St	Sports Complex
Brentwood Park	1402 Mac Pherson St	Mini
Brigham Park	911 Rosedale Ave	Mini
Britta Park	4300 Britta Pkwy	Mini
Brittingham Park	829 W Washington Ave	Community
Burr Jones Park	1820 E Washington Ave	Neighborhood
Burrows Park	25 Burrows Rd	Neighborhood
Cardinal Glenn Park	426 Pine Lawn Pkwy	Neighborhood
Carpenter-Rideway Park	1220 Carpenter St	Neighborhood
Cherokee Park	1000 Burning Wood Way	Neighborhood
Churchill Heights Park	4402 DiLoreto Ave	Mini
Country Grove Park	7353 East Pass	Community
Cypress Spray Park	902 Magnolia Ln	Special

De Volis Park	4300 De Volis Pkwy	Mini
Demetral Park	601 N Sixth St	Community
Dominion Park	602 Wyalusing Dr	Neighborhood
Doncaster Park	4335 Doncaster Dr	Mini
Door Creek Park	7035 Littlemore Dr	Community
Droster Park	5629 Kalas St	Neighborhood
Duane F. Bowman Park	1775 Fish Hatchery Rd	Sports Complex
Dudgeon School Park	3200 Monroe St	Mini
Eagle Trace Park	10321 White Fox Ln	Neighborhood
Eastmorland Park	99 Silver Rd	Neighborhood
Edward Klief Park	1200 Milton St	Mini
Eken Park	2407 Coolidge St	Mini
Elmside Circle Park	500 Elmside Blvd	Mini
Elvehjem Park	1202 Painted Post Dr	Neighborhood
Elver Park	1250 McKenna Blvd	Community
Emerson East Park	1915 E Johnson St	Mini
Esther Beach Park	2802 Waunona Way	Mini
Everglade Park	406 Eveglade Dr	Mini
Felland Park	2601 Waterfall Way	Neighborhood
Filene Park	1610 Sherman Ave	Mini
Fisher Street Park	1834 Fisher St	Mini
Flad Park	4937 Flad Ave	Mini
Flagstone Park	8325 Flagstone Dr	Neighborhood
Galaxy Park	132 Milky Way	Mini
Garner Park	333 S Rosa Rd	Community
Giddings Park	429 Castle Pl	Mini
Glacier Hill Park	1018 Glacier Hill Dr	Neighborhood
Glen Oak Hills Park	301 Glen Hwy	Neighborhood
Glenwood Children's Park	602 Glenway St	Mini
Skip to main content Goodman Park	1402 Wingra Creek Pkwy	Community
Greenside Park	29 Greenside Cir	Mini
Greentree-Chapel Hills Park	6649 Schroeder Rd	Neighborhood
Haen Family Park	7702 Tree Ln	Neighborhood
Hammersley Park	6114 Hammersley Rd	Mini
Hampton Court Park	413 Park Way	Mini
Hawthorne Park	220 Division St	Mini

Heritage Heights Park	701 Meadowlark Dr	Neighborhood
Hiawatha Circle Park	99 Hiawatha Cir	Mini
Hiestand Park	4302 Milwaukee St	Community
High Crossing Park	5501 Burke Rd	Neighborhood
High Point Park	7499 Watts Rd	Neighborhood
Highland Manor Park	10 Manor Dr	Neighborhood
Hill Creek Park	9818 Hill Creek Dr	Community
Hillington Green Park	435 Hillington Way	Mini
Hillpoint Park	8213 Watts Rd	Mini
Honeysuckle Park	280 N Thompson Dr	Mini
Hoyt Park	3902 Regent St	Community
Hudson Park	2919 Lakeland Ave	Mini
Huegel Park	5902 Williamsburg Way	Neighborhood
Hughes Park	837 Hughes Pl	Mini
Ice Age Ridge Park	3502 Ice Age Dr	Mini
Indian Hills Park	5001 Flambeau Rd	Mini
James Madison Park	614 E Gorham St	Community
Junction Ridge Park	8502 Elderberry Rd	Neighborhood
Kennedy Park	5202 Retana Dr	Community
Kerr-McGee Triangle Park	728 Jenifer St	Mini
Kestrel Park	9702 Grey Kestrel Dr	Mini
Kingston-Onyx Park	334 Garnet Ln	Neighborhood
Kingswood Park	17 Kingswood Cir	Neighborhood
Lake Edge Park	511 Park Ct	Neighborhood
Lake View Heights Park	1621 Sunfield St	Mini
Lakeland-Schiller Triangle Park	651 Schiller Ct	Mini
Law Park	410 S Blair St	Community
Lerdahl Park	3514 Little Fleur Ln	Mini
Linden Grove Park	1617 Wheeler Rd	Mini
Lost Creek Park	4417 Hey Jude Ln	Mini
Lucia Crest Park	514 N Owen Dr	Neighborhood
Lucy Lincoln Hiestand Park	1506 Prairie Rd	Neighborhood
Manchester Park	3238 Manchester Rd	Neighborhood
Mandan Circle Park	4015 Mandan Cir	Mini
Maple Prairie Park	3117 Prairie Rd	Neighborhood
Marlborough Park	2222 Whenona Dr	Community

[Skip to main content](#)

Marshall Park	2101 Allen Blvd	Community
Mayfair Park	1102 Mendota St	Mini
McClellan Park	701 McClellan Dr	Neighborhood
McCormick Park	702 McCormick Ave	Mini
McFarland Park	5305 Brandenburg Way	Mini
McGinnis Park	9 Crystal Ln	Neighborhood
McPike Park	202 S Ingersoll St	Community
Meadow Ridge Park	4002 Meadow Valley Dr	Neighborhood
Meadowood Park	5800 Thrush Ln	Mini
Merrill Springs Park	5102 Spring Ct	Mini
Midland Park	1005 Midland St	Mini
Midtown Commons Park	1310 Waldorf Blvd	Neighborhood
Mohican Pass Triangle Park	1001 Mohican Pass	Mini
Monona Park	4601 Kay St	Neighborhood
Morrison Park	1451 Morrison St	Mini
Nakoma Park	3801 Cherokee Dr	Neighborhood
Nautilus Point Park	321 Nautilus Dr	Mini
Newbery Park	7834 Lois Lowry Ln	Mini
Newville (Kenneth) Park	1867 Beld St	Mini
Norman Clayton Park	6401 Shoreham Dr	Mini
North Star Park	502 N Star Dr	Community
Northeast Park	5501 Tancho Dr	Community
Northland Manor Park	902 Northland Dr	Neighborhood
O.B. Sherry Park	22 Leon St	Neighborhood
Oak Park Heights Park	641 Hilltop Dr	Mini
Ocean Road Park	910 Ocean Rd	Mini
Odana Hills East Park	4627 Odana Rd	Mini
Odana School Park	678 Segoe Rd	Neighborhood
Olbrich Park	3527 Atwood Ave	Community
Old Middleton Road Park	639 Bordner Dr	Mini
Olin Park	1156 Olin-Turville Ct	Community
Olive Jones Park (Randall School)	1810 Regent St	Mini
Ontario Park	720 Ontario St	Mini
Orchard Ridge Park	5214 Whitcomb Dr	Mini
Orchard Ridge Valley Park	961 Gilbert Rd	Neighborhood
Orlando Bell Park	2274 S Thompson Dr	Neighborhood

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Orton Park	1103 Spaight St	Mini
Owl Creek Park	23 Horned Owl Ct	Mini
Patriot Park	5333 Congress Ave	Neighborhood
Paunack (A.O.) Park	6399 Bridge Rd	Neighborhood
Peace (Elizabeth Link) Park	452 State St	Mini
Penn Park	2101 Fisher St	Neighborhood
Pilgrim Park	2034 Westbrook Ln	Neighborhood
Portland Park	4210 Portland Pkwy	Mini
Proudfit Park	101 Proudfit St	Mini
Quaker Park	4321 Buckeye Rd	Mini
Quann Park	1802 Quann-Olin Pkwy	Community
Quarry Cove Park	3333 Bradbury Ct	Mini
Raemisch Homestead Park	6909 Chelsea St	Mini
Raymond Ridge Park	2138 Muir Field Rd	Neighborhood
Reger (George) Park	201 Oak St	Mini
Reindahl (Amund) Park	1818 Portage Rd	Community
Rennebohm Park	115 N Eau Claire Ave	Community
Reservoir Park	126 Glenway St	Mini
Reston Heights Park	217 Summertown Dr	Neighborhood
Reynolds Park	810 E Mifflin St	Mini
Richmond Hill Park	6117 Cottontail Trl	Neighborhood
Rimrock Park	2906 Rockwood Dr	Mini
Rutic Park	38 Rustic Pkwy	Neighborhood
Sandburg Park	2818 Independence Ln	Neighborhood
Sandstone Park	3937 Manchester Rd	Neighborhood
Sauk Creek Park	402 N High Point Rd	Neighborhood
Sauk Heights Park	525 Bear Claw Way	Neighborhood
Secret Places Park	6001 Sledding Pkwy	Neighborhood
Segoe Park	502 S Segoe Rd	Mini
Skip to main content Sheridan Triangle Park	1301 Farragut St	Mini
Sherman Village Park	1226 Delaware Blvd	Mini
Sherwood Forest Park	1038 Friar Ln	Mini
Skyview Park	1419 E Skyline Dr	Mini
Slater (William) Park	561 S Segoe Rd	Mini
Spring Harbor Beach Park	1918 Norman Way	Mini
Spring Harbor Park	5218 Lake Mendota Dr	Neighborhood

Stevens Street Park	2710 Stevens St	Mini
Sugar Maple Park	252 Sugar Maple Ln	Mini
Sunridge Park	5901 Piping Rock Rd	Mini
Sunset Park	300 E Sunset Ct	Mini
Swallowtail Park	901 Swallowtail Dr	Mini
Sycamore Park	830 Jana Ln	Community
Tenney Park	1414 E Johnson St	Community
Thousand Oaks Park	9725 Sunny Spring Dr	Neighborhood
Thut Park	2630 Nana Ln	Neighborhood
Town Center Park	6301 Town Center Dr	Mini
Valley Ridge Park	1281 Meadow Sweet Dr	Neighborhood
Veterans Memorial Park	4601 Star Spangled Trl	Neighborhood
Vilas (Henry) Park	1602 Vilas Park Dr	Community
Village Park	6606 Village Park Dr	Mini
Waldorf Park	1736 Waldorf Blvd	Mini
Walnut Grove Park	202 N Westfield Rd	Community
Waltham Park	2617 Waltham Rd	Neighborhood
Warner Park	2930 N Sherman Ave	Community
Washington Manor Park	801 N Oak St	Mini
Waunona Park	5323 Raywood Rd	Neighborhood
Westchester Gardens Park	3330 Basil Dr	Neighborhood
Western Hills Park	2401 S Whitney Way	Mini
Westhaven Trails Park	3020 Cimarron Trl	Neighborhood
Westmorland Park	4114 Tokay Blvd	Neighborhood
Westport Meadows Park	4338 Bielfuss Dr	Mini
Wexford Park	1201 N Westfield Rd	Community
Wheeler Heights Park	4410 Northview Dr	Mini
Whitetail Ridge Park	1818 Anhalt Dr	Neighborhood
Windom Way Park	1920 Windom Way	Mini
Skip to main content Wingra Park & Boat Livery	824 Knickerbocker St	Neighborhood
Wirth Court Park	2801 Saint Paul Ave	Mini
Woodland Hills Park	834 Pebble Beach Dr	Neighborhood
Worthington Park	3102 Worthington Ave	Neighborhood
Yahara Hills Park (South)	Siggelkow Rd	Community

Yahara Hills Park (West)	3901 Savannah Rd	Community
Yahara Place Park	2025 Yahara Pl	Neighborhood
Zoo Park	950 Pontiac Trl	Mini

Contacts

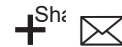
- Maribeth Witzel-Behl, (608) 266-4601, clerk@cityofmadison.com
(<mailto:clerk@cityofmadison.com>)

Agency: [Clerk's Office \(/clerk\)](#), [Parks \(/parks\)](#)

Category: [City Hall \(/city-hall\)](#)

Links

City of Madison Ballot Drop-off Sites (<https://www.cityofmadison.com/clerk/elections-voting/voting/vote-absentee/ballot-drop-off-sites>)



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Why or why not?

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City-County Building

210 Martin Luther King Jr. Blvd
Madison, WI 53703

Madison Municipal Building

215 Martin Luther King Jr. Blvd
Madison, WI 53703

Monday – Friday, 8:00 am – 4:30 pm

WI Relay Service (/civil-rights/programs/disability-rights-services-program/assistive-communication/wisconsin-relay)

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Mayor's Office (/mayor)

City Council (/council)

Meeting Schedule (/clerk/meeting-schedule)

ELECTION RECOUNT PROCEDURES

November 2020



Wisconsin Elections Commission

P.O. Box 7984
Madison, WI 53707-7984

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FAX: (608) 267-0500
Email: elections@wi.gov
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Introduction

Elections are often decided by a few votes. In many cases they are decided by one or two votes out of the several hundred or even several thousand votes that are cast. An election may even end in a tie vote. These circumstances encourage a candidate, typically the one who loses the election, to have all the ballots counted again to assure all legal votes are counted properly, any illegal votes are not counted, and the proper procedures for conducting the election were followed by the election officials.

The process of counting the ballots again is known as a recount. There is no automatic recount. The procedures for requesting and conducting a recount are spelled out in the election laws. A recount is the exclusive remedy to test in court the right of a candidate to hold office based on the number of votes cast at an election.

This manual explains the statutory requirements for requesting a recount, attempts to explain ambiguity in those statutes, expands on the statutory requirements with recommended procedures for conducting a recount, and contains sample forms for use during the recount. Additionally, the Appendix to this manual includes a Commission staff memorandum on the construction of Wisconsin's election statutes which in some cases can influence the advice rendered by Commission staff to board of canvassers conducting a recount. The advice is rendered on a case-by-case basis and is intended to "give effect to the will of the electors" when making decisions during a recount. This memorandum also outlines the discretion board of canvassers may exercise when making decisions during a recount and provides analysis of situations where the board of canvassers considers if an error in the election process was made by a voter or an election official and how that difference impacts the tallying of votes.

This information is prepared by the Wisconsin Elections Commission ("WEC" or "Commission") pursuant to the requirements of [Wis. Stat. § 9.01\(10\)](#). If you have any questions about the recount process, please contact Commission staff through any of the methods below:

Phone: 608-261-2028
Toll Free: 866-VOTE-WIS
Fax: 608-267-0500
Email: elections@wi.gov

Procedures for Requesting a Recount

Who May Request a Recount?

Any individual who voted at a referendum election may request a recount of the referendum results. Only an aggrieved candidate, defined as a candidate for an office whose total votes were within 1% of the winner's vote total when at least 4,000 votes were cast or within 40 votes of the winner's total if fewer than 4,000 votes were cast may request a recount of results for an office. [Wis. Stat. § 9.01\(1\)\(a\)1](#). There is no automatic recount, even if the unofficial results are extremely close.

How is a Recount Requested?

A recount is requested by filing a sworn petition with the filing officer along with the filing fee, if required. For the office of the president, a petition for recount must be filed not earlier than the completion of the canvass and not later than 5 p.m. on the 1st business day following the day on which the WEC receives the last county board of canvassers statement. For all other offices, a petition for recount must be filed not earlier than the completion of the canvass and not later than 5 p.m. on the 3rd business day following the last meeting day of the board of canvassers determining the result for the office/referendum. [Wis. Stat. § 9.01\(1\)\(a\)1](#).

What is a Recount Petition?

A recount petition is a sworn statement requesting that the votes at an election be counted again and setting out the reasons why the ballots should be recounted. A recount petition must be filed with the filing officer along with any applicable fee.

The recount petition must state the following information:

1. The petitioner must specifically request a recount or otherwise clearly indicate they desire a recount of particular election results. See [Wis. Stat. § 9.01\(1\)\(a\)1](#).
2. The petitioner must indicate he or she was an aggrieved candidate for the office in question [Wis. Stat. § 9.01\(1\)\(a\)5](#). If the results of a referendum election are at issue, the petition must state that the petitioner voted on the referendum question. [Wis. Stat. § 9.01\(1\)\(a\)2.a](#).
3. The basis for requesting the recount. This can consist of a general statement that the petitioner believes that a mistake or fraud was committed in a specified ward or municipality in the counting and return of the votes cast for the office; or more specific grounds, such as a particular defect, irregularity, or illegality in the conduct of the election, may be listed in the petition. The petitioner shall state if this information is based on personal knowledge of the petitioner or if the petitioner believes the information to be true based on information received from other sources. [Wis. Stat. § 9.01\(1\)\(a\)2.b](#).
4. The ward or wards to be recounted.¹ If a municipality consists of only one ward, the petition

¹ If a candidate petitions for a recount in part, but not all, of the wards or municipalities within a jurisdiction or district, the opposing candidate may file a petition for a recount in any or all of the remaining wards or municipalities. The latter petition must be filed not later than 5:00 p.m. two days after the board of canvassers completes the first recount. The board of canvassers convenes at 9:00 a.m. on the next business day to count the remaining wards or municipalities. This right also applies to a referendum election. Any elector who voted at the election may petition to recount the remaining wards or municipalities in a referendum election. [Wis. Stat. § 9.01\(4\)](#).

need only list the municipality in which the recount is desired. If all wards in a municipality, county or district are to be recounted, the petition may list the municipality, county or district without specifying each ward to be recounted. The petitioner may also state “all wards” if the petitioner wants the entire election recounted. If no ward specifications are indicated, the filing officer will assume that all wards are included. [Wis. Stat. § 9.01\(1\)\(a\)3](#).

5. A verification signed under oath before a person authorized to administer oaths. The verification must state that the matters contained in the petition are known to the petitioner to be true except for allegations stated on information and belief, which the individual believes to be true. See Sample Recount Petition ([EL-186](#) or [EL-186R](#)).

If a recount petition is not filed in the proper form, or not accompanied by the filing fee (if required) by the filing deadline, the petitioner loses his or her right to a recount of the election. See Wis. Stat. § [9.01\(1\)\(a\)2](#) & [\(ag\)3](#). A sample recount petition ([EL-186](#) or [EL-186R](#)) is available in the Appendix.

After filing the recount petition, the petitioner may amend the petition. This may be done to include information discovered as a result of the facts gathered and determined by the board of canvassers during the recount. If the petitioner wants to amend his or her petition, the petitioner must file a motion to amend the petition with the board of canvassers as soon as possible after the petitioner discovers, or should have reasonably discovered, the new information, and show that the petitioner was unable to include the information in the original petition. [Wis. Stat. § 9.01\(1\)\(a\)4](#).

When is a Filing Fee Required?

Determining if a filing fee is required depends on the total votes cast for the office² and the difference between the total votes cast for the “leading candidate” and the total votes cast for the petitioner. The “leading candidate” is typically the candidate who won the election. However, in an election where more than one candidate is elected to the same office, or in a primary election when two or more candidates are nominated, the “leading candidate” is the person who received the fewest votes, but is still elected or nominated; not the candidate with the most votes. When more than one candidate is elected or nominated, the number and percentage of votes cast is calculated by first dividing the total votes cast by the number of candidates elected or advancing. [Wis. Stat. § 9.01\(1\)\(ag\)5](#). Please see “Recount Fee Scenarios” in the Appendix for an example of how to determine if a filing fee is required.

If 4,000 or fewer votes are cast:

No fee is required if the difference in the total votes cast between the leading candidate and those cast for the petitioner or between the affirmative and negative votes cast at a referendum is less than 10. If the difference is at least 10 votes, a filing fee is required.

If more than 4,000 votes are cast:

No fee is required if the difference between the leading candidate and those cast for the petitioner or between the affirmative and negative votes cast at a referendum is 0.25% or less. If the difference is greater than 0.25%, a filing fee is required.

When a filing fee is required, the cost of the recount should be estimated by the filing officer

² In an election in which more than one office of the same type is to be filled from the same territory, the total votes cast for the office is determined by dividing the total number of votes cast for the office by the number of offices to be filled. The difference between the total votes cast for the leading candidate and the petitioner is divided by the total votes cast for the office to calculate the percentage difference to determine when a fee is required. [Wis. Stat. § 9.01\(1\)\(ag\)5](#).

including the actual cost incurred by the Elections Commission to provide services for performing the recount, and pre-paid by the petitioner in cash or in another form of payment acceptable to the filing officer at the time of filing. [Wis. Stat. § 9.01\(1\)\(ag\)2 and 3](#).

If the recount results in the petitioner being elected or a reversal of the outcome of a referendum or the recount results in a difference in the votes cast that is at or above the threshold for paying the fee, the filing fee shall be refunded to the petitioner within 45 days after the board of canvassers makes its determination in the recount. If the results of the recount do not change the outcome of the election, or the recount results in a difference in the votes cast that is below the threshold for paying the fee, the petitioner shall pay any balance owing toward the actual cost of the recount within 45 days after the filing officer provides the petitioner with a written statement of the amount due. [Wis. Stat. § 9.01\(1\)\(ag\)3m](#).

Campaign Finance Note:

Per Wis. Stat. § 11.1104(9), “Contributions used to pay legal fees and other expenses incurred as a result of a recount under s. 9.01” are not subject to contribution limits. These contributions may be collected from the time of the initial recount petition has been filed until the recount process ends. Legislative campaign committees and political parties are not subject to contribution limits, and can give unlimited amounts to candidate committees however reporting requirements still apply. For information regarding the campaign finance laws, please contact the Wisconsin Ethics Commission (<http://ethics.wi.gov/content/contact-us>).

Where Does the Petitioner File the Recount Petition?

The petitioner files the recount petition with the filing officer with whom nomination papers or a declaration of candidacy are filed for that office. The filing officer for any federal or state office or referendum is the Wisconsin Elections Commission. The filing officer for any county office or referendum is the county clerk. The filing officer for a municipal office or referendum is the municipal clerk or the board of election commissioners. The filing officer for a school board office or referendum is the school district clerk. [Wis. Stat. §§ 8.10\(6\)\(d\), 9.01\(1\)\(ar\)1](#).

When Must the Petition be Filed?

If a municipal or county board of canvassers determines the election results, the time frame for filing is not earlier than the completion of the canvass for the election and not later than 5:00 p.m. on the third business day after the last meeting day of the board of canvassers which determines the election or referendum results. [Wis. Stat. § 9.01\(1\)\(a\)1](#).

If the Wisconsin Elections Commission Chairperson or designee determines the election or referendum result, the petition must be filed no earlier than the last meeting day of the last county board of canvassers to make a statement in the election or referendum and no later than 5:00 p.m. on the third business day after the Wisconsin Elections Commission receives the last statement from the county board of canvassers. [Wis. Stat. § 9.01\(1\)\(a\)1](#).

For an election for President of the United States, the recount petition deadline is the 5:00 p.m. on the first business day after the Wisconsin Elections Commission receives the last statement from a county board of canvassers for the election.

What Happens When the Petition is Properly Filed?

Upon receipt of a valid recount petition, the filing officer shall prepare a public notice of the recount (see Appendix for an example) pursuant to [Wis. Stat. § 19.84](#) describing when and where the recount will be held. The filing officer shall send a copy of the notice to the board of canvassers and deliver a copy of the petition and public notice to all candidates whose names were listed on the ballot for the same office. The Wisconsin Elections Commission recommends that the filing officer also deliver the notice to any registered write-in candidates. In a partisan primary, candidates from all parties for the same office must be notified by the filing officer. A candidate or agent designated by the candidate may personally accept delivery of the copy of the petition. Upon delivery, the candidate or agent shall be required to sign a receipt (see Appendix). If a candidate or agent does not personally accept delivery, the copies shall be given promptly to the sheriff. The sheriff shall promptly serve the copies on the candidates without fee. [Wis. Stat. § 9.01\(2\)](#).

The petitioner and other candidates are encouraged to obtain legal counsel to represent them in any recount proceedings. [Wis. Stat. § 9.01\(3\)](#). The board of canvassers should also make arrangements to obtain legal advice as needed during the recount proceedings. The Commission staff may also be made available via phone during the recount upon request.

Please note that the Wisconsin Elections Commission should be notified of all recounts. In the event of a recount for state or federal office involving more than one county, the boards of canvassers shall consult with the Commission staff in order to ensure that uniform procedures are used to the extent practicable. The Commission staff will make arrangements for a teleconference through the respective county clerks prior to beginning the recount. Candidates will be invited to participate and the teleconference will be open to the public. [Wis. Stat. § 9.01\(10\)](#).

Procedures for Conducting the Recount

When Does the Recount Begin?

The recount begins no earlier than 9 a.m. on the day following delivery of notice to all candidates and no later than 9 a.m. on the day following the last day for filing the recount petition. [Wis. Stat. § 9.01\(1\)\(ar\)3](#). In a recount ordered by the Wisconsin Elections Commission, the board of canvassers shall convene no later than 9 a.m. on the third day following receipt of the order by the county clerk. [Wis. Stat. § 9.01\(1\)\(b\)](#). If the following morning is a Saturday (or holiday) the Wisconsin Elections Commission recommends that the board of canvassers begin the recount on the Saturday (or holiday).

Who Conducts the Recount?

The board of canvassers that determined the original election result conducts the recount, except for state and federal elections. For state and federal elections, the county boards of canvassers for the counties in which the contested votes are cast conduct the recount. The Wisconsin Elections Commission recommends that the board of canvassers be composed of the same people who initially canvassed the election results. However, in the event one of the original members is unavailable when the recount is scheduled to begin, other qualified individuals may be appointed to fill the temporary vacancy. [Wis. Stat. §§ 7.53\(1\)\(b\), \(2\)\(a\), 7.60\(2\)](#). If a member of the board of canvassers is unavailable for the recount, the clerk should be notified immediately and a list of qualified replacements composed before the recount begins. The minutes of the recount should reflect any change in canvass board members and the reason for the substitution.

The board of canvassers may hire tabulators who work at the canvass board's direction and who assist in administering the recount. Tabulators may assist the board of canvassers in conducting the recount, but only members of the board of canvassers are competent to make any determination as to the validity of any vote tabulated. [Wis. Stat. § 9.01\(5\)\(b\)](#). The Wisconsin Elections Commission recommends that where possible, the election inspectors who worked the polls on Election Day serve as tabulators.

Who May Attend the Recount?

Any person may attend the recount. This includes the candidates, their representatives or legal counsel, media representatives, and any other interested persons. [Wis. Stat. § 9.01\(3\)](#). If there are multiple representatives from a single campaign, a single representative shall be identified as the designated primary representative to the board of canvassers. Secondary representatives may ask clarifying questions of recount staff and request that ballots be set aside for further review by the board of canvassers, but any challenges or objections for the record must be made by the designated primary representative. The recount statute does not specifically dictate how many individuals must be allowed to observe a recount, but it is clear that the ballot and materials must be available for candidates and their representatives to view and offer any objections to a ballot being counted. [Wis. Stat. § 9.01\(1\)\(b\)11](#).

The canvass board members and the tabulators are the only persons who may handle and touch the ballots and other election materials. The board of canvassers must, however, allow the candidates and their representatives and/or legal counsel to view and identify the election materials. [Wis. Stat. § 9.01\(1\)\(b\)11](#). Public health guidance should be considered by the board of canvassers when setting up the recount location and observation areas. Social distancing, the use of facecoverings and hand hygiene should all be clearly communicated to individuals that will be attending the recount in person to ensure the safety of everyone involved in recount. (See Public Health Guidance starting on Page 16 of the Appendix to this manual). Any challenges to the procedure established by the board of canvassers regarding observation should be decided by the board and documented in the minutes. The optional use of a live video feed to provide greater transparency and minimize the number of individuals observing in person should also be considered.

The board of canvassers shall exercise reasonable control over the conduct of the recount to assure that the canvassers and tabulators do not experience interference from any person observing the recount. All persons who are not under the supervision of the board of canvassers are considered observers and are subject to the observer [guidelines](#) established by the Wisconsin Elections Commission [in this manual](#) and the board of canvassers. [To clearly identify candidate representatives, all](#) observers shall wear badges or nametags identifying themselves and their role (candidate, media, etc.). [This procedure allows individuals assisting the board of canvassers to quickly identify candidate representatives who are provided the ability to view and identify ballots and election materials for purposes of raising an objection to the counting of a ballot with the board of canvassers.](#)

The board of canvassers may establish marked observer areas³ and ask that observers remain within those areas unless otherwise permitted by the board of canvassers. If there is not sufficient room for all observers to view the election materials, preference shall be given to candidates or

³ Unlike observation areas in the polling place, recount observations areas are not required to be placed at any specific distance as long as the candidates and their representatives can view and identify the election materials and the observers are not disruptive to the recount process.

their representatives. The use of video or still cameras inside the recount room is permitted unless it is disruptive or interferes with the recount. The board of canvassers may enforce reasonable restrictions on items brought into the recount room such as marking devices, food, or drink.

If any observer engages in disruptive behavior that in the opinion of the board of canvassers threatens the orderly conduct of the recount, the board of canvassers shall issue a warning and if the observer does not cease the offending conduct, order the observer's removal.

Recount Preparations

Unless a court orders otherwise, the board of canvassers may decide to either hand-count or use voting equipment to tabulate the ballots. The board of canvassers may also choose to hand-count certain wards, while using voting equipment to tabulate other wards. [Wis. Stat. § 5.90\(1\)](#). If voting equipment is used, it should be programmed to read and tally only the results for the contest to be recounted. Prior to the recount, the filing officer should consult individually with board of canvass members to inquire how each prefers the ballots be tabulated. Based on that informal polling, the filing officer can prepare for the recount. The formal decision on the tabulation method to be used should be made publicly when the recount begins so as to provide an opportunity for candidates or their representatives to object.

The filing officer administering the recount should ensure that all the supplies and materials needed for the recount have been acquired prior to the start of the recount. The filing officer should also acquire the necessary original election materials for each reporting unit to be recounted. A sample checklist of materials and supplies is available in the Appendix.

If the necessary materials are not on hand when the recount is scheduled to begin, the Wisconsin Elections Commission recommends that the board of canvassers convene by the deadline set by statute, document what materials are missing, what steps have been taken to procure them for the record, and adjourn until the materials are available.⁴ In the event that the board of canvassers has the required materials for some, but not all the wards to be recounted at the time they are scheduled to begin the recount, the board of canvassers may begin the recount with those wards for which it has the required materials while the missing materials are being obtained.

The Wisconsin Elections Commission recommends that the board of canvassers note in the minutes if proper notice of the recount was given to all candidates. Also, the board of canvassers should note if the recount was properly noticed as a public meeting under [Wis. Stat. § 19.84](#).

The filing officer may choose to conduct an administrative review of the recount materials prior to the recount commencing to identify possible errors or anomalies (e.g., reconciliation of poll books). If any such review was conducted by the filing officer prior to the recount, the filing officer shall publicly present a full report to the board of canvassers of any errors or anomalies identified as well as any corrective action taken. The board of canvassers may choose to adopt or reverse any decision made by the filing officer during the administrative pre-recount review.

What Does the Board of Canvassers Do?

The duty of the board of canvassers is to recount the votes cast for the office in question and to correct the errors, if any, that were made at the original determination of the election results. If necessary, the board of canvassers may also issue subpoenas to compel witnesses or documents for

⁴ The Board of Canvassers may not adjourn for more than one day at a time. [Wis. Stat. § 9.01\(1\)\(ar\)3](#).

the recount. The board of canvassers is also required to make a complete written record of the recount. [Wis. Stat. § 9.01\(5\)\(a\)](#).

Each party to a recount must be given an opportunity to object and provide offers of evidence on:

- all objections to the recount itself,
- the composition of the board of canvassers,
- the procedures followed,
- any ballot cast at the election, and
- any other issues presented to the board of canvassers during the recount.

[Wis. Stat. § 9.01\(5\)\(a\)](#).

Any objections or offers of evidence, the canvass board's decisions, and any findings of fact regarding any irregularities discovered during the recount, must be recorded in the written minutes of the recount proceedings. While a court reporter is not required, an audio recorder is recommended to ensure detailed minutes are kept. A sample format for the recount minutes can be found in the Appendix.

How Does the Board Conduct the Recount?

The board of canvassers conducts the recount by following the procedures in Wis. Stat. §§ [5.90](#); [7.50](#); [7.51](#); & [9.01\(1\)\(b\)](#). Please see the Appendix for checklists specific to the use of each type of tabulation method and the Commission staff memorandum on the construction of Wisconsin's election statutes and the discretion a board of canvassers may exercise when making decisions during the recount. These procedures are conducted separately for each municipality and reporting unit within the municipality. The board of canvassers shall announce each reporting unit before beginning the recount process for that reporting unit. Please note that the board of canvassers must keep complete minutes of each step completed, any objections made, any evidence introduced, any findings of fact made, and any decisions of the board of canvassers including the reasoning behind the decision.

1. Reconcile Poll Lists – Wis. Stat. § 9.01(1)(b)1

The board reconciles the two poll lists and any supplemental lists to confirm the lists record the same voters, the same total number of electors who voted in the ward or municipality, and that the same supplemental information is noted. The canvassers determine from the poll lists the total number of voters, the number of absentee votes recorded, and identify any irregularities appearing on these lists. The canvassers note in the minutes the total number of persons who voted, how many absentee votes were recorded, and any irregularities found on the poll lists.

2. Review Absentee Ballots and Materials – Wis. Stat. § 9.01(1)(b)2

Determine Number of Absentee Voters

The Wisconsin Elections Commission recommends that the board of canvassers determines the number of absentee voters by reviewing the poll lists, the absentee ballot certificate envelopes, the Inspectors' Statement (EL-104), and the absentee ballot log (EL-124).

Examine Written Absentee Applications

The board of canvassers then reviews the written applications for absentee ballots and the list of absentee voters maintained by the municipal clerk. There should be a written application for each absentee ballot envelope except those issued in-person in the clerk's office. In the case of indefinitely confined, a designation on a list prepared by the municipal clerk is sufficient if it indicates that an absentee ballot was delivered to and returned by an absentee voter.

Do not reject an absentee ballot if there is no separate written application.⁵ Because of the variety of reasons that the board of canvassers may not be able to locate a specific written application, and the likelihood that a voter may be improperly disenfranchised, the board of canvassers should not reject an absentee ballot due to the lack of a written application. The board of canvassers records in the minutes the number of written absentee ballot applications on file as well as an explanation of any discrepancy, but any request to reject a ballot on this basis should be determined by a reviewing court rather than the board of canvassers.

Review Rejected Absentee Ballots

The board of canvassers examines the rejected absentee ballot certificate envelopes contained in the brown carrier envelope (EL-102). Rejected absentee ballot certificate envelopes are identified by the election inspectors on election night and marked "rejected." The reason for the rejection should be noted on the Inspectors' Statement (EL-104).

The board of canvassers should make their own determination for each rejected absentee ballot certificate envelope.⁶ Any improperly rejected ballots should be marked and placed into the pool of ballots to be counted. If the number of voters is increased under this procedure the change should be recorded in the minutes. Any errors by election inspectors in rejecting absentee ballots should be documented in the minutes along with the corrective action taken.

Examine Defective Absentee Ballot Envelopes

The board of canvassers examines the used absentee ballot certificate envelopes (EL-122) contained in the white carrier envelope (EL-103). If the board finds any defective⁷ absentee ballot certificate envelope not identified on election night they should be marked as defective, assigned a serial number, set aside, and properly preserved. A notation including a description of the defect should be made in the minutes.

The number of voters determined at the beginning of the recount is reduced by the total number of absentee ballots set aside under this procedure. This adjusted number is noted in the minutes and used whenever the number of voters is referred to during the recount. Do not remove ballots from the pool yet.

3. Examine Ballot Bag or Container – Wis. Stat. § 9.01(1)(b)3

The board of canvassers examines the ballot bag or ballot container (EL-101) to determine that it has not been tampered with, opened, or opened and resealed. The board of canvassers should verify that the tamper-evident seal matches the serial number on the Ballot Container

⁵ See Informal Opinion of Staff Attorney Re: Recount of the Town of Walworth Recall Election (11/18/02); but see also [Wis. Stat. § 6.84\(2\)](#); [Walter V. Lee v. David Paulson, 2001 WI App 19](#).

⁶ See [Wis. Stat. § 6.88\(3\)](#) for procedures and guidance on accepting or rejecting absentee ballot certificate envelopes.

⁷ An absentee ballot is defective only if it is not witnessed, the witness did not provide an address, it is not signed by the voter, or if the certificate envelope or the certification language is missing. [Wis. Stat. § 9.01\(1\)\(b\)2](#).

Certification (EL-101) and the Inspectors' Statement (EL-104). The Wisconsin Elections Commission recommends the board of canvassers investigate any irregularities or possible tampering with the ballots and note its findings in the minutes.

4. Reconcile Ballot Count – Wis. Stat. § 9.01(1)(b)4.

❑ *Ballot Count – 4.(a)*

The board of canvassers opens the ballot bag or ballot container and removes the contents. The canvassers or tabulators count the number of ballots in the ballot bag, excluding any ballots that were set aside and not counted by the election inspectors on election night under the provisions of [Wis. Stat. § 7.51\(2\)](#). These “set aside” ballots should have been marked and bundled by the election inspectors on election night.

The board of canvassers reviews all ballots marked rejected, defective, and objected to, to decide whether such ballots were correctly categorized when the ballots were first examined after the election.

❑ *Separate Probable Absentee Ballots – 4.(b)*

The board of canvassers separate all “probable absentee ballots”⁸ from the other ballots. The number of probable absentee ballots should equal the number of properly completed certificate envelopes (as determined by the board of canvassers in step 2 above), the number of absentee ballots recorded on the registration list on election night, and the number of written applications. Any discrepancies should be recorded in the minutes.

❑ *Reconciling the Number of Ballots with the Number of Voters⁹*

If the number of voters is greater than or equal to the number of ballots, skip this step. Only in the situation where the number of ballots exceeds the number of voters should the board of canvassers engage in the following procedure.

If the board of canvassers previously determined that any absentee ballot certificate envelopes were defective, the board of canvassers draws at random, without inspection, from the pool of probable absentee ballots, the number of ballots equal to the number of envelopes that have been determined defective. If the board of canvassers finds more defective absentee ballot envelopes than probable absentee ballots, the board of canvassers shall set aside all probable absentee ballots. The probable absentee ballots shall not be counted, but shall be marked as to the reason for their removal, set aside and properly preserved. The board of canvassers notes in the minutes the steps taken under this procedure and the results determined. [Wis. Stat. § 9.01\(1\)\(b\)4.b.](#)

If the number of ballots still exceeds the number of voters, the board of canvassers or the tabulators shall place all the ballots face up to check for blank ballots. Any blank ballots (ballots which have not been marked for any office) shall be marked as to the reason for their removal, set aside and properly preserved. The board of canvassers should record this action in the minutes. [Wis. Stat. § 9.01\(1\)\(b\)4.c.](#)

⁸ The board of canvassers shall presume that a ballot initialed only by the municipal clerk, executive director of the board of election commissioners, deputy clerk or secretary is an absentee ballot. [Wis. Stat. § 9.01\(1\)\(b\)4.b.](#)

⁹ See Appendix pgs. 12-15 for discussion of the Board of Canvassers retaining some discretion to ensure that statutes are applied to “give effect to the will of the electors.”

If the number of ballots still exceeds the number of voters after removing all blank ballots, the board of canvassers shall place all ballots face down to check for initials. Any ballots not properly initialed by two inspectors or any probable absentee ballots not properly initialed by the municipal clerk or deputy clerk are set aside. The board of canvassers must, without inspection, randomly draw from the improperly initialed ballots as many ballots as are necessary to reduce the number of ballots to equal the number of voters determined to have voted on election day less any defective absentee ballot certificate envelopes. Any ballots removed for lack of proper initials shall not be counted, but shall be marked as to the reason for their removal, set aside and properly preserved. The board of canvassers should record this action in the minutes. [Wis. Stat. § 9.01\(1\)\(b\)4.d.](#)

If the number of ballots still exceeds the number of voters, the board of canvassers places the remaining ballots in the ballot bag and randomly draws, without inspection, the number of ballots equal to the number of excess ballots.¹⁰ These ballots shall not be counted, but shall be marked as to the reason for their removal, set aside and properly preserved. The actions taken under this procedure are recorded in the minutes. [Wis. Stat. § 9.01\(1\)\(b\)4.e.](#)

When the number of ballots equals the number of voters or if the number of voters exceeds the total number of ballots, the board of canvassers returns the ballots to the ballot bag or container and thoroughly mixes the ballots. [Wis. Stat. § 9.01\(1\)\(b\)5.](#)

5. Review Provisional Ballots

The board of canvassers shall examine the Inspectors' Certificate of Provisional Ballots (EL-108), Provisional Ballot Reporting Form (EL-123r), Provisional Ballot Certificate envelopes (EL-123), and Statement of the Municipal Board of Canvassers (EL-106AP) to determine if provisional ballots were correctly processed. The board of canvassers should determine if all ballots for voters providing the required information¹¹ have been included in the original result. The board of canvassers shall record any discrepancies in the minutes. [Wis. Stat. § 6.97.](#)

6. Count the Votes

When counting paper or optical scan ballots, questions often arise concerning the intent of the elector. Election officials have a duty to attempt to determine voter intent and give effect to that intent if it can be determined. Election officials are expected to use common sense to determine the will of an elector based on the marks made by the elector on the ballot. The decisions of the election inspectors may be reviewed by the board of canvassers conducting the recount. Wis. Stat. §§ [7.50](#), [7.51](#), [7.60](#).

Even if an elector has not fully complied with the provisions of the election law, votes should be counted as intended by the elector to the extent that the elector's intent can be determined. Wis. Stat. §§ [5.01\(1\)](#), [7.50\(2\)](#). The Wisconsin Elections Commission has a manual titled "Counting Votes," which is designed to assist election officials in determining voter intent. A copy of the "[Counting Votes](#)" manual is available on the agency website and should be reviewed by the board of canvassers prior to the recount.

The exact steps for tabulating the votes will vary depending on the method or combination of

¹⁰ See Appendix pgs. 12-15 for discussion of the Board of Canvassers retaining some discretion in potential drawdown scenarios to ensure that statutes are applied to "give effect to the will of the electors." One factor considered, is whether an error can be determined and whether the error was committed by the voter or the election official.

¹¹ See [Wis. Stat. § 6.97](#) and [Wis. Admn. Code Ch. EL § 3.04](#).

methods of tabulation selected by the board of canvassers:

1. Hand Count

The Wisconsin Elections Commission recommends that hand counts be conducted using teams of at least two tabulators. These tabulators will double-check each other's work throughout the process to ensure that an accurate count is maintained.

Sort Ballots by Candidate

Each tabulation team should begin by sorting the ballots into stacks: One stack for each candidate (ballots that clearly indicate a vote for a ballot candidate or a valid write-in candidate) and one stack for ballots where no vote may be counted (defective ballots, votes for invalid write-in candidates, etc). Candidate representatives should be given the opportunity to review each ballot as it is sorted, and may request that the tabulators set aside questionable ballots for closer examination and determination of voter intent by the board of canvassers.¹² The board of canvassers may consult with its legal counsel or the Wisconsin Elections Commission staff regarding any questionable ballots. The Wisconsin Elections Commission recommends that any such consultation should be recorded in the minutes.

Create Stacks of a Fixed Number

Set aside the stack of ballots for which no vote can be counted. For each stack of ballots marked for a candidate, each tabulator should create sub-stacks of a fixed number (e.g., 25 ballots) with a remainder stack for any number left over from creating the full-size stacks. Each stack should be double-checked by a second tabulator to ensure the stack contains exactly the number expected.

Tally Stacks to Determine the Total Vote

The board of canvassers then carefully counts the number of stacks for each candidate. The counts should be recorded separately by two individuals on two clearly-labeled tally sheets (EL-105). After all of the counts have been recorded, the two tally sheets should be compared against each other to ensure an accurate count is determined. The recount vote totals are recorded in the minutes.

A reconciliation of the ballots for which no vote could be counted should be recorded in the minutes. This documentation should list the reasons the ballots could not be counted and the number of ballots not counted for each reason.

2. Optical Scan

If an optical scan tabulator is used, the Wisconsin Elections Commission recommends that where possible the tabulator should be programmed to only tally the results for the contest to be recounted. If the tabulator is not reprogrammed to tally only the contest to be recounted, the Wisconsin Elections Commission recommends that the counts for other contests be separated, set aside and preserved. The recounted results for the other contests should not be included in the board of canvassers report of recount results.

Note: The original memory device for the voting equipment from election day cannot be cleared

¹² Please refer to the [Counting Votes Manual](#) on the WEC website for detailed rules and examples of when to count or not count a mark as a vote.

and reprogrammed for use at the recount, so an alternative memory device must be acquired for use at the recount. [Wis. Stat. § 7.23\(1\)\(g\), \(2\)](#).

Examine the optical scan tabulator

The board of canvassers shall make a record of the number of the tamper evident seal, protective counter, or other device, if any, before opening any of the voting equipment. The board of canvassers examines the electronic voting equipment to determine that any other tamper evident seals are intact and match the log maintained by the election inspectors and the municipal clerk. The board of canvassers notes in the minutes any irregularities or possible tampering with the device. Wis. Stat. §§ [5.90\(1\)](#) & [9.01\(1\)\(b\)6](#).

Test the optical scan tabulator

The board of canvassers tests the automatic tabulating equipment to ensure it is programmed correctly for the recount using a pre-audited group of ballots marked to record a predetermined number of valid votes for each candidate or contest choice (test deck). The test deck should include at least one ballot with more selections than permitted (overvote) and for recounts in a partisan primary, at least one ballot with votes in more than one party primary (crossover) in order to test the ability of the tabulator to reject such ballots. The results of the test deck tabulation should be compared to the pre-audited results to ensure accuracy and a record of the test results should be noted in the minutes. Wis. Stat. §§ [5.84\(1\)](#), [5.90\(1\)](#). The board of canvassers may choose to test the tabulator for all reporting units at once and skip this step in subsequent reporting units if using the same memory device for all reporting units.

Compare Duplicate Ballots with Original Ballots

On election day, some ballots cannot be processed by the optical scan tabulator due to overvotes or other defects. When this happens, election officials create a duplicate ballot to honor as much of the elector's intent as possible. The duplicate ballot is then tallied by the equipment and the original is set aside and not counted. Both the duplicate and original ballots should be marked as such and contain identical serial numbers so they can be matched up.

The board of canvassers compares any duplicate ballots with their respective originals to determine the correctness of the duplicates. If any duplicate ballots were remade incorrectly, the board of canvassers should set aside the incorrectly remade duplicate ballot, mark it with the reason for its removal, create a new duplicate ballot, and mark it as such. [Wis. Stat. § 5.90\(1\)](#).

Insert Ballots Into the Optical Scan Tabulator

Each ballot shall be reviewed by the board of canvassers and may be inspected by the candidates or their representatives before being inserted into the tabulator. If it appears the ballot may not be recorded correctly by the tabulator, or if the ballot is objected to, the ballot is set aside to be examined by the board of canvassers for voter intent and counted separately by hand.

Generate Results

The board of canvassers places the optical scan tabulator into post-election mode and generates a results tape for the reporting unit. The board of canvassers adds in any votes counted

separately by hand using new tally sheets and records the total results as part of the revised canvass statement, see Step #9.

If the equipment needs to be used for another reporting unit, the board of canvassers shall ensure that all ballots have been removed from the tabulator and re-secured in ballot bags or containers before proceeding to reset the equipment for use with the next reporting unit.

3. Direct Record Electronic (DRE)

In many polling places across the state direct record electronic (DRE) voting equipment is used in conjunction with paper ballots or optical scan ballots to enable individuals with disabilities to vote privately and independently. As a result, the paper ballots and optical scan ballots should be counted first by following the steps described above, if applicable.

Separate the Voter Verified Paper Audit Trail into Individual Ballots

DRE equipment records votes two separate ways: electronically and on a paper tape that the voter can view to verify the equipment is recording their votes correctly before casting their ballot. In a recount, the board of canvassers is required to use the paper record. [Wis. Stat. § 5.90\(1\)](#). The paper tape consists of a pre-election readiness report, a zero-report showing that no votes are currently in the memory of the machine, individual ballot records, and a closing results report.

To facilitate counting of the individual ballot records and to preserve the confidentiality of an individual's vote, the board of canvassers may cut the paper record to separate the individual voter records and then further cut the paper tape into the individual ballots, which would then be randomized. When cutting the paper tape be careful that only the section of the tape covering election day is used. When separating the tape into individual ballots, watch for "voided" ballots which appear the same as other ballot entries except they will be followed by a "void" entry on the tape. The "void" entry may appear far below the record of votes cast on the tape. These "voided" ballots should not be counted as they were not cast.

As an alternative to cutting the paper tape, the boards of canvassers may retain the paper record in its original format and simply scroll through the tape to count each individual ballot. However, if the tape is not cut, the board of canvassers must take the appropriate precautions to ensure the confidentiality of votes as the entries on the paper record will be in the order that the voters used the equipment.

If due to a paper jam or misprint some individual ballot records are not available, the board of canvassers may consult with the voting equipment vendor to determine if the missing records can be recreated. The board of canvassers may be able to obtain records from the vendor, such as cast ballot records, that will allow them to tally votes from the missing ballot records. Any such tallying should be documented in the recount minutes.

Tally Individual Ballots to Determine the Total Vote

The board of canvassers carefully counts each individual ballot record as recorded on the tape. The counts should be recorded by two individuals on clearly labeled tally sheets (EL-105). After all of the counts have been recorded, the two tally sheets should be compared against each other to ensure an accurate count is determined. The recount vote totals should be compared against the original results as generated by the DRE and any discrepancies shall be recorded in the

minutes.

7. Secure Original Materials

After concluding the recount for a particular reporting unit, the board of canvassers shall gather and account for all original election materials. All ballots shall be placed into a ballot bag or container and resealed. The board of canvassers shall document in the minutes the serial number of any new security seals or tags used.

All election materials should be accounted for before proceeding to the next reporting unit to prevent the accidental mixing of materials from different reporting units.

8. Prepare New Canvass Statement

If any corrections were made to the results, the board of canvassers shall prepare a statement of revised election results using the canvass reporting form (EL-106). [Wis. Stat. § 9.01\(1\)\(b\)9.](#)

After the Recount

What does the board of canvassers do after completing the recount?

- If the recount is for a municipal election, the board of canvassers promptly forwards the results and minutes to the municipal clerk.
- If the recount is for a school board election, the board of canvassers promptly forwards the results and minutes to the school board clerk.
- If the recount is for a county election, the county board of canvassers promptly forwards the results and minutes to the county clerk.
- If the recount is for a state or federal election, the results and minutes of the recount are to be forwarded immediately to the Wisconsin Elections Commission and should be received no later than 13 days after the recount is ordered. [Wis. Stat. § 9.01\(1\)\(ar\)3.](#)

A copy of the minutes of any recount should be sent to the Wisconsin Elections Commission. For federal, state, and county elections, the board of canvassers should also send copies of the minutes to the chief officers of the state or county committee for any registered political party who ran candidates for that office. [Wis. Stat. § 9.01\(5\)\(bm\).](#)

No certificate of election may be issued by the filing officer until the deadline for filing all appeals has passed and the election results are final.

How Does a Candidate or Petitioner Challenge the Recount Results?

The candidate or petitioner has a right to appeal the recount determination in circuit court. The appeal must be filed with the circuit court within five (5) business days of the completion of the recount in all counties concerned. Notice must also be served in person or by certified mail on all other candidates and persons who filed a written notice of appearance before the board of canvassers. If the recount affects a state or federal office or referendum, notice of the appeal must be served on the Wisconsin Elections Commission. See Wis. Stat. §§ [9.01\(6\)](#), [\(7\)](#), [\(8\)](#), & [9](#).

The recount process and the subsequent judicial appeals is the exclusive 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\(11\)](#).

Conclusion

This information is prepared pursuant to [Wis. Stat. § 9.01\(10\)](#). Petitioners, candidates, and filing officers should seek legal counsel when they are involved in a recount. If you have any questions, concerns, suggestions or recommendations about the recount process, please contact the:

Wisconsin Elections Commission

P.O. Box 7984

Madison, WI 53707-7984

Phone: 608-261-2028 Fax: 608-267-0500

Email: elections@wi.gov

Website: <http://elections.wi.gov>

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SAMPLE RECOUNT PETITION

In Re: The Election for
(specify office)

Verified Petition
for Recount

Petitioner (name of petitioner) alleges and shows to (specify the clerk or body with whom nomination papers are filed for that office):

1. That Petitioner was a candidate for the office of (specify office) in an election held on (specify_date of election);
2. The Petitioner is an aggrieved party as defined in Wis. Stat. § 9.01(1)(a)5.
3. That Petitioner is informed and believes that a (mistake or fraud) has been committed in (specify each ward or municipality) in the counting and return of votes cast for the office of (specify office); and/or
4. That Petitioner (is informed and believes) or (knows of his/her own knowledge) that:

(Specify other defects, irregularities or illegalities in the conduct of the election).

Wherefore: Petitioner requests a recount of (specify each ward or municipality in which a recount is desired); each ward need not be specified if a recount is requested for all wards within a jurisdiction).

Dated this _____ day of _____, _____.

Petitioner

I, (name of petitioner), being first duly sworn, on oath, state that the matters contained in the above petition are known to me to be true except for those allegations stated on information and belief, which I believe to be true.

Petitioner

Subscribed and sworn to before me this _____ day of _____, _____.

Notary Public (or other person authorized to administer oaths)

My Commission Expires _____
(specify expiration date)

The information on this form is required by Wis. Stat. § 9.01. This form is prescribed by the Wisconsin Elections Commission, 212 E. Washington Avenue, 3rd Floor, P.O. Box 7984, Madison, WI 53707-7984, (608) 261-2028
EL-186 (Rev.4/18)

SAMPLE RECOUNT PETITION FOR REFERENDUM

In Re: The Election for
 (specify referendum)

Verified Petition
 for Recount

Petitioner (name of petitioner) alleges and shows to (specify the clerk or body with whom the referendum was filed):

1. That Petitioner was an elector who voted upon the referendum in the election held on (specify_date of election);
2. That Petitioner is informed and believes that a (mistake or fraud) has been committed in (specify each ward or municipality) in the counting and return of votes cast for the referendum of (specify referendum); and/or
3. That Petitioner (is informed and believes) or (knows of his/her own knowledge) that:

 (Specify other defects, irregularities or illegalities in the conduct of the election).

Wherefore: Petitioner requests a recount of (specify each ward or municipality in which a recount is desired; each ward need not be specified if a recount is requested for all wards within a jurisdiction).

Dated this _____ day of _____, _____.

Petitioner

I, (name of petitioner), being first duly sworn, on oath, state that the matters contained in the above petition are known to me to be true except for those allegations stated on information and belief, which I believe to be true.

Petitioner

Subscribed and sworn to before me this _____ day of _____, _____.

Notary Public (or other person authorized to administer oaths)

My Commission Expires _____
(specify expiration date)

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EL-186R (Rev.11/09/16)

SAMPLE ORDER FOR RECOUNT

STATE OF WISCONSIN – (County)

In the matter of:)	
)	ORDER FOR RECOUNT
A Recount of the (Election))	
for (Title of Office))	
for the (District), held)	
on (Date))	

On (Date Recount Petition was filed), a recount petition was filed by (Petitioner’s Name), a candidate for the office of (Office Title) for the (District), at the (Election) held on (Date).

The petition requests a recount of (list specific wards or municipalities) for the office of (Office Title).

The filing officer has reviewed the petition. The petition is sufficient. Any applicable fee has been received and accepted.

Pursuant to Wis. Stat. § 9.01:

IT IS ORDERED THAT:

1. A recount be conducted of all the votes cast for the office of (Office Title) for the (District) at the (Election) held on (Election Date) in (list of specific wards or municipalities).
2. The boards of canvassers convene at (Time) on (Date) at (Location), to begin the recount.
3. The recount be completed by the board of canvassers immediately.
4. The clerk transmit a certified canvass report of the result of the recount and a copy of the minutes of the recount proceedings to the Wisconsin Elections Commission immediately after the completion of the recount.

Dated: _____

(Clerk’s Name)
(Clerk’s Title)

SAMPLE PUBLIC NOTICE

Notice of Recount for the Office of (Office Title) for the (District) in the (Election)

TO: All Candidates On The Ballot For The Office of (Office Title) for the (District) and
Other Interested Persons

FROM: (Clerk)

SUBJECT: Recount of the Votes Cast for the Office of (Office Title) for the (District) in the
(Election)

DATE: (Date)

A recount of the votes cast at the (Election Date) (Election) for the office of (Office Title) for the
(District) will begin at the time and location set forth below:

(Municipality) – 9:00 a.m. on (Date), at (Location).

A copy of the recount petition is attached. This notice is given pursuant to Wis. Stat. § 9.01(2).

You have the right to be present and to be represented by counsel to observe and challenge the votes
cast and the board of canvassers' decisions at the election.

Attachment

Sample Acceptance of Service

MEMORANDUM

DATE: (Date)
TO: (Clerk)
FROM: Candidate for (Office)
SUBJECT: Service of Recount Petition

Pursuant to Wis. Stat. § 9.01(2) on this day, I have personally received delivery of copies of the notice of recount, recount petition, and order for recount for the office of (office) at the (election date) (election name). I agree to waive service and accept delivery.

(Signature of Candidate)

(Print Name)

Sample Recount Minutes

Date of Recount:

County:

Office to be Recounted: *(Include District Number)*

Original Result: *(Candidates' Names and Votes for Each Candidate. If there was a tie, explain how it was broken.)*

Canvass Board Members: *(If substitute, give reason for substitution.)*

Other Personnel: *(Tabulators, Corporation Counsel, Clerical Support)*

Others Present:

Notification: *(Were candidates notified and was public notice given?)*

Electronic Voting Equipment Test Results:

For Each Reporting Unit:

Name of Municipality:

Reporting Unit:

Original Vote Totals for Reporting Unit:

Number of Voters from Registration List:

Number of Absentee Ballot Applications:

Number of Absentee Ballots:

Notes: *(Include a description of any discrepancies, irregularities, errors, problems, objections raised by observers. Record any decision of the board of canvassers. Identify any exhibits by description and number.)*

Recount Vote Totals for Reporting Unit:

Recount Results:

An electronic or hard copy of the minutes from any recount must be sent to:

Wisconsin Elections Commission
P.O. Box 7984
Madison, WI 53707-7984
elections@wi.gov

Recount Fee Scenarios

Scenario #1: Village President

Candidate	Votes
A	4,500
B	4,410

In this scenario, candidate A would currently be elected to office. If a recount was requested, the fee is determined by first calculating the total votes cast for the office ($4,500+4,410 = 8,910$). The difference between the leading candidate and the petitioner (90 votes) is divided by the total votes cast (8,910) and then multiplied by 100 to get the percentage difference (1.01%).

Candidate B would be required to pay a filing fee as the percentage difference is greater than .25%. However, the vote difference between the leading candidate and the petitioner is more than 1% so the contest is not eligible for a recount.

Scenario #2: School Board (vote for up to 3)

Candidates	Votes
A	3,500
B	3,000
C	2,920
D	2,910
E	2,900
F	2,800

In this scenario, candidates A-C would currently be elected to office. If a recount was requested, the fee is determined by adding up all the votes cast for the office (18,030 total) and dividing it by the number of offices to be filled (3 in this scenario) to get a total of 6,010. The difference between the leading candidate (C, as he or she is the candidate with the lowest number of votes still being elected to office) and the petitioner is divided by 6,010 and multiplied by 100 to get the percentage difference.

So in this case:

- If Candidate D requested a recount, there would be no fee required as the difference is .17%, which is not greater than .25%
- If Candidate E requested a recount, a filing fee would be required as the difference is .33%, which is greater than .25%
- If Candidate F requested a recount, the difference would be 2% so the contest is not eligible for recount.

General Checklist of Supplies and Materials Needed for the Recount:

- Paper and Pens (To record the minutes of the recount!)
- Tape Recorder (Optional)
- Speaker Phone (for consultation with WEC staff or counsel)
- Test Deck for Electronic Voting Equipment Test
- New *Tally Sheets* (EL-105)
- New *Canvass Reports* (EL-106)
- Copies of any informational memoranda relating to the election and the recount prepared by the Wisconsin Elections Commission staff and sent to county and municipal clerks.
- Recount checklists and the *Elections Recount Procedures Manual* available from the Wisconsin Elections Commission

Election Materials from Each Reporting Unit:

- All ballots to be recounted, contained in the original ballot bag or ballot container (EL-101), including any provisional ballots processed after Election Day;
- All paper audit trails from direct record electronic (DRE) voting devices;
- All logs of security seals for ballot boxes or electronic voting equipment;
- Both copies of the original poll lists, including any supplemental voter lists;
- All absentee ballot applications (See page 7);
- Any rejected absentee ballots, contained in the original brown carrier envelope (EL-102);
- Any used absentee ballot certificate envelopes, contained in the white carrier envelope (EL-103);
- The original Inspectors' Statement (EL-104);
- The MBOC Record of Activity (EL-104P) created during the processing of provisional ballots, if any;
- The original tally sheets (EL-105) and any results tapes generated by electronic voting and tabulating devices;
- The original canvass report of the election results (EL-106);
- The amended canvass report of the election results created after any provisional ballots were tabulated (EL-106P);
- Any provisional ballot documentation (EL-108 & EL-123);
- The absentee ballot log (EL-124); and
- The test deck for any electronic voting equipment.

Recount Checklist

Hand Counted Paper Ballots

Municipality _____ Date _____
Reporting unit _____ Contest _____

This checklist is designed to facilitate uniform practices and is to be completed simultaneously with the recount process for each reporting unit in the recount.

- Compare and reconcile poll lists.
- Absentee ballot review: number, applications, rejected, defective envelopes.
- Verify tamper evident serial number on ballot container matches seal number written on Inspectors' Statement (EL-104) and Ballot Container Certification (EL-101).
- Ballot count.
 - Review ballots marked "rejected," "defective," or "objected to."
 - Separate absentee ballots and drawdown (*May be skipped if the number of absentee ballots equals the number of proper envelopes*).
 - Reconcile the number of ballots with the number of voters.
 - Treatment of excess ballots (*May be skipped if the number of voters equals or exceeds the number of ballots.*)
- Review provisional ballots.
- Hand count paper ballots.
 - Sort ballots by candidate.
 - Create stacks of a fixed number.
 - Tally the stacks using duplicate original tally sheets (EL-105).
- Add in any votes counted separately by other methods.
- Secure the original election materials.
- Prepare canvass statement.
- Prepare minutes for each reporting unit and attach completed checklist to minutes.

Recount Checklist

Optical Scan Voting Equipment

Municipality _____ Date _____
Reporting unit _____ Contest _____

This checklist is designed to facilitate uniform practices and is to be completed simultaneously with the recount process for each reporting unit in the recount.

- Compare and reconcile poll lists.
- Absentee ballot review: number, applications, rejected, defective envelopes.
- Verify tamper evident serial number on ballot container matches seal number written on Inspectors' Statement (EL-104) and Ballot Container Certification (EL-101).
- Ballot count.
 - Review ballots marked "rejected," "defective," or "objected to."
 - Separate absentee ballots and drawdown (*May be skipped if the number of absentee ballots equals the number of proper envelopes*).
 - Reconcile the number of ballots with the number of voters.
 - Treatment of excess ballots (*May be skipped if the number of voters equals or exceeds the number of ballots.*)
- Review provisional ballots.
- Verify voting equipment tamper evident serial number seal number written on Inspectors' Statement (EL-104) contains Chief Inspector's initials for pre-election and post-election verification.
- Test the automatic tabulator (*The Board of Canvassers may choose to test the tabulator for all reporting units at once and skip this step in subsequent reporting units if using the same memory device for all reporting units.*)
- Compare duplicate ballots with original ballots.
- Feed ballots into the optical scan tabulator.
- Generate results.
- Add in any votes counted separately by other methods.
- Secure the original election materials.
- Prepare canvass statement.
- Prepare minutes for each reporting unit and attach checklist to minutes.

Recount Checklist

Direct Recording Electronic (DRE)/Touch Screen Voting Equipment

Municipality _____ Date _____
Reporting unit _____ Contest _____

This checklist is designed to facilitate uniform practices and is to be completed simultaneously with the recount process for each reporting unit in the recount.

- Compare and reconcile poll lists.
- Absentee ballot review: number, applications, rejected, defective envelopes.
- Verify tamper evident serial number on ballot container matches seal number written on Inspectors' Statement (EL-104) and Ballot Container Certification (EL-101).
- Ballot count.
 - Review ballots marked "rejected," "defective," or "objected to."
 - Separate absentee ballots and drawdown (*May be skipped if the number of absentee ballots equals the number of proper envelopes*).
 - Reconcile the number of ballots with the number of voters.
 - Treatment of excess ballots (*May be skipped if the number of voters equals or exceeds the number of ballots.*)
- Review provisional ballots.
- Verify voting equipment tamper evident serial number seal number written on Inspectors' Statement (EL-104) contains Chief Inspector's initials for pre-election and post-election verification.
- Separate voter-verified paper audit trail into individual ballots (may be skipped if canvass board members take appropriate precautions to ensure the confidentiality of individual electors' votes)
- Hand count permanent paper record of votes generated by DRE and record on duplicate tally sheets (EL-105).
- Add in any votes counted by other methods.
- Secure the original election materials.
- Prepare canvass statement.
- Prepare minutes for each reporting unit and attach checklist to minutes.

WISCONSIN ELECTIONS COMMISSION

212 EAST WASHINGTON AVENUE, 3RD FLOOR
POST OFFICE BOX 7984
MADISON, WI 53707-7984
(608) 261-2028
ELECTIONS@WI.GOV
ELECTIONS.WI.GOV



COMMISSIONERS

BEVERLY R. GILL
JULIE M. GLANCEY
ANN S. JACOBS
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DEAN KNUDSON
MARK L. THOMSEN, CHAIR

INTERIM ADMINISTRATOR MEAGAN WOLFE

MEMORANDUM

DATE: For the May 24, 2018 Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Meagan Wolfe
Interim Administrator

Prepared and Presented by:
Michael Haas, Staff Counsel
Nathan Judnic, Senior Elections Specialist

SUBJECT: Commission Recount Manual

The information contained in the Commission's Recount Manual is prepared pursuant to Wis. Stat. § 9.10(10) to ensure that uniform procedures for boards of canvassers conducting recounts are followed when possible. The purpose of the Recount Manual, and other manuals and guidance documents prepared by the Commission staff, is to help explain statutory requirements, offer guidance on ambiguous provisions of the statutes, if necessary, and when needed, expand upon statutory requirements with recommended best practices and procedures.

Unlike laws governing other topic areas, the construction and application of election laws is somewhat unique.

5.01 **Scope. (1)** CONSTRUCTION OF CHS. 5 TO 12. Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.

Wis. Stat. § 5.01(1). The Legislature's decision to construct Wisconsin's election statutes in this manner affects how the courts have interpreted these statutes which in turn influences advice provided by Commission staff when fact specific scenarios are presented, usually on a case by case basis. The construction of statutes to "give effect to the will of the electors" has resulted in three general concepts which provide the framework for advice rendered by Commission staff: 1) directory vs. mandatory application of election statutes, 2) election official error vs. voter error, and 3) board of canvassers decision-making discretion.

Directory vs. Mandatory Application of Statutes to "give effect to the will of the electors"

Based on Wis. Stat. § 5.01(1) (and its identical predecessor statute), Wisconsin courts view the election statutes with an eye towards a voter's ballot being counted as cast when possible, versus a ballot being set aside and not counted if the will of the elector can be determined, even if a statute directs – but does not mandate – a ballot to be set aside in certain circumstances. Especially during a recount, this construct can be important in reviewing ballots that may or may not have been issued, cast or counted in compliance with every specific step of the election statutes. The consistent application of this concept is illustrated by the following statements of the Wisconsin Supreme Court:

The difference between mandatory and directory provisions of election statutes lies in the consequences of nonobservance: An act done in violation of a mandatory provision is void, whereas

an act done in violation of a directory provision, while improper, may nevertheless be valid. Deviations from directory provisions of election statutes are usually termed ‘irregularities,’ and, as has been showing in the preceding subdivision, such irregularities do not vitiate an election. Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result, as where the statute merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election. *Sommerfeld v. Board of Canvassers*, 269 Wis. 299, 69 N.W.2d 235 (1955), *Olson v. Lindberg*, 2 Wis.2d 229, 85 N.W.2d 775 (1957).

In keeping with sec. 5.011, Stats. (which is now sec. 5.01(1)), this court has quite consistently construed the provisions of election statutes as directory rather than mandatory so as to preserve the will of the elector. *Grandinjan v. Boho*, 29 Wis.2d 674, 139 N.W.2d 557 (1966).

...We have held that the word ‘shall’ can be construed to mean ‘may.’ *George Williams College v. Williams Bay*, 242 Wis. 311, 7 N.W.2d 891 (1943).

In passing upon statutes regulating absentee voting, the court should look to the whole and every part of the election laws, the intent of the entire plan, the reasons and spirit for their adoption, and try and give effect to every portion thereof. *Sommerfeld*, 269 Wis.2d at 238.

The Court has consistently sought to preserve the will of the electors by construing election provisions as directory if there has been substantial compliance with their terms. *Grandinjan*, 29 Wis.2d at 682.

Throughout the statutes with reference to elections the intent of the legislature is apparent. It is to encourage and assist qualified electors to cast their ballots for candidates of their choice. To prevent fraud the legislature in some instance has specifically stated that there must be strict compliance with a statute or a ballot cannot be counted. In so far as we have been called upon to construe that statutes we have held that where the legislature has provided in explicit language that absentee ballots shall not be counted unless certain provisions of the statute are complied with, compliance with those provisions is mandatory. Where it has not done so expressly and in clear language we have held that provisions regulating absentee voting are directory, and that strict compliance therewith is not required. *Petition of Anderson*, 12 Wis.2d 530, 533 (1961).

See also additional cases in which the Court has determined that election statutes shall be interpreted as directory and not mandatory as to give effect to the will of the electors: *State ex rel. Tank v. Anderson*, 191 Wis. 538, 211 N.W. 938 (1927), *State ex rel. Bancroft v. Stumpf*, 21 Wis. 586 (1867), *Ollman v. Kowalewski*, 238 Wis. 574, 300 N.W. 183 (1941), *State ex rel. Graves v. Wiegand*, 212 Wis. 286, 249 N.W. 537 (1933), *State ex rel. Oaks v. Brown*, 211 Wis. 571, 249 N.W. 50 (1933), *Lanser v. Koconis*, 62 Wis.2d 86, 214 N.W.2d 425 (1974), *McNally v. Tollander*, 302 N.W.2d 440, 100 Wis.2d 490 (1981).

One area of the election statutes that the Legislature has determined should be read as mandatory, are some provisions related to the absentee voting process – Wis. Stat. §§ 6.86, 6.87(3) to (7) - and how absentee ballots should be treated at a recount – Wis. Stat. § 9.01 (1)(b)2. and 4. See Wis. Stat. § 6.84(1) and (2). In those instances, for example, when an absentee ballot certificate envelope is unsigned by the voter or the witness, those ballots cannot be counted. If absentee ballots were originally counted by the local board of canvassers in contravention of the absentee ballot procedures, those ballots during a recount “may not be included in the certified result of any election.” This is the basis for separating probable absentee ballots from regularly cast ballots during a recount – the mandatory versus directory treatment of ballots cast in contravention of an absentee procedure contained in §§ 6.86 or 6.87(3) to (7).

With the noted exception above for certain absentee ballot procedures, the Commission staff (as well as the former State Elections Board staff and the former Government Accountability Board staff) provides guidance that is intended to give effect to the will of the electors which may apply a directory reading of the statutes, given a specific-fact scenario. This may happen when, for example, a question is received as to whether a drawdown should occur when the election officials can identify the issue, it was no fault of the voter that more ballots exist than voters, the total number of ballots issued at a polling place reconciles with the total number of voters (but not within the reporting unit, meaning incorrect ballots were likely issued), and there is no evidence of any fraud or malfeasance. In such cases Commission staff often advise that a draw down is not the best practice, although the final decision is

up to the board of canvassers. Drawing down requires the removal of a ballot, or ballots, at random and is generally viewed as a last resort option because the result will likely disenfranchise a random voter – something that the Legislature was arguably trying to avoid by inserting the language contained in Wis. Stat. § 5.01(1).

Election Official Error vs. Voter Error

Another line of cases which factors into advice provided by Commission staff, especially during a recount, concerns the identity of the individual that committed an error. The error is magnified when it results in the number of voters and ballots failing to reconcile which could trigger a random draw down of ballots prior to the counting of ballots at the recount. The question becomes whether a voter and their properly cast ballot should be subject to random removal and potential disenfranchisement if an error was committed by an election official and not the voter. Removing ballots through the draw down procedure when an election official issued a voter the wrong ballot or failed to initial a ballot does not seem to agree with the Legislature’s construction of election statutes set forth in Wis. Stat. § 5.01(1) and caselaw below.

The Wisconsin Supreme Court has stated:

...The voter’s constitutional right to vote cannot be baffled by latent official failure or defect.
Ollmann, 238 Wis. at 579.

In *State ex rel. Symmonds v. Barnett*, 182 Wis. 114, 195 N.W. 707 (1923), the ballot of certain voters were not counted, because the voter’s names did not appear on the voter registration list. These voters were, however, duly registered voters who had voted in the preceding primary election. Only the failure of the registration board to update the registration list explained the omission of their names. This Court ordered that votes of these voters must be counted, stating: As a general rule a voter is not to be deprived of his constitutional right of suffrage through the failure of election officers to perform their duty, where the elector himself is not delinquent in the duty which the law imposes on him. *State ex rel. Wood v. Baker*, 38 Wis. 171 (1875); *Barnett*, 182 Wis. at 127.

Because the right to vote is so central to our system of government, this Court has consistently sought to protect its free exercise. *McNally v. Tollander*, 302 N.W.2d 440, 100 Wis.2d 490 (1981). In the *Ollmann* case, ballots were initialed by only one election official, rather than being initialed by two election officials per the statutory requirement. The Wisconsin Supreme Court held that the ballots with only one set of initials were properly counted, stating that: “The voter would not knowingly be doing wrong. And not to count his vote for no fault of his own would deprive him of his constitutional right to vote...A statute purporting so to operate would be void, rather than the ballots.” *McNally*, 100 Wis.2d at 502 citing *Ollmann*.

When questions are asked by local officials regarding how to treat a ballot, especially in recount situations, who made the error is a factor that is considered when rendering advice based on the decisions issued in these cases. Without considering this factor, election officials with ill intentions could potentially manipulate election results by purposefully committing errors (issue wrong ballots, fail to apply required election official notations to the ballot), knowing that ballots will automatically be drawn down or a new election potentially ordered if errors are discovered and the statute requiring a draw down is applied in a mandatory fashion without considering the source of error.

In such cases, where it is clear that an error has been committed by an election official, the voter is not at fault and there is no evidence of fraud or malfeasance, Commission staff often advise that a draw down is not the best practice, although the final decision is up to the board of canvassers. Drawing down requires the removal of a ballot, or ballots, at random and is generally viewed as a last resort option because the result will likely disenfranchise a random voter – something that the Legislature was arguably trying to avoid by inserting the language contained in Wis. Stat. § 5.01(1).

Board of Canvassers Discretion

Despite advice provided by Commission staff when asked by a board of canvassers, ultimately that statutory body retains the authority and discretion to make decisions it deems appropriate. Statutes specifically provide the board of canvassers the authority to count and recount ballots and correct errors that may have occurred during the initial canvassing of ballots and certification of results. See Wis. Stat. §§ 7.51, 7.52, 7.53, 7.60 and 9.01(1) and (5). The board of canvassers is comprised of an odd number of individuals and takes into account party balance when

possible in its composition. Courts rely on the determination and reasoning of the board of canvass when determining if a decision on appeal was properly decided and gave effect to the will of the electorate. See *DeBroux v. Board of Canvassers for the City of Appleton* (Three Cases), 557 N.W.2d 423, 206 Wis.2d 321 (Wis. App., 1996) (“As the SEB notes in its brief, the statutory scheme for a recount ‘places a premium’ on the Board’s judgment to give effect to the will of the electorate.”)

The Commission’s procedures set forth in the Recount Manual, as well as the advice provided when a local election official or member of the board of canvassers asks a specific question on the treatment of a ballot, many times in the context of a recount, strives to be consistent with the intent of the election statutes and the supporting caselaw.

While the draw down procedure for example, is effective at creating ballot and voter totals that reconcile, it is not an effective tool for determining and removing the exact offending ballot or ballots, which caused the number of ballots to not match the number of voters. Rather than recommend a procedure that will likely disenfranchise a random voter due to an error made by an election official, the Commission staff’s approach has been to advise a board of canvassers that they have some discretion to avoid a draw down if they can identify an explanation as to why the discrepancy occurred, considering the factors discussed above.

Ultimately, the decision of the board of canvassers is what is challenged in court, not the advice rendered by the Commission staff. The Commission staff, however, believes the board of canvassers should be provided with advice that considers the cases discussing the “directory vs. mandatory” application of election statutes as well as considering who made the error that has generated the question in the first place. Any decisions made should consider “the will of the electors, if that will can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.”

DATE: For the November 18, 2020 Commission Meeting
TO: Members, Wisconsin Elections Commission
FROM: Meagan Wolfe Richard Rydecki
 Administrator Deputy Administrator
SUBJECT: Public Health Guidance for Recount Proceedings

In preparation for a statewide recount Wisconsin Elections Commission (WEC) staff has worked with a public health professional from the Wisconsin Department of Health Services to develop suggested procedures for counties to apply to recount planning and setup efforts. These procedures follow the same concepts we have stressed throughout the 2020 elections that have been conducted during the COVID-19 pandemic. Public health considerations such as hand hygiene, face coverings, social distancing and COVID-19 symptom screenings should be incorporated into any recount setup. New considerations must be made to account for how recounts differ from administering voting at polling places or during the in-person absentee period.

Conducting a recount requires a significant number of people to be present in the same room or facility, including Board of Canvass members, tabulators, candidate representatives, public observers and other staff to assist with administrative and security-related tasks. The recount timeline also requires participants to be present in enclosed areas for long periods of time until the recount is complete. State law requires any recount to be completed within 13 days of the issuance of the recount order and several counties have expressed they will need the majority of that time to complete all required procedures before the deadline. In addition, a recount requires tabulators and Board of Canvass members to work within close proximity of one another and allows candidate representatives to be close enough to review each ballot before it is tabulated. All of these factors were presented to the public health official who assisted with the development of this guidance and have been considered in the procedures outlined below.

Space Considerations

In order to keep all participants and observers spaced out appropriately during the recount, counties have had to consider securing a larger space during their planning process. Additional space provides the ability to space out tables where tabulators are working while still allowing for multiple reporting units or municipalities to be recounted at the same time. WEC staff has discussed this option on several calls with county clerks in preparation for the recount and many indicated they identified and reserved larger spaces to conduct the recount.

The use of a larger space was confirmed as a recommended option by DHS as the larger space will allow for increased airflow that prevent aerosols from building up throughout the day. Any practices that increase the percentage of outdoor air in the recount space are recommended, such as opening windows and propping open doors, if possible. You may be able to work with the vendor or owner of the recount space to increase total airflow supply to occupied spaces, if possible. This can be done by disabling or changing the settings of demand-control ventilation (DCV) controls that reduce air supply based on temperature or occupancy.

Because of the prolonged nature of the recount, county officials may also consider the use of UV sanitation lights and additional ventilation, such as fans, where practicable. Some of these additional efforts may help to combat accumulation of aerosol particles. However, care should be taken in regard to where these items are utilized. For example, additional fans would not be appropriate directed at a table of paper, election materials, but a portable UV

light may be.

Setup Considerations

The recount space should be set up so that there is adequate space between all participants and observers but allows for transparency and efficiency throughout the process. Signs, tape marks, or other visual cues such as decals or colored tape should be used on the floor, placed six feet apart, to keep the recount area organized and to ensure space between all parties when physical barriers are not possible.

Tabulators are required to work in pairs when hand counting ballots and candidate representatives have the ability to review (but not touch) ballots before they are tabulated. For those that must work closely together, it is recommended some physical barriers (e.g., plexiglass shields) are used to provide protection between participants. These barriers can be the tabletop shields that many municipal clerks used on election day at polling places or in their offices during in-person absentee voting. Counties can coordinate with their municipal clerks to borrow excess shields that can be used during the recount.

Tables used for the recount should be arranged in a way that ensures adequate distance between participants and observers. The number of people assigned to each table should also be limited. Arrange chairs in seating areas by turning, draping (covering chair with tape or fabric so seats cannot be used), spacing, or removing chairs to maintain social distancing. Identifying chairs that should not be used will be essential if rooms are used during the recount that have permanent seating, such as county board meeting rooms.

Designated candidate representatives should be able to review a ballot during the recount proceedings. This will require the implementation of a system for the representative to safely examine the ballot without violating social distancing standards. Clear tabletop barriers can be used for this purpose, but other methods may be used depending on the set up and needs of each recount site.

Additional observers, beyond the party representatives who need to be allowed access to see voting materials, may be asked to remain in an area designated by the county officials that accounts for social distancing. Current public health guidance is that a six-foot distance should be maintained meaning that non-party representative observers should expect that they will be asked to stay at least six feet from recount workers and other observers.

Screening Questions

All individuals entering the recount facility or room should be screened to determine if they are exhibiting symptoms of COVID-19. Symptomatic individuals should not be allowed to participate in or observe the recount proceedings until they are free from symptoms. These questions were developed with the assistance of public health officials from the Wisconsin Department of Health Services.

1. Have you come in contact with a person known or suspected to have COVID-19?
2. Have you had a fever or chills in the last 24 hours?
3. Have you had a cough in the last 24 hours?
4. Have you had any shortness of breath or difficulty breathing in the last 24 hours?
5. Have you had any unexplained muscle or body aches in the last 24 hours?
6. Have you experienced a loss of taste or smell within the last 24 hours?
7. Have you had a sore throat within the last 24 hours?

If you answered “yes” to any of the seven questions, you should not participate in or observe at the recount today.

Face Coverings

Face coverings should be required of all people inside the recount space to help prevent the spread of COVID-19 among participants. Larger spaces and workstations that are spread out to account for social distancing will help minimize potential transmission of the virus but recount procedures still require tabulators and observers to be in close

proximity to one another and face coverings should be required to increase the safety of all involved in the recount. The Executive Order requiring face coverings is still in effect while legal challenges to that order are settled by the courts and other counties may have local public health orders that also require face coverings. The Board of Canvassers conducting the recount should clearly communicate with those attending the recount about social distancing, face coverings and hand hygiene health guidance prior to the start of the recount to ensure all individuals participating are aware of the role they play in keeping the location safe. It is recommended that County Clerks have additional disposable face coverings available for tabulators and observers who do not have their own upon arrival at the recount facility.

Hand Hygiene and Surface Cleaning

Strict hand hygiene and surface cleaning procedures should also be incorporated into the protocols at recount sites to minimize potential surface transmission of the virus. These procedures are familiar to election officials and have been recommended since the onset of the pandemic earlier this year. Participants and observers should be required to wash or sanitize their hands upon entry to the recount facility. In addition, tabulators should wash or sanitize their hands regularly throughout the day. If gloves are used, recount participants should take care when removing those gloves so as to not contaminate their bare hands in the process. After gloves have been removed, hands should be washed or sanitized to minimize the chance for COVID-19 transmission.

Surfaces such as tables and voting equipment should also be disinfected regularly throughout the day. Information on recommendations for election specific cleaning and disinfection are available on the Centers for Disease Control and Prevention webpage. In addition, approved cleaning procedures provided by your voting equipment vendor should be used to clean any voting equipment at regular intervals during the day. Best practices for cleaning different models of voting equipment can be found here: <https://elections.wi.gov/node/6723>.

STATE OF WISCONSIN

IN RE: THE 2020 ELECTION FOR PRESIDENT AND VICE PRESIDENT OF THE
UNITED STATES

AFFIDAVIT OF LORI OPITZ

STATE OF WISCONSIN)
) SS.
COUNTY OF WAUKESHA)

I, Lori Opitz, being first duly sworn on oath, state as follows:

1. I am an adult resident of the Town of Hartford, Washington County, Wisconsin and a qualified elector in the State of Wisconsin.
2. I am also the Clerk of the Town of Oconomowoc and, in such capacity, I administer elections in the Village, including the in person absentee ballot voting period under Wis. Stat. § 6.86(1)(b).
3. For the November 2020 General Election, and any and all elections that I have administered, I have always required a written application from each elector prior to issuance of any absentee ballots, including during the in person ballot voting period, as required by Wis. Stat. § 6.86(1)(ar).
4. When an elector would come in to the office and ask to vote an absentee ballot in person, I would take their photo identification and cross check it against the electronic MyVote system. If the elector had not previously submitted a request for an absentee ballot via My Vote, I would require them to complete a written application using form EL-121 prior to giving them a ballot.

[signature page follows]

Dated at this 20th day of November, 2020.

Lori Opitz
Lori Opitz

Subscribed to and sworn before me
this 20th day of November, 2020

Wendy Gulley
Notary Public, State of Wisconsin
My Commission: is permanent

000000-0120\29356407.v1

STATE OF WISCONSIN

IN RE: THE 2020 ELECTION FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

AFFIDAVIT OF JORDAN MOSKOWITZ

STATE OF WISCONSIN)
COUNTY OF DANE) SS.

I, Jordan Moskowitz, being first duly sworn on oath, state as follows:

- 1. I am an adult resident of Wisconsin. I am also a representative of President Donald J. Trump and Vice-President Michael R. Pence and their respective campaigns for the purposes of this recount.
2. I previously submitted an Affidavit with an attached exhibit containing all of the electors who cast absentee ballots in Dane County ("Dane County Absentees"). The data included in the spreadsheet was compiled by the various municipal clerks and then provided to the Wisconsin Elections Commission. The data is both a public record under Wis. Sta.t. § 19.31, et seq. and within the scope of election related materials to which any candidate is guaranteed access by Wis. Stat. §§ 7.54 and 9.01(1)(b)11.
3. Attached hereto as Exhibit #1 is a subset of the Dane County Absentees. I sorted the Dane County Absentees by App Type (a category in that All Absentee List) and Date of Request (a category in that All Absentee List). The App Type chosen was "Indefinite", a term used to describe all those claiming Indefinite Confinement status under the Wisconsin Statutes for the November 3, 2020 election. Attached hereto as Exhibit #2 is a subset of Exhibit #1. In Exhibit #2 I removed all persons identified as having not returned a ballot, those shown as voting through a Special Voting Deputy in the Delivery Method, those shown as having a ID on file, and those where it was noted in the comments section that the ballot was spoiled or otherwise was not cast.
4. Exhibit #1 lists 23,954 individuals. Exhibit #2 lists a total of 15,102 individuals, and of that total, there were 8,907 added after March 25, 2020.
5. Attached as Exhibit #3 is a line graph that illustrates data in graphic form from Exhibit #2. It shows the breakdown of the Indefinitely Confined Requests by the Day the request was made.
6. Attached as Exhibit #4 is an exhibit that illustrates the Cumulative number of Indefinitely Confined Requests outstanding (i.e. the sum of all outstanding requests on file on a given

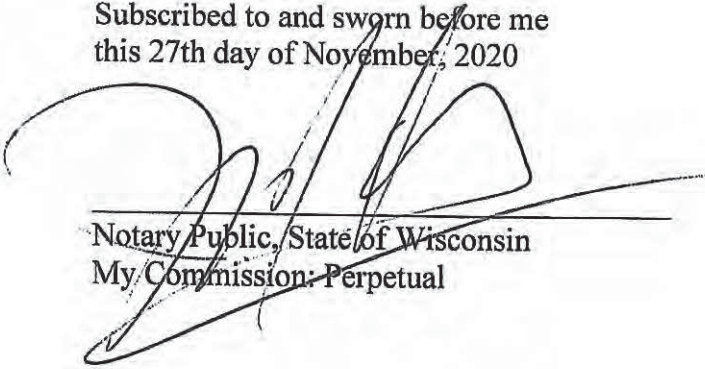
day). It takes Exhibit #2 and shows the total number of outstanding requests for Indefinitely Confined Status on that day.

7. Attached hereto as Exhibit #5 is a printed copy of a Wisconsin Supreme Court Order of March 31, 2020. That Order notes, that a March 25, 2020 Facebook post by Scott McDonell, Dane County Clerk was made that "indicated, inter alia, that all Dane County voters could declare themselves to be "indefinitely confined" under Wis. Stat. 6.86(2) due to illness solely because of the Wisconsin Department of Health Services Emergency Order #12...." [In footnote #1 "Petitioners note that the Milwaukee County Clerk issued nearly identical advice."]
8. Attached hereto as Exhibit #6 is a Facebook post dated March 27 from Scott McDonell I obtained at the address shown on that Exhibit.

Dated at this 27th day of November, 2020.

Name:  _____

Subscribed to and sworn before me
this 27th day of November, 2020



Notary Public, State of Wisconsin
My Commission: Perpetual

Exhibit 1

SPREADSHEET

EXHIBIT 2

SPREADSHEET

EXHIBIT 3

DANE COUNTY INDEFINITELY CONFINED REQUESTS PER DAY

JORDAN MOSKOWITZ AFFIDAVIT 11/27/20 (AS DESCRIBED IN ¶ 3)

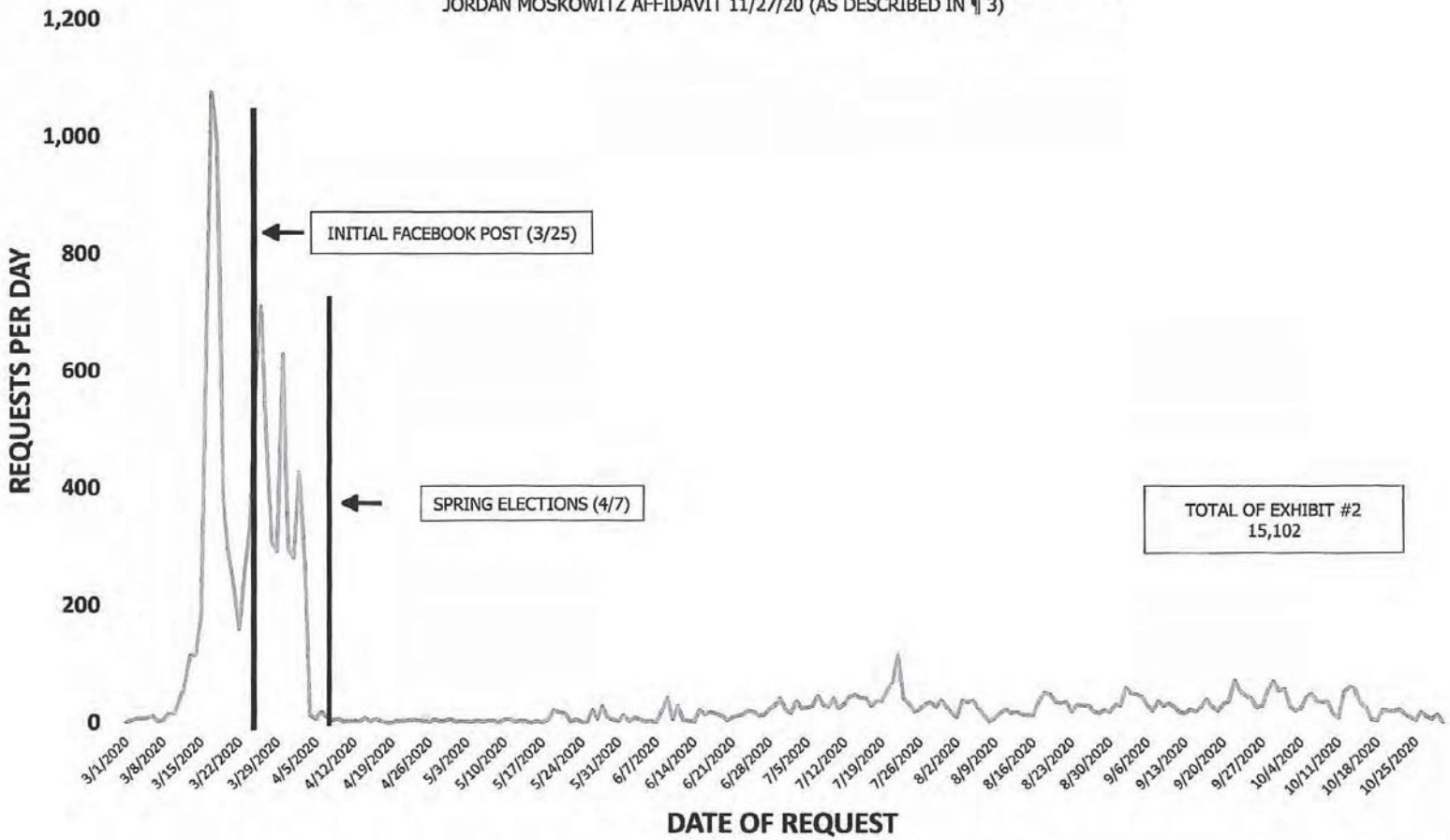


EXHIBIT 4

DANE COUNTY

CUMULATIVE INDEFINITELY CONFINED REQUESTS

JORDAN MOSKOWITZ AFFIDAVIT 11/27/20 (AS DESCRIBED IN ¶ 3)

TROUPIS 009752

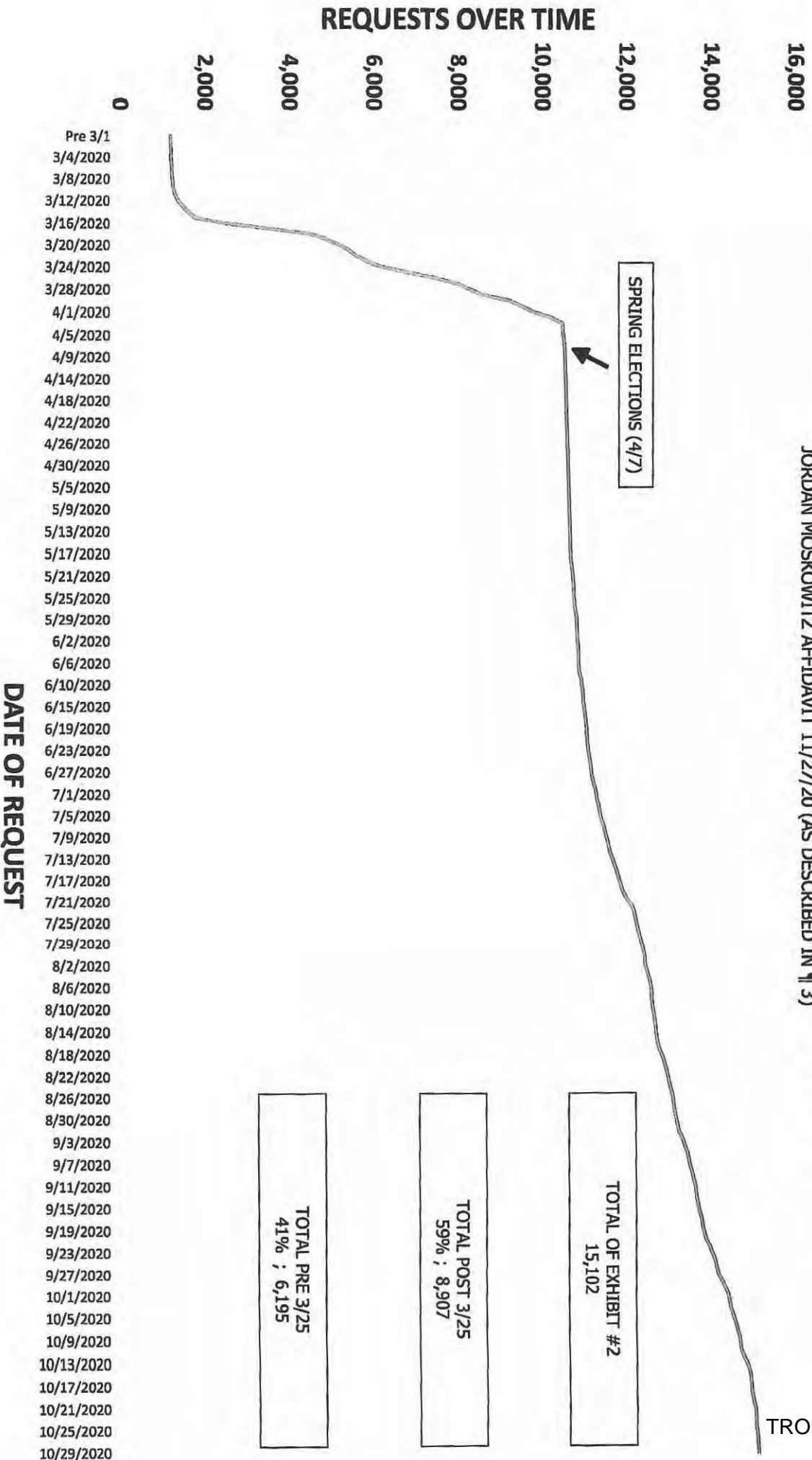


EXHIBIT 5



OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

March 31, 2020

To:

David R. Gault
Marcia A. MacKenzie
Dane County Corporation Counsel
Room 419
210 Martin Luther King Jr. Blvd.
Madison, WI 53703-3345

Lisa M. Lawless
Husch Blackwell, LLP
555 E. Wells St., Ste. 1900
Milwaukee, WI 53202-3819

Eric M. McLeod
Lane E. B. Ruhland
Husch Blackwell LLP
P.O. Box 1379
Madison, WI 53701-1379

Misha Tseytlin
Kevin M. LeRoy
Troutman Sanders LLP
1 N. Wacker Dr., Ste. 2905
Chicago, IL 60606

You are hereby notified that the Court has entered the following order:

2020AP557-OA

Jefferson v. Dane County

On March 27, 2020, petitioners, Mark Jefferson and the Republican Party of Wisconsin, filed a petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a supporting legal memorandum, and a motion for temporary injunctive relief. On that same date, the court ordered the named respondents, Dane County and Scott McDonell, in his official capacity as Dane County Clerk, to file a response to the original action petition and the motion for temporary injunctive relief by 1:00 on March 30, 2020. The court has reviewed the filings of the parties and now addresses the motion for temporary injunctive relief.

When we have considered whether to grant temporary injunctive relief, we have required a movant to show (1) a reasonable probability of success on the merits; (2) a lack of an adequate remedy at law; (3) that the movant will suffer irreparable harm in the absence of an injunction; and (4) that a balancing of the equities favors issuing the injunction. See, e.g., Pure Milk Products Coop. v. National Farmers Org., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). The decision whether to grant an injunction is a discretionary one, although injunctions are not to be issued lightly. Werner, 80 Wis. 2d at 520.

The temporary injunction the petitioners seek would order respondent, Scott McDonell, the Dane County Clerk, to remove a March 25, 2020 Facebook post in which he indicated, inter alia, that all Dane County voters could declare themselves to be "indefinitely confined" under Wis. Stat. § 6.86(2) due to illness solely because of the Wisconsin Department of Health Services Emergency Order #12 (the Safer at Home Order) and difficulties in presenting or uploading a valid proof of identification, thereby avoiding the legal requirement to present or upload a copy of the voter's proof of identification when requesting an absentee ballot.¹ The petitioners further ask this court to order respondent McDonell and respondent Dane County to issue new statements setting forth the statutory interpretation proposed by the petitioners.

Although respondents do not represent that McDonell's original March 25, 2020 post has been removed, they argue that McDonell's later posting renders the petitioners' motion moot because McDonell has now posted the Wisconsin Elections Commission's (WEC) guidance on his Facebook page. They also argue that the petitioners' petition and motion for temporary relief cannot go forward in this court because they have not exhausted their administrative remedies by first filing a complaint with the WEC under Wis. Stat. § 5.06(1) and (2).

McDonell's March 25, 2020, advice was legally incorrect. In addition, McDonell's subsequent Facebook posting does not preclude McDonell's future posting of the same erroneous advice. Furthermore, his erroneous March 25, 2020 Facebook posting continues distribution on the internet.

Accordingly, we conclude that clarification of the purpose and proper use of the indefinitely confined status pursuant to Wis. Stat. § 6.86(2) as well as a temporary injunction are warranted.

In regard to clarification, the WEC has met and has issued guidance on the proper use of indefinitely confined status under Wis. Stat. § 6.86(2) in its March 29, 2020 publication, "Guidance for Indefinitely Confined Electors COVID-19." The WEC guidance states as follows:

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.
2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness or infirmity, or disability.

We conclude that the WEC's guidance quoted above provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time.

We further determine that the petitioners have demonstrated a reasonable probability of success on the merits, at least with respect to certain statements in McDonell's March 25th

¹ Petitioners note that the Milwaukee County Clerk issued nearly identical advice.

Facebook post. Voters may be misled to exercise their right to vote in ways that are inconsistent with Wis. Stat. § 6.86(2). Namely, McDonell appeared to assert that all voters are automatically, indefinitely confined solely due to the emergency and the Safer at Home Order and that voters could therefore declare themselves to be indefinitely confined when requesting an absentee ballot, which would allow them to skip the step of presenting or uploading a valid proof of identification. Indeed, we do not see how the respondents could prevail with an argument that such statements in the March 25th post constitute an accurate statement of the relevant statutory provisions.

NOW THEREFORE, IT IS ORDERED that the petitioners' motion for temporary injunctive relief is granted and we order McDonell to refrain from posting advice as the County Clerk for Dane County inconsistent with the above quote from the WEC guidance.

DANIEL KELLY, J., did not participate.

Sheila T. Reiff
Clerk of Supreme Court

EXHIBIT 6

LINK: <https://www.facebook.com/1253430194/posts/10216043337616921/?d=n>



Scott McDonnell

March 27

Below is the legal advise from the Wisconsin Election Commission (WEC) which I agree with completely on voter's declaring themselves indefinitely confined due to the pandemic. There will need to be a review of the voter rolls after the election. Statue requires that once you are no longer indefinitely confined you must notify your municipal clerk in order to be removed from the list.

Indefinitely Confined Absentee Applications

WEC staff has received numerous questions from clerks about the increase in voters requesting absentee ballots as indefinitely confined. Wisconsin Statutes provide the option for a voter to self-certify whether they meet the definition of indefinitely confined. The statutory definition of "age, illness, infirmity or disability" does not require any voter to meet a threshold for qualification and indefinitely confined status need not be permanent. A voter with a broken leg or one recovering from surgery may be temporarily indefinitely confined and may use that status when voting during that period of time.

We understand the concern over the use of indefinitely confined status and do not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin. During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates. We have told clerks if they do not believe a voter understood the declaration they made when requesting an absentee ballot, they can contact the voter for confirmation of their status. They should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status. Any request for confirmation of indefinitely confined status should not be accusatory in nature.

There may be a need to do some review of the absentee voting rolls after this election to confirm voters who met the definition of indefinitely confined during the public health crisis would like to continue that status. WEC staff has already discussed this possibility and may be able to provide resources to assist clerks with these efforts.

16

2 Shares

Share

STATE OF WISCONSIN

IN RE: THE 2020 ELECTION FOR PRESIDENT AND VICE PRESIDENT OF THE
UNITED STATES

AFFIDAVIT OF JORDAN MOSKOWITZ

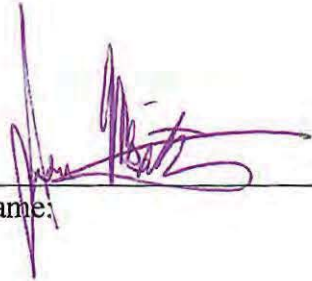
STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

I, Jordan Moskowitz, being first duly sworn on oath, state as follows:

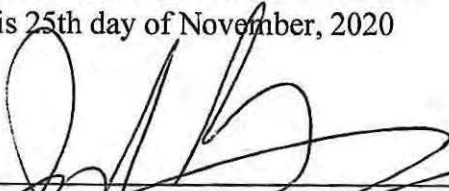
1. I am an adult resident of Wisconsin. I am also a representative of President Donald J. Trump and Vice-President Michael R. Pence and their respective campaigns for the purposes of this recount.
2. I previously submitted an Affidavit with an attached exhibit containing all of the electors who cast absentee ballots in Milwaukee County (“Milwaukee County Absentees”). The data included in the spreadsheet was compiled by the various municipal clerks and then provided to the Wisconsin Elections Commission. The data is both a public record under Wis. Stat. § 19.31, *et seq.* and within the scope of election related materials to which any candidate is guaranteed access by Wis. Stat. §§ 7.54 and 9.01(1)(b)11.
3. Attached hereto as Exhibit #1 is a subset of the Milwaukee County Absentees. I sorted the Milwaukee County Absentees by App Type (a category in that All Absentee List) and Date of Request (a category in that All Absentee List). The App Type chosen was “Indefinite”, a term used to describe all those claiming Indefinite Confinement status under the Wisconsin Statutes for the November 3, 2020 election. Attached hereto as Exhibit #2 is a subset of Exhibit #1. In Exhibit #2 I removed all persons identified as having not returned a ballot, those shown as voting through a Special Voting Deputy or Appointed Agent in the Delivery Method, those shown as having a ID on file, and those where it was noted in the comments section that the ballot was spoiled or otherwise was not cast.
4. Exhibit #1 lists 51,060 individuals. Exhibit #2 lists a total of 31,396 individuals, and of that total, there were 19,488 added after March 25, 2020.
5. Attached hereto as Exhibit 3 is a printed copy of a Wisconsin Supreme Court Order of March 31, 2020. That Order notes, that a March 25, 2020 Facebook post by Scott McDonell, Dane County Clerk was made that “indicated, inter alia, that all Dane County voters could declare themselves to be “indefinitely confined” under Wis. Stat. 6.86(2) due to illness solely because of the Wisconsin Department of Health Services Emergency

Order #12...." [In footnote #1 "Petitioners note that the Milwaukee County Clerk issued nearly identical advice."]

Dated at this 25 day of November, 2020.


Name: _____

Subscribed to and sworn before me
this 25th day of November, 2020



Notary Public, State of Wisconsin
My Commission: perpetual

STATE OF WISCONSIN

IN RE: THE 2020 ELECTION FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

AFFIDAVIT OF KYLE J. HUDSON

STATE OF WISCONSIN)
) SS.
)

I, Kyle J. Hudson, being first duly sworn on oath, state as follows:

- 1. I am an adult resident of Wisconsin. I am also a representative of President Donald J. Trump and Vice-President Michael R. Pence and their respective campaigns for the purposes of this recount.
2. Attached to this affidavit as Exhibits A through G is publicly available information about certain individuals. Each of these electors is listed as being Indefinitely Confined and appear in both Exhibit 1 and 2 of the Jordan Moskowitz Affidavit of November 27, 2020.
A. Attached hereto as Exhibit A is a true and correct copy of a computer-generated social media post of Jaedn Stauffacher, a resident of Madison, WI, downloaded from Facebook. The social media post shows Jaedn Stauffacher celebrating his birthday on September 27, 2020.
B. Attached hereto as Exhibit B is a true and correct copy of a computer-generated social media post of Ciarra Myers, a resident of Madison, WI, downloaded from Facebook. The social media post is a video from Ciarra Myers wedding reception on July 14, 2020.
C. Attached hereto as Exhibit C Tanya Brown, a resident of Madison, WI downloaded from Facebook. The social media post shows Tanya Brown works a nurse and her public profile picture is quoted as saying, "I'm a Nurse, I cannot stay home!" on April 6, 2020.
D. Attached hereto as Exhibit D is a true and correct copy of a computer-generated social media post of Allen Jeannette, a resident of Madison, WI downloaded from Facebook. The social media post shows Allen Jeannette eating out at Shake Shack on October 10, 2020.

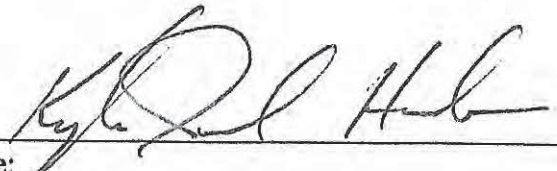
E. Attached hereto as Exhibit E is a true and correct copy of a computer-generated social media post of Jonah Zamzow-Schmidt, a resident of Madison, WI downloaded from Facebook. The social media post shows a video media file showing the spray painting of murals on State Street taken by Jonah Zamzow-Schmidt.

F. Attached hereto as Exhibit F is a true and correct copy of a computer-generated social media posts of Albert Kaimo Poliarco, a resident of Madison, WI downloaded from Facebook. The social media posts show three different video media files of protests in downtown Madison on November 7, 2020.

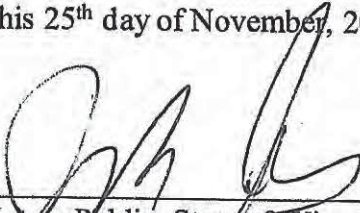
G. Attached hereto as Exhibit G is a true and correct copy of a computer-generated social media post of Christina Beeler, a resident of Madison, WI downloaded from Facebook. The social media posts show Christina Beeler attended a wedding on September 8, 2020, and going for a hike on November 10, 2020.

[signature page follows]

Dated at this 25th day of November, 2020


Name: _____

Subscribed to and sworn before me
This 25th day of November, 2020



Notary Public, State of Wisconsin
My Commission: Perpetual

EXHIBIT

A

Jaedn Stauffacher

<https://www.facebook.com/NewGenerationJesus>



Jaedn Stauffacher is with Jake Stauffacher and 2 others at **Eno Vino Downtown.** ...

September 27 · Madison · 🌐

Celebrated my 30th birthday with family.




EXHIBIT

B

Ciarra Myers

<https://www.facebook.com/100004045724070/videos/2118597944951709/>



 Ciarra Myers is with Lgp Dawsky Wawsky. July 14 · 🌐


Our walk-in was most definitely turn up Lgp Dawsky Wawsky

 110  19 Comments

 Like  Share

Up Next

 Highway to Hell (from Countdown, 1979) · B... AC/DC  4:20
5 weeks ago · 294.2K Views

 When Arya Killed the Night King | Game of... HBO Caribbean  4:56
29 weeks ago · 1.2M Views

 Rich Bitch · By Die Antwoord (Official... DIE ANTWOORD  2:59
5 weeks ago · 1.4M Views

 Scotch Eggs | Gordon Ramsay Gordon Ramsay  3:28

Comments


See All ▾

EXHIBIT

C

Tonya Brown

<https://www.facebook.com/photo?fbid=1726991484110647&set=a.338836016259541>




#ICannotStayAtHome,
I'mANurse!

Tonya Brown
April 6 · 🌐


👍👍 12 8 Comments 2


🔗 Share


View 2 more comments

 Rose McDermott
A BIG thank you! 🙏
33w


 Deb Kurth

 33w

 Mary Jo Hoffmann
stay safe 🙏
33w

 Carol Runde
Thank you, stay safe! 🙏
33w

 Jean Ann Sysko
You two are so cute
33w

 Ellen Temperly
Be safe! And a great nurse, I'm sure

EXHIBIT

D

Allen Jeannette

<https://www.facebook.com/photo?fbid=10164204689400246&set=a.10150826051470246>



Allen Jeannette
October 10 · Madison · 🌐
Trying out Shake Shack!
— with Brenda Shackelford Jeannette at Shake Shack (Hilldale Center).

👍👍 55 26 Comments
👍 Like 💬 Comment ➦ Share

View 5 more comments

Laurie Howell
I have heard they are good.
Like · Reply · 6w 🗨️ 1

Kristin Johnson
How was it? Any gluten-free options?
Like · Reply · 6w 🗨️ 1
↳ **Kristin Johnson replied · 2 Replies**

Cylest Brooks
Their chicken sandwich is amazing. Now my mouth is watering.
Like · Reply · 6w 🗨️ 1
↳ **Cylest Brooks replied · 2 Replies**

Denise Folker Fenrick
One of my favorite burger joints!
Like · Reply · 6w 🗨️ 1
Write a comment... 🗨️ 📷 📍 📺 📧

EXHIBIT

E

Jonah Zamzow-Schmidt



Jonah Zamzow-Schmidt July 26 · 🌐

Erika on state. Defacing murals. What a piece of shit.

👤👤👤 110 171 Comments

👍 Like 💬 Comment ➦ Share

Up Next

-  **Shallow - By Lady Gaga, Bradley Coope...**
Lady Gaga 🌐
17 weeks ago · 1.8M Views
-  **Scotch Eggs | Gordon Ramsay**
Gordon Ramsay 🌐
14 weeks ago · 2.8M Views
-  **Let There Be Rock (Apollo Theatre,...**
AC/DC 🌐
5 weeks ago · 323K Views
-  **The greatest scene in film history**
Lord of the Rings
5 weeks ago · 1.9M Views

Comments [See All](#)

👤 Write a comment... 🗨️ 😊 📷 📺 🗑️

🔍 🏠 📶 🔌 🌐 🕒 2:50 PM

EXHIBIT F

Albert Kaimo Poliarco

<https://www.facebook.com/1290416602/videos/10218593677495056/>

<https://www.facebook.com/1290416602/videos/10218593661734662/>



Al Poliarco
November 7 at 4:44 PM · 🌐

👤 10

👍 Like 💬 Comment ➦ Share

Up Next

 **When the Seasons Change (Official...)** ...
Five Finger Death Punch 🌐
a week ago · 969.3K Views

 **Ralphie May on Protesters** ...
Ralphie May 🌐
12 weeks ago · 2.4M Views

 **Lamb With Fried Bread | Gordon Ramsay** ...
Gordon Ramsay 🌐
22 weeks ago · 5.2M Views

 **FAKE WOKE ACTIVISM NO ONE ASKED FOR...** ...
The Andrew Schulz 🌐
20 weeks ago · 1.1M Views

 **Girl In A Country Song** ...

Comments See All

🗨️ Write a comment... 🗨️ 📷 📺 📌 📄



Al Poliarco
November 7 at 4:44 PM · 🌐

👤 7

👍 Like 💬 Comment ➦ Share

Up Next

 **WATCH: NY Business Owners Kick Out...** ...
Ben Shapiro 🌐
a week ago · 1.1M Views

 **The Real Reason These Celebs Refused To D...** ...
Looper 🌐
11 weeks ago · 34K Views

 **WHAT A FANTASTIC HOBBIT SCENE** ...
Lord of the Rings 🌐
11 weeks ago · 1.1M Views

 **Troy: Achilles vs Boagrius** ...
The Best Parts 🌐
11 weeks ago · 1.1M Views

 **All About That Bass** ...

Comments See All

EXHIBIT G

Christina Beeler

<https://www.facebook.com/photo?fbid=10164373749625078&set=a.10151122325575078>

<https://www.facebook.com/photo?fbid=10164643690175078&set=a.10150275012430078>



 Christina Beeler
November 10 at 9:49 AM · 🌐

👤 2

➦ Share



 Christina Beeler
September 8 · 🌐

Goofin'

👤 32

➦ Share

 Nikki Culpitt
Squirrel moment lol
11w

1 Comment

OFFICIAL ABSENTEE BALLOT APPLICATION/CERTIFICATION

(Official Use Only) The voter has met or is exempt from the photo ID requirement. Municipal or Deputy Clerk initial here:

Note: With certain exceptions, an elector who mails or personally delivers an absentee ballot to the municipal clerk at an election is not permitted to vote in person at the same election on Election Day. Wis. Stat. §6.86(6).

Voter: Please complete steps **1** through **5** below, in the presence of your witness.

1 Place your voted ballot inside the envelope and seal it. Do not use tape or glue.

2 Complete the section below if not completed by the clerk.
Provide your VOTING address.

Date of Election (month, day, year)	County
-------------------------------------	--------

Municipality (check type and list name) Town Village City of

Voter's Name (Last, First, Middle) including suffix *(Please print legibly)*

Street Address—Provide house number and street name or fire number and street name. OR

If your rural address does not include a house number/fire number and street name, provide rural route number and box no.

City	WI	Zip Code
------	----	----------

Official use only: Ward # District (if applicable) Voted in clerk's office

3 Sign and date this section.

CERTIFICATION OF VOTER *(Required)*

I certify, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), that I am a resident of the ward of the municipality in the county of the state of Wisconsin indicated hereon, and am entitled to vote in the ward at the election indicated hereon; that I am not voting at any other location in this election; that I am unable or unwilling to appear at the polling place in the ward on election day, or I have changed my residence within the state from one ward to another later than 28 days before the election. I certify that I exhibited the enclosed ballot, unmarked, to the witness, that I then in the presence of the witness and in the presence of no other person marked the ballot and enclosed and sealed the ballot in this envelope in a manner that no one but myself and any person providing assistance under Wis. Stat. § 6.87(5), if I requested assistance, could know how I voted. I further certify that I requested this ballot.

X _____ /_____/_____
▲ Signature of Voter ▲ *(All voters must sign.)* Today's Date

REQUIRED OF MILITARY AND OVERSEAS VOTER ONLY: I further certify my birth date is: _____/_____/_____

4 Have your witness sign and write their address below.

CERTIFICATION OF WITNESS *(signature and address of witness are required)*

I, the undersigned witness, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), certify that I am an adult U.S. Citizen and that the above statements are true and the voting procedure was executed as stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the voter to vote for or against any candidate or measure. I further certify that the name and address of the voter is correct as shown.

1. _____
▲ Signature of ONE adult U.S. citizen witness▲

2. _____
▲ If witnesses are Special Voting Deputies, both must sign. ▲
▼ Address of witness or addresses of both SVDs ▼

1. _____
2. _____

Provide house number and street name or fire number and street name, city, state and zip code. OR
If your rural address does not include a house number/fire number and street name, provide rural route number and box number, city, state and zip code.

CERTIFICATION OF ASSISTANT *(if applicable)* - assistant may also be witness

I certify that the voter named on this certificate is unable to sign his/her name or make his/her mark due to a physical disability and that I signed the voter's name at the direction and request of the voter.

X _____
▲ Signature of Assistant ▲

5 Mail back your ballot. Allow 4-5 days for delivery to ensure your ballot is received by Election Day. Ballots received after Election Day will NOT be counted.

= = = = =
IN RE: 2020 PRESIDENTIAL ELECTION RECOUNT
= = = = =

Madison, Wisconsin
November 29, 2020

Reporters: Jessica Bolanos

Page 2

E X H I B I T S		
No.	Description	Identified
Exh. 2	List of indefinitely confined by county	6
Exh. 3	Sample letter that went out statewide	6

(Original exhibits retained by Dane County Board of Canvassers.)

Page 3

TRANSCRIPT OF 2020 PRESIDENTIAL ELECTION RECOUNT, taken before Jessica Bolanos, notary public in and for the State of Wisconsin, at the offices of Monona Terrace, 1 John Nolen Drive, City of Madison, County of Dane, and State of Wisconsin, on the 29th day of November 2020, commencing at 10:00 a.m.

A P P E A R A N C E S

ATTORNEYS FOR JOE BIDEN AND KAMALA HARRIS:
Diane M. Welsh, Christa Westerberg

ATTORNEYS FOR DONALD J. TRUMP AND MIKE PENCE:
Sophia Papandreas Tjotjos, Megan Revis Frederick, Wren Williams

ATTORNEY FOR THE BOARD OF CANVASS:
Marcia MacKenzie

BOARD OF CANVASS MEMBERS:
Scott McDonell (Chair), Allen Arntsen, Joyce Waldrop

Page 4

(Board Exhibit Nos. 2 and 3 marked for identification.)

MR. McDONELL: Okay, everyone. It's 10:00. I'll call the meeting of the Board of Canvass to order. We have a little bit of -- of business to do first. We're going to continue to -- as we've been going along, we've been reconciling our numbers. So -- but we -- we need to do yesterday's numbers and make sure that they make sense to us before we certify the results.

Once we finish that, those will get scanned along with the others, and then we can get a total change in the -- the difference between the canvass and the recount certified, but that'll take a few minutes as well.

So I just want to make a note that when -- when -- for example, for the -- the minutes of each ward or each precinct, we will be posting that to the agenda in Legistar. So that will all be publicly available to you guys and anyone watching in the next few days. And then, again, all the inspector statements we'll attach. All the materials that we're using to -- for this -- to get this number, we'll attach and will be publicly available. So we're in just a little

Page 5

bit of a hurry up and wait for a little while. So we'll let you know when we're ready to get to certification. Okay?

(Recess)

MR. McDONELL: Okay. All right, everybody. We're ready to start moving along here. We do have some administrative things to -- to clean up for just a minute. We have been able to reconcile our numbers by precinct. That's what we were just finishing up from yesterday here today.

I did add two exhibits from myself to the record. One is a letter that was sent by a Madison city clerk after the April election, I believe in May, to all indefinitely confined -- indefinitely confined voters to confirm their status. And I -- that was actually sent out by the Election Commission to all clerks statewide, and I believe one of the things I'll follow up on is to see whether every community in Dane County did the same as Madison. I believe they did.

So I mentioned that in a previous discussion on the record, and I -- I just wanted to have this, the actual document to -- to correspond to what I had said at a previous Board

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1 of Canvass meeting.
 2 And then I also included the total
 3 numbers from 2016 and 2020 indefinitely confined
 4 voters by county, and I -- it was because I had
 5 also referenced earlier that the number of
 6 indefinitely confined voters had gone up
 7 dramatically for four years in every county in the
 8 state. So that, I just want to -- that's publicly
 9 available data from the Election Commission, but I
 10 just wanted to have it on the record.
 11 We're about to -- we're ready to sign
 12 off on the numbers. I wanted to -- I know that,
 13 Diane, you wanted to say something briefly.
 14 Wren, you guys as well.
 15 MR. WILLIAMS: Real quick, Scott. What were
 16 the exhibit numbers that you had for those?
 17 MR. ARNTSEN: 2 and 3. Board 2 and 3.
 18 MR. MCDONELL: Board 2 is the list of
 19 indefinitely confined by county. Board 3 is a
 20 sample letter that went out statewide, but -- and
 21 specifically, I know it went out in Madison.
 22 MR. WILLIAMS: Thank you.
 23 MR. McDONELL: And, Diane, I apologize. If
 24 you want to use a mic -- or you guys can have the
 25 same opportunity. I know you guys spoke at the

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1 left them up to Scott McDonell if they weren't
 2 being resolved, and we think that helped to smooth
 3 things over and keep things going. So we really
 4 appreciate that that was the agreement.
 5 And I think that was -- you know, at the
 6 end of the day last night, we were surprised to
 7 receive 155 pages of handwritten notes that make
 8 allegations that were never before presented to me
 9 as lead counsel for the Biden team. So it was
 10 just kind of troubling to see that, because had
 11 there been any problems, we certainly could have
 12 been working on addressing them.
 13 And -- but, again, overall, I think the
 14 process was transparent, especially considering
 15 that we have a pandemic in Dane County and
 16 Wisconsin, and I appreciate the wisdom of the
 17 Board in -- in fulfilling its duties. Thank you.
 18 MR. McDONELL: All right. Thank you. You
 19 good?
 20 MR. WILLIAMS: Yes.
 21 MR. McDONELL: Okay. Thank you, guys.
 22 Okay. Let me -- I'm just going to say a
 23 few comments, and then I'll let you guys have the
 24 updated numbers. Sophia, they're slightly
 25 different than what you saw. So I just want to

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1 end yesterday, but I think Diane wanted to say
 2 some more remarks. So you're welcome to. Then
 3 we'll wrap up.
 4 MS. WELSH: Good morning. I'm Diane Welsh.
 5 With me is Christa Westerberg. We're with
 6 Pines Bach, LLP, here in Madison, Wisconsin.
 7 We want -- like the Trump team, we wanted to take
 8 this opportunity to thank the Board, to thank all
 9 of the clerks and tabulators who ensured that this
 10 was a good process. We especially appreciate the
 11 patience that was demonstrated in educating
 12 observers and attorneys about how election law
 13 works in Wisconsin and Dane County, and we
 14 appreciate the transparent process.
 15 Christa and I are both Dane County
 16 voters. So we really appreciate the dedication
 17 that everyone demonstrated here. I want to thank
 18 Biden volunteers, staff, and attorneys for
 19 dedicating their time. I want to thank
 20 Christ Troupis and Lou Esposito and Wren Williams
 21 and the others on the Trump team.
 22 You know, early on on the first day, we
 23 had an agreement to alert each other if there were
 24 problems among staff or volunteers and -- so that
 25 problems could be addressed immediately, or we

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1 make sure we're all on the same page, and we'll
 2 make it publicly available.
 3 MS. TJOTJOS: Okay.
 4 MR. McDONELL: First, I just want to thank,
 5 you know, my staff, in particular, Patty Anderson
 6 and Rachel Rodriguez and how -- what a fabulous
 7 job they did this week; the managers who we
 8 recruited. Some of the them were municipal clerks
 9 and chief inspectors. I mean, without them, this
 10 would have gone on much longer and been much more
 11 difficult.
 12 And I know County staff was here,
 13 especially the first week, just putting in
 14 incredible hours. The first few days putting
 15 incredible hours in for IT, our corporation
 16 counsel, HR to make sure all the tabulators could
 17 get paid, and the Monona Terrace staff also just
 18 worked a lot of hours to make sure this went well.
 19 I think this setup worked well, and I'm glad we
 20 picked it, and I appreciate all their efforts.
 21 I appreciate the -- the Board of
 22 Canvass. This was hard on -- on Joyce and Allen
 23 and myself. I -- I think the last few days were
 24 much easier, and I really appreciate how smoothly
 25 things went. The first few days were hard in

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1 particular. So the fact that we're all still
 2 alive is a testament to each other.
 3 And I do want to shout out to the -- the
 4 municipal clerks in Dane County who came in and
 5 did their work. The tabulators, the observers,
 6 I -- I want to say that I really appreciated the
 7 complements the last few days in particular I got
 8 from observers, Trump observers and Biden
 9 observers, about the process and how much they
 10 were able to learn and how transparent it was.
 11 Those were comments that I heard. Maybe there
 12 were other ones, but, you know, I appreciate that
 13 a lot.
 14 And I -- the attorneys -- and I
 15 appreciate what Diane said today and what -- what
 16 you guys said yesterday. I thought everyone was
 17 extremely professional and helpful. You know, we
 18 not only -- we were constantly giving each other
 19 ideas on how this could run better, and we
 20 implemented those. And honestly, if the last two
 21 days had been the same the whole time, we would
 22 have -- we wouldn't be here now. It would have
 23 gone -- but -- it would have gone much faster, but
 24 that's how it goes. You learn as you go, and
 25 everybody learns; the tabulators, the observers,

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1 So I think we need to think about this
 2 as a -- a -- whether that is equal protection
 3 under the Constitution. Those voters aren't being
 4 protected if that were true, that -- that the same
 5 action in one county as another, one vote gets
 6 tossed, the other doesn't. I think that that's
 7 disturbing.
 8 But I want to reiterate that I'm
 9 grateful to all of your for making sure this work
 10 went smoothly, and your professionalism was -- it
 11 was very much appreciated. And I will say that
 12 for anybody who needs me to say that after this.
 13 And I think it was really a success. This recount
 14 was a success, and I appreciate all of you.
 15 Now, moving to the certification, I'll
 16 just read out for everyone on the spreadsheet so
 17 it's easier. On the county canvass, Biden
 18 received 260,185 votes. That's what we sent to
 19 the State. And the recount, that number is now in
 20 Dane County 260,094 votes. That's a 91 vote
 21 reduction in Biden/Harris.
 22 The Trump/Pence county canvass number
 23 was 78,800. That number is now 78,754. That's a
 24 reduction of 46 votes. So the total difference
 25 between those two numbers is 45. The -- so

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1 all of us.
 2 Where was I? Yeah, you know, what --
 3 for me, what this recount showed was that there
 4 was absolutely no evidence of voter fraud in this
 5 election, even after looking at over 300,000
 6 ballots, over 254,000 envelopes. Really, the
 7 incredible level of transparency should provide
 8 reassurance to the public that the election was
 9 run properly and accurately and there was no
 10 corruption.
 11 What we have really is more of a policy
 12 argument about the wisdom of the indefinitely
 13 confined statute or advice that may have been
 14 given to the Election Commission.
 15 You know, one that -- what bothered me
 16 during this process is that really only Dane and
 17 Milwaukee County were subject to this recount.
 18 Those disagreements are true statewide. So as an
 19 example, if a clerk cured an address, as they were
 20 instructed to for a witness on an absentee ballot
 21 envelope, that was true in Ashland. That was true
 22 in Brown County. There was true everywhere,
 23 Waukesha; and, yet, only the votes of Dane County
 24 and Milwaukee were targeted for drawdown or to be
 25 not counted.

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1 the -- we have signed the certification to that
 2 effect, and we're ready to transmit it to the
 3 State. So our business as the Board of Canvass is
 4 concluded. Thank you, guys. Appreciate it.
 5 (Applause)
 6 (Adjourning at 10:32 a.m.)
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AFFIDAVIT OF CLAIRE WOODALL-VOGG

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

Claire Woodall-Vogg, being first duly sworn upon oath, deposes and states as follows:

1. I am the Executive Director of the City of Milwaukee Election Commission (“MEC”).

2. I led the MEC’s operations in connection with the November 3, 2020 election, including our office’s handling of the absentee balloting process.

3. Presumably as a result of the COVID-19 pandemic, our office processed an unprecedented amount of absentee ballot requests in the Spring Election conducted on April 7, 2020, the Fall Primary conducted on August 11, 2020, and the General Election conducted on November 3, 2020.

4. When our office received returned absentee ballots, we reviewed the envelopes to confirm that they included the required voter signature, witness signature and witness address.

5. If an absentee ballot envelope was missing a voter signature or a witness signature, we returned the envelope to the voter with instructions to add the missing signature(s) and return the corrected envelope no later than 8:00p.m. on Election Day.

6. If an absentee ballot envelope included the signatures of the voter and witness, but was missing some or all of the witness’ address, we followed the October 18, 2016 Wisconsin Election Commission (“WEC”) Guidance Memorandum addressed to all Wisconsin County and Municipal Clerks as well as the City and County of Milwaukee

Elections Commissions. In that Memo, the WEC instructed that Clerks “**must** take corrective actions in an attempt to remedy a witness address error. If clerks are reasonably able to discern any missing information from outside sources, clerks are not required to contact the voter before making that correction directly to the absentee ballot envelope.” (Emphasis in original.)

7. The WEC Guidance is reinforced by the WEC Election Administration Manual at page 99, which states: “Clerks may add a missing witness address using whatever means are available. Clerks should initial next to the added witness address.”

8. Since receiving the WEC Memo in October 2016, the MEC has consistently adhered to the following process for completing missing witness address information on an absentee ballot envelope certification:

- a. If the only missing item was the municipality, and we confirmed that the street address was located in the City of Milwaukee, we added the municipality.
- b. If the street address was not in the City of Milwaukee but we could confirm the municipality from available governmental databases, we added the municipality.
- c. If there was not a full street address but the witness signature was legible, we consulted the WisVote database or the Tax Assessor’s database to determine the address of the witness. If there was only one person by the witness’s name, we would add the address. If more than one person went by that name, we would call the voter to ask the identity and address of the witness.
- d. If the witness signature was not legible, we would call the voter to acquire the missing information. If the voter could provide the missing information,

we added it to the envelope. If the voter could not, we informed the voter that the absentee ballot would not be processed unless the information could be provided and offered to send the envelope back to the voter to add the missing information.

9. All added information was done using a red pen, so that it was transparent that the MEC had added the information.

10. We have not received any complaints about the process from any candidate or any voter.

11. Our office's goal is to ensure that every registered Milwaukee voter can successfully cast a ballot in every election.

12. Absentee ballot applications are maintained in any variety of media, depending upon the original source of the application.

13. At the beginning of the calendar year 2020, there were approximately 6,000 absentee ballot applications on file with the MEC from indefinitely confined electors.

14. By about mid-March of 2020, the MEC received additional absentee ballot applications by written application (Form EL-121) and via the website MyVote.wi.gov, numbering approximately 79,000. For applications made during this timeframe, if the application was made on a written Form EL-121, the MEC would maintain the paper record. If the application was made on MyVote.wi.gov, the MEC would receive an e-mail confirmation of the request. Of those applications, if the application was for someone identified as an indefinitely confined voter, or by someone who had already filed proof of ID on file, the MEC would take no additional action to create a paper record. For other applications made on MyVote.wi.gov, the MEC would receive an e-mail confirmation and would additionally print copies of the application and ID. These were separated, due to differing record retention schedules, and stored in the City Records Bureau.

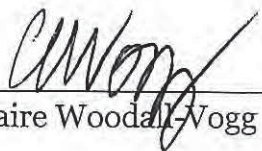
15. Since the April 7, 2020 election, the MEC received additional absentee ballot applications by written application (From EL-121) and via the website MyVote.wi.gov, numbering approximately 50,000. For applications made during that timeframe, the request was made on a written Form EL-121, and the MEC would maintain the paper record. If the application was made on MyVote.wi.gov, the MEC would receive an e-mail confirmation of the request and took no additional action to create paper records.

16. There is no separate absentee ballot request when a person votes in person absentee pursuant to Wis. Stat. § 6.86(1)(ar). The absentee ballot certificate envelope serves as the absentee ballot request when a person votes in person absentee. Election Administration Manual p. 91.

17. The Absentee Ballot Log (EL-124) and WisVote.wi.gov are also used to track absentee ballot requests and the issuance of absentee ballots. Election Administration Manual p. 98.

18. The MEC has at all times followed the WEC's Guidance for Indefinitely Confined Electors issued on March 29, 2020.

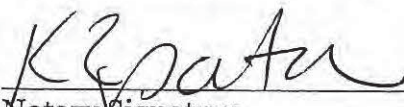
Dated: November 23, 2020



Claire Woodall Vogg

STATE OF WISCONSIN
County of Milwaukee

Sworn to before me this 23rd day of November, 2020



Notary Signature



My commission expires 06-09-2024, or is permanent.

AFFIDAVIT OF KYLE HUDSON

STATE OF WISCONSIN)
) ss
COUNTY OF DANE)

1. My name is Kyle Hudson. I am over the age of 18. All the facts stated herein are true and based on my personal knowledge.

2. I have personal knowledge of the Dane County Recount and the exhibits entered, and the objections made, in such Recount.


3. I have also reviewed the transcript from the Dane County Recount and, in particular, the number of absentee ballot certifications or envelopes objected to in Dane County, which are still in possession the boards of canvasser.

4. In Dane County, based on my review of the transcripts, the following number of absentee ballot certifications or envelopes were objected to:

- a. Red ink and/or changes made by Clerk to certification – 129
- b. Incomplete envelope and/or signature missing – 2,533
- c. No initials of Clerk on In-Person Voter – 265
- d. Ballots without appropriate initials – 375

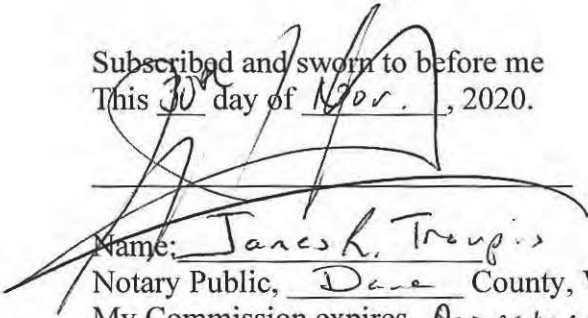
5. I declare under penalty of perjury pursuant to that the forgoing is true and correct to the best of my knowledge.

Executed on the 30th day of November, 2020



Kyle Hudson

Subscribed and sworn to before me
This 30 day of Nov., 2020.

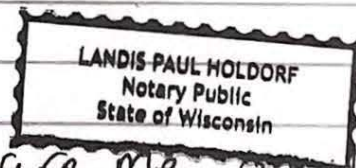

Name: James H. Troupis
Notary Public, Dane County, WI
My Commission expires Perpetual

To Whom it May Concern:

Prior to the April 2020 election, my wife and I moved to the Town of Westport in Dane County. I had never voted there previously so contacted the Town Clerk for information on registering. Since I had just renewed my drivers license it was not on file w/ the Town of Westport.

I was told by the clerk (per phone conversation) that I could receive a Mail in Ballot by signing into their site online and indicating that I was "Indefinitely Confined". By doing this I would not have to provide an ID to receive a ballot. I followed these instructions and received a ballot in the mail in a few days. I was further told this would mean that I would automatically receive ballots by mail for all future elections without needing to request them.

State of WI
County of Dane



Signed and Sworn before me on 11/27/2020
by Charles D. Cook Charles D. Cook

Landis Holdorf Landis Holdorf
My Commission expires on 8/3/2022

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AFFIDAVIT OF JOSEPH VOILAND

STATE OF WISCONSIN)
) ss
COUNTY OF MILWAUKEE)

1. My name is Joseph Voiland. I am over the age of 18. All the facts stated herein are true and based on my personal knowledge.

2. I have personal knowledge of the Milwaukee County Recount and the exhibits entered, and the objections made, in such Recount.

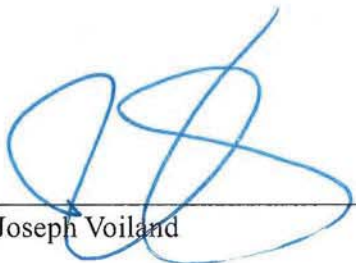
3. I have also reviewed the transcripts from the Milwaukee County Recount and, in particular, the number of absentee ballot certifications or envelopes objected to in Milwaukee County, which are still in possession of the respective boards of canvassers.

4. In Milwaukee County, based on my review of the record, the following number of absentee ballot certifications or envelopes were objected to:

- a. Red ink and/or changes made by Clerk to certification – 2193
- b. No witness – 15
- c. No date – 7

5. I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge.

Executed on the 30th day of November, 2020



Joseph Voiland

Subscribed and sworn to before me
This 30 day of November, 2020.

Karen J. Brandt

Name: Karen J. Brandt
Notary Public, Milwaukee County, WI
My Commission expires 11/3/21



AFFIDAVIT OF JOSEPH VOILAND

STATE OF WISCONSIN)
) ss
COUNTY OF MILWAUKEE)

1. My name is Joseph Voiland. I am over the age of 18. All the facts stated herein are true and based on my personal knowledge.
2. I have personal knowledge of the Milwaukee County Recount and the exhibits entered, and the objections made, in such Recount.
3. I have also reviewed the transcripts from the Milwaukee County Recount and, in particular, the number of absentee ballot certifications or envelopes objected to in Milwaukee County, which are still in possession of the respective boards of canvassers.
4. In Milwaukee County, based on my review of the record, the number of absentee ballot certifications or envelopes objected to with red ink and/or changes made by the Clerk is 2193.
5. During the recount on November 24, 2020 Claire Woodall-Vogg submitted an affidavit and the Commission admitted it into the record, noting that it would later “announce what exhibit number that affidavit will be.” Transcript, November 24, 2020 at pg. 15:16 to pg. 16:12. A copy of that affidavit is attached hereto as Exhibit A.
6. The Commission later released its Master Exhibit List and failed to include Ms. Woodall-Vogg’s affidavit. The Commission’s Master Exhibit List also includes the objected to applications in the City of Oak Creek as Exhibits 814-819. At the time the

Commission finally adjourned on November 27, 2020 the Commission had yet to complete the tallies for Exhibits 814-819. Therefore, the total number in paragraph 4 of 2193 is necessarily larger because it does not include the City of Oak Creek's numbers.

7. I wrote to the Commission on multiple occasions about the above issues and received no response. A copy of those communications are attached to this affidavit as Exhibit B.

8. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on the 30th day of November, 2020

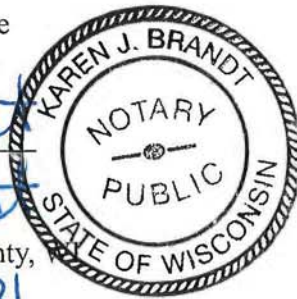


Joseph Voiland

Subscribed and sworn to before me
This 30 day of November, 2020.

Karen J. Brandt

Name: Karen J. Brandt
Notary Public, Milwaukee County,
My Commission expires 11/3/21



AFFIDAVIT OF CLAIRE WOODALL-VOGG

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

Claire Woodall-Vogg, being first duly sworn upon oath, deposes and states as follows:

1. I am the Executive Director of the City of Milwaukee Election Commission (“MEC”).
2. I led the MEC’s operations in connection with the November 3, 2020 election, including our office’s handling of the absentee balloting process.
3. Presumably as a result of the COVID-19 pandemic, our office processed an unprecedented amount of absentee ballot requests in the Spring Election conducted on April 7, 2020, the Fall Primary conducted on August 11, 2020, and the General Election conducted on November 3, 2020.
4. When our office received returned absentee ballots, we reviewed the envelopes to confirm that they included the required voter signature, witness signature and witness address.
5. If an absentee ballot envelope was missing a voter signature or a witness signature, we returned the envelope to the voter with instructions to add the missing signature(s) and return the corrected envelope no later than 8:00p.m. on Election Day.
6. If an absentee ballot envelope included the signatures of the voter and witness, but was missing some or all of the witness’ address, we followed the October 18, 2016 Wisconsin Election Commission (“WEC”) Guidance Memorandum addressed to all Wisconsin County and Municipal Clerks as well as the City and County of Milwaukee



Elections Commissions. In that Memo, the WEC instructed that Clerks “**must** take corrective actions in an attempt to remedy a witness address error. If clerks are reasonably able to discern any missing information from outside sources, clerks are not required to contact the voter before making that correction directly to the absentee ballot envelope.” (Emphasis in original.)

7. The WEC Guidance is reinforced by the WEC Election Administration Manual at page 99, which states: “Clerks may add a missing witness address using whatever means are available. Clerks should initial next to the added witness address.”

8. Since receiving the WEC Memo in October 2016, the MEC has consistently adhered to the following process for completing missing witness address information on an absentee ballot envelope certification:

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- c. If there was not a full street address but the witness signature was legible, we consulted the WisVote database or the Tax Assessor’s database to determine the address of the witness. If there was only one person by the witness’s name, we would add the address. If more than one person went by that name, we would call the voter to ask the identity and address of the witness.
- d. If the witness signature was not legible, we would call the voter to acquire the missing information. If the voter could provide the missing information,

we added it to the envelope. If the voter could not, we informed the voter that the absentee ballot would not be processed unless the information could be provided and offered to send the envelope back to the voter to add the missing information.

9. All added information was done using a red pen, so that it was transparent that the MEC had added the information.

10. We have not received any complaints about the process from any candidate or any voter.

11. Our office's goal is to ensure that every registered Milwaukee voter can successfully cast a ballot in every election.

12. Absentee ballot applications are maintained in any variety of media, depending upon the original source of the application.

13. At the beginning of the calendar year 2020, there were approximately 6,000 absentee ballot applications on file with the MEC from indefinitely confined electors.

14. By about mid-March of 2020, the MEC received additional absentee ballot applications by written application (Form EL-121) and via the website MyVote.wi.gov, numbering approximately 79,000. For applications made during this timeframe, if the application was made on a written Form EL-121, the MEC would maintain the paper record. If the application was made on MyVote.wi.gov, the MEC would receive an e-mail confirmation of the request. Of those applications, if the application was for someone identified as an indefinitely confined voter, or by someone who had already filed proof of ID on file, the MEC would take no additional action to create a paper record. For other applications made on MyVote.wi.gov, the MEC would receive an e-mail confirmation and would additionally print copies of the application and ID. These were separated, due to differing record retention schedules, and stored in the City Records Bureau.

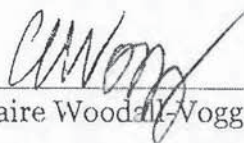
15. Since the April 7, 2020 election, the MEC received additional absentee ballot applications by written application (From EL-121) and via the website MyVote.wi.gov, numbering approximately 50,000. For applications made during that timeframe, the request was made on a written Form EL-121, and the MEC would maintain the paper record. If the application was made on MyVote.wi.gov, the MEC would receive an e-mail confirmation of the request and took no additional action to create paper records.

16. There is no separate absentee ballot request when a person votes in person absentee pursuant to Wis. Stat. § 6.86(1)(ar). The absentee ballot certificate envelope serves as the absentee ballot request when a person votes in person absentee. Election Administration Manual p. 91.

17. The Absentee Ballot Log (EL-124) and WisVote.wi.gov are also used to track absentee ballot requests and the issuance of absentee ballots. Election Administration Manual p. 98.

18. The MEC has at all times followed the WEC's Guidance for Indefinitely Confined Electors issued on March 29, 2020.

Dated: November 23, 2020



Claire Woodall-Vogg

STATE OF WISCONSIN
County of Milwaukee

Sworn to before me this 23rd day of November, 2020



Notary Signature



My commission expires 06-09-2024, or is permanent.

Joseph W. Voiland

262.343.5397

November 28, 2020

Milwaukee County Election Commission
and Milwaukee County Clerk George L. Christenson
Milwaukee County Courthouse - Room 105
901 North 9th Street
Milwaukee, WI 53233

Dear Commissioners and Clerk Christenson:

Immediately prior to the Commission's adjournment late yesterday, the Commission released the List of Exhibits incident to the 2020 Presidential Recount in Milwaukee County. On the record, this document was referred to as the "Master Exhibit List."

I note that the List is missing the Affidavit of Claire Woodall-Vogg, Executive Director of the City of Milwaukee Election Commission.

On November 24, Ms. Woodall-Vogg Affidavit submitted her affidavit, and the Commission admitted her affidavit into the record, noting that it would later "announce what exhibit number that affidavit will be." Transcript, November 24, 2020, at pg. 15:16 to pg. 16:12.

Accordingly, we ask that you assign the Woodall-Vogg Affidavit an exhibit number and that you issue an updated List of Exhibits.

Sincerely,

Joseph W. Voiland

for Donald J. Trump and Michael R. Pence

cc Margaret Daun, Milwaukee County Corporation Counsel
Stefan Dostanic, Deputy County Clerk
Attorney James R. Troupis
Attorney Stewart Karge
Attorney Christopher Meuler
Attorney Chris Trebatoski
Attorney Michelle Umberger

EXHIBIT
B

Joseph W. Voiland

262.343.5397

November 30, 2020

Milwaukee County Election Commission
and Milwaukee County Clerk George L. Christenson
Milwaukee County Courthouse - Room 105
901 North 9th Street
Milwaukee, WI 53233

Dear Commissioners and Clerk Christenson:

I write to follow up on my November 28, 2020 letter to you. First, I have not received a response to that letter. Second, I alert you to additional information missing from the Master Exhibit List you issued immediately prior to adjourning on Friday afternoon.

The Master Exhibit List is missing page number 9. Further, Exhibits 814 through 819 are shown on the Master Exhibit list at pages 21-22, but those exhibits remain missing. A number of other exhibits appear to be missing, but to be certain which are actually missing you will first need to provide a complete Master Exhibit List, including page number 9.

We requested the missing page 9 from the official court reporter retained by the Commission, Samantha J. Shallue of Brown & Jones Reporting. She, too, is missing page 9. Attached is her message confirming that she is missing page 9 of the List as well.

I ask that you have all these materials available no later than Noon today for pickup at the courthouse.

Sincerely,

Joseph W. Voiland

for Donald J. Trump and Michael R. Pence

cc Margaret Daun, Milwaukee County Corporation Counsel
Stefan Dostanic, Deputy County Clerk
Michelle Hawley, Deputy Director Milwaukee County Election Comm'n
Attorney James R. Troupis
Attorney Stewart Karge
Attorney Christopher Meuler
Attorney Chris Trebatoski
Attorney Michelle Umberger

TROUPIS 009799

App. 280

From: Samantha Shallue <sjshallue@yahoo.com>
Subject: Re: Final Transcript
Date: November 30, 2020 at 7:43:13 AM CST
To: Joe Voiland <jwvoiland@yahoo.com>, Alexandra Schweitzer <alischweitzer128@icloud.com>
Cc: Joe Voiland <jwvoiland@yahoo.com>, Brown & Jones Reporting <schedule@brownjones.com>

I can, but mine also is missing Page 9. The original exhibit with the identification sticker is with Michelle Hawley. I can send what I have, but I fear it's identical to Attorney Schweitzer's.

Samantha J. Shallue, RPR
Brown & Jones Reporting

Sent from Yahoo Mail for iPhone

On Monday, November 30, 2020, 7:33 AM, Joe Voiland <jwvoiland@yahoo.com> wrote:

Thank you Samantha. Do you have the Exhibit List you can send? It's the 22 page document released on Friday.

On Mon, Nov 30, 2020 at 7:07 AM, Samantha Shallue <sjshallue@yahoo.com> wrote:

Morning!

Unfortunately, I am of no use. All original exhibits, since there was 820 of them, were retained by Michelle Hawley, Deputy Director for the Milwaukee County Election Commission. I would suggest contacting her.

Samantha J. Shallue, RPR
Brown & Jones Reporting

Sent from Yahoo Mail for iPhone

On Sunday, November 29, 2020, 11:55 PM, Alexandra Schweitzer
<alischweitzer128@icloud.com> wrote:

Hi Samantha,

I am wondering if you can send me an electronic copy of 2020 General Election Recount List of Exhibits the was submitted into exhibit on November 27. If you are unable to send the entire exhibit I really need page 9, if you could forward that.

Can I also have copies of exhibit numbers 814-819, which are the exhibits for Oak Creek

Thanks,

~Ali Schweitzer
414-617-3720

On Nov 27, 2020, at 8:22 PM, Samantha Shallue
<sjshallue@yahoo.com> wrote:

Evening!

Attached hereto is the final transcript from the
Presidential Recount from today, November 27th, 2020.

Samantha J. Shallue, RPR
Brown & Jones Reporting
<Election Recount 11272020.zip>

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(13)**

I hereby certify that:

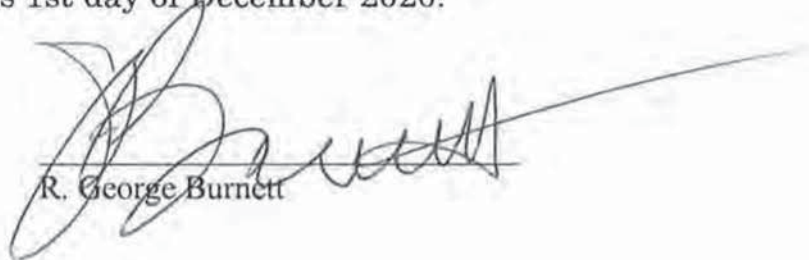
I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

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

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

Dated this 1st day of December 2020.


R. George Burnett

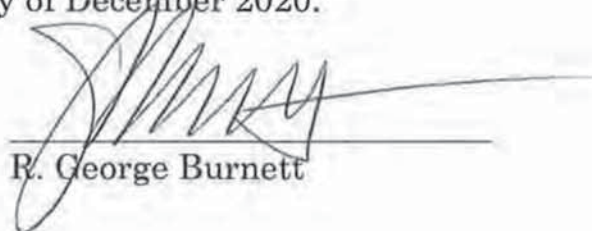
APPENDIX CERTIFICATION

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

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 1st day of December 2020.



R. George Burnett

DEC 01 2020

No. _____

CLERK OF SUPREME COURT
OF WISCONSIN

In the Supreme Court of Wisconsin

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

PETITIONERS,

v.

ANTHONY S. EVERS, Governor of Wisconsin in his official capacity, THE WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, Chair of the Wisconsin Elections Commission in her official capacity, SCOTT MCDONELL, Dane County Clerk in his official capacity, ALAN A. ARNSTEN, Member of the Dane County Board of Canvassers in his official capacity, JOYCE WALDROP, Member of the Dane County Board of Canvassers in her official capacity, GEORGE L. CHRISTENSON, Milwaukee County Clerk in his official capacity, TIMOTHY H. POSNANSKI, Member of the Milwaukee County Board of Canvassers in his official capacity, RICHARD BASS, Member of the Milwaukee County Board of Canvassers in his official capacity, and DAWN MARTIN, Member of the Milwaukee County Board of Canvassers in her official capacity,

RESPONDENTS.

MEMORANDUM IN SUPPORT OF PETITION FOR ORIGINAL ACTION

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No. _____

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RESPONDENTS.

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Counsel for Petitioners

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ISSUES PRESENTED BY THE CONTROVERSY

1. Whether absentee ballots issued in-person to voters by municipal clerks' offices in Milwaukee County and Dane County without the required written application, pursuant to Wis. Stat. § 6.86(1)(ar), are illegal and invalid.

2. Whether absentee ballots issued by municipal clerks' offices in Milwaukee County and Dane County without the required written application, pursuant to Wis. Stat. § 6.86(1)(ar), should be excluded from the Presidential Election results in Wisconsin as required by Wis. Stat. § 6.84(2).

3. Whether absentee ballots accompanied by incomplete certifications or on which municipal clerks added missing information in contravention of Wis. Stat. §§ 6.84(2) and 6.87(6d) are illegal and invalid.

4. Whether absentee ballots accompanied by incomplete certifications or on which municipal clerks added missing information in contravention of Wis. Stat. §§ 6.84(2) and 6.87(6d) should be excluded from the Presidential Election results in Wisconsin as required by Wis. Stat. § 6.84(2).

5. Whether absentee ballots cast by electors claiming Indefinite Confinement status, which status was claimed on or after March 25, 2020, for which there was no voter identification provided are illegal and invalid.

6. Whether absentee ballots cast by electors claiming Indefinite Confinement status, which status was claimed on or after March 25, 2020, for which there was no voter identification provided should be excluded from the Presidential Election results in Wisconsin.

7. Whether stationing poll workers, receiving ballots, witnessing ballot certifications and other clerk's office activities in Madison's "Democracy in the Park" events complied with Wisconsin Election laws.

8. Whether relief by drawdown is appropriate for legal violations committed at "Democracy in the Park" events.

INTRODUCTION¹

The 2020 Presidential Election (the "Election") is one of the closest contests in history with numerous states reporting results within a single percentage point, including Wisconsin. In addition to the just concluded Wisconsin Recount and these proceedings, recounts, election challenges, audits and other post-election actions have taken place or are ongoing in Georgia, Pennsylvania, Michigan, Arizona, and Nevada. The final determination of outcome of the Election hangs in the balance.

Here, in Wisconsin, Petitioners have identified systemic violations of Wis. Stat. Ch. 6 with regard to the issuance, acceptance, and, ultimately, the inclusion in the vote totals of certain absentee ballots. The remedy for these violations is expressly dictated by statute. Ballots issued, accepted, and/or counted in violation of the specific provisions at issue in this case *cannot* be "included in the certified results" of the 2020 Presidential Election. *See* Wis. Stat. § 6.84(2) ("Ballots cast in

¹ Citations to "App. ___" refer to the page(s) of the Appendix filed with Petitioners' Petition for Original Action; 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]."

contravention of the procedures specified in [Wis. Stat. §§ 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4.] may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.”); accord *Lee v. Paulson (in re Ballot Recount)*, 2001 WI App 19 (ordering the removal of improperly issued absentee ballots from the final vote totals and changing the outcome of an election.).

The unofficial results of the Election in Wisconsin reported by the Wisconsin Elections Commission (“WEC”) indicate that President Donald J. Trump and Vice President Michael R. Pence received 1,610,076 votes and Joseph R. Biden and Senator Kamala D. Harris received 1,630,503 votes, a difference of 20,427 votes or 0.620%. WEC, Unofficial Results for the November 3, 2020 General Election, available at <https://elections.wi.gov/node/7234>. The Recount totals certified by WEC indicate that President Donald J. Trump and Vice President Michael R. Pence received 1,610,184 votes and Joseph R. Biden and Senator Kamala D. Harris received 1,630,866 votes. WEC, Statement of Canvas for President, Vice President and Presidential Electors General Election, November 3, 2020, available at: https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20President%20-%20Vice%20President_0.pdf; Milwaukee Cty. Trans. 11/27/20 at 27:11-28:7; Dane Cty. Trans. 11/29/20 at 12:15-25. App. 120:11-121:8, 261 at 12:15-25.

Petitioners, President Donald J. Trump and Vice President Michael R. Pence, requested a recount of the results in both Milwaukee County and Dane County pursuant to Wis. Stat. § 9.01(1)(a) (the “Recount”). The Verified Petition filed to request the Recount details mistakes, irregularities, and illegal behavior affecting more than enough votes to alter the outcome of the election. WEC, Unofficial Results for the November 3, 2020 General Election, *available at* <https://elections.wi.gov/node/7234>. The Recount verified those claims.

While there was a pattern of activities improperly undertaken that affected the Election, four stand out: (1) a total of at least 170,140 absentee ballots were improperly counted as they were issued without the elector having first submitted a written application as expressly required by Wis. Stat. § 6.86(1)(ar); (2) no less than 5,517 absentee ballots were improperly counted as the certifications were, when received by the clerks’ offices, incomplete and, as to a substantial proportion, the clerks’ offices subsequently altered the certifications by inserting missing information; (3) 28,395 absentee ballots were counted that were cast by individuals claiming Indefinite Confinement status even as there was “reliable information that [the]... elector no longer qualifies for the service....” Wis. Stat. § 6.86(2); and (4) 17,271 absentee ballots were cast or received at “Democracy in the Park” events.²

² Other improper actions occurred during the recount as in Milwaukee, ballots with no clerk’s initials were allowed to be recounted in contravention of Wis. Stat. 6.80(2)(d). Milwaukee Cty. Trans. 11/24/20 at 65:21-66:21. App. 114:21-115:21.

Despite clear law to the contrary and the express objections by the Trump Campaign to the inclusion in the Recount totals of the ballots identified above, the Milwaukee County and Dane County Boards of Canvassers improperly included those ballots in their Recount totals. The fact that the Milwaukee County and Dane County Boards of Canvassers rendered decisions that are in direct conflict with applicable Wisconsin Statutes and published case law implicates an urgent matter of state-wide and national importance and warrants the Court's exercise of its original jurisdiction.

Contrary to the express provision of Wisconsin Statutes, allowing for a five day period to appeal the results of the recount, Governor Evers appears to have begun to take steps to issue a certificate of election and name Wisconsin's electors. Wis. Stat. § 7.70(5)(a) ("When a valid petition for recount is filed ... the governor or commission may not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed ..."); Wis. Stat. § 9.01(6)(a) ("within 5 business days after completion of the recount determination by the commission chairperson ... any candidate ... aggrieved by the recount may appeal ..."). The Court must act in these proceedings to order the Governor to withdraw that certificate and to allow for the orderly recount process to continue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

If this Court grants the Petition for Original Action, that will indicate that this case is appropriate for argument and publication.

STATEMENT OF THE CASE

A. The Relevant Election Law Governing Absentee Balloting

The voting process in Wisconsin elections is governed by Chapters 5-10 of the Wisconsin Statutes. Voting by absentee ballot is authorized by Wis. Stat. § 6.20 under the specific procedures set forth in Wis. Stat. §§ 6.84 to 6.89.

The Wisconsin Legislature has made it clear that voting in-person on Election Day is a constitutional right, but that voting by absentee ballot is a privilege that must be “carefully regulated.” Specifically, Wis. Stat. § 6.84 states as follows:

LEGISLATIVE POLICY. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Because of the need to “carefully regulate[]” absentee balloting, Wisconsin law requires that “with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4., *shall be construed as mandatory.*” Wis. Stat. § 6.84(2) (emphasis added). In an effort to leave no doubt, the Legislature prescribed the specific remedy for any failure to adhere to these provisions:

Ballots cast in contravention of the procedures specified in those provisions *may not be counted*. Ballots counted in contravention of the procedures specified in those provisions *may not be included in the certified result of any election*.

Wis. Stat. § 6.84(2) (emphasis added).

i. Written Application is Required for All Absentee Ballots, Including All In-Person Absentee Ballots.

Pursuant to Wis. Stat. § 6.86(1)(a) an eligible voter must apply to vote by absentee ballot by submitting a “written application to the municipal clerk” by one of six expressly prescribed methods, including by mail, email or facsimile, and in person at the municipal clerk’s office. Wis. Stat. § 6.86(1)(a). In order to facilitate that process, a Form EL-121 is provided to the voters. WEC, EL-121 Application for Absentee Ballot (rev. 2020-07), available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/EL-121%20Application%20for%20Absentee%20Ballot%20%28rev.%202020-06%29.pdf>; App. 161-162.

In-person absentee balloting is authorized by Wis. Stat. § 6.86(1)(b), which requires as follows:

If application [for an absentee ballot] is made in person, the application shall be made no earlier than 14 days preceding the election and no later than the Sunday preceding the election. No application may be received on a legal holiday. A municipality shall specify the hours in the notice under s. 10.01 (2) (e). The municipal clerk or an election official shall witness the certificate for any in-person absentee ballot cast.

Wis. Stat. § 6.86(1)(b).

While statutes allow for the absentee process to occur in person, the Wisconsin Statutes expressly and unequivocally make clear that the elector must submit a written application before a ballot can be issued and that a municipal clerk is prohibited from issuing an absentee ballot to an elector unless that elector first submits a written application for the ballot:

[T]he municipal clerk *shall not issue an absentee ballot unless the clerk receives a written application therefor* from a qualified elector of the municipality. The clerk shall retain each absentee ballot application . . . *if a qualified elector applies for an absentee ballot in person* at the clerk's office, the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification. *The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application* . . .

Wis. Stat. § 6.86(1)(ar) (emphasis added). Indeed, Form EL-121 expressly provides for its use when submitting a ballot during the in person absentee voting period—a box to be checked by the clerk indicates it was completed for an “in-person voter.” WEC, EL-121 Application for Absentee Ballot (rev. 2020-07), *available at* <https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/EL-121%20Application%20for%20Absentee%20Ballot%20%28rev.%202020-06%29.pdf>; App. 161-162. Clerks outside of Dane and Milwaukee County appropriately required a separate application for in person voting under Wis. Stat. § 6.86(1)(b). Aff. Lori Opitz (11/20/20) ¶¶ 2-4; App. 222-223.

Furthermore, *Wisconsin law requires strict compliance with absentee ballot procedures*, including those governing the in-person absentee balloting process:

Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. **6.86**, 6.87 (3) to (7) and 9.01(1)(b) 2. and 4. **shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.**

Wis. Stat. § 6.84(2) (emphasis added); *accord Lee v. Paulson*, 2001 WI App 19, 241 Wis.2d 38, 623 N.W.2d 577 (excluding 5 absentee ballots from the certified election results because there was no corresponding written application. The removal of the 5 ballots changed the outcome of the election).

As a result, absentee ballots in Wisconsin may not be counted or included in the certified election results without a corresponding and prior written application.³

ii. Absentee Ballot Certifications Must be Complete and Cannot Be Altered by Municipal Clerks.

Absentee balloting must be witnessed, and the certification on the outside of the envelope provides a place where the witness must sign *and provide his or her address*. Wis. Stat. § 6.87(2). If the certification lacks the witness's address, it may not be counted: "*If a certificate is missing the address of a witness, the ballot may not be counted.*" Wis. Stat. § 6.87(6d) (emphasis added). Lest there be any doubt about whether this is directory or mandatory, this provision falls within the scope of provisions that § 6.84(2) declares mandatory. As recently as 2015 the Wisconsin

³ In Milwaukee, Petitioners requested to review all written applications for absentee ballots (Milwaukee Cty. Trans. 11/20/20 at 9:18 – 21), but after being told all written applications were or would be at the recount site (Milwaukee Cty. Trans. 11/20/20 at 35:9-17), Petitioners were denied the right to see or inspect the boxes purportedly containing written applications. Milwaukee Cty. Trans. 11/22/20 at 22:12 – 56:23). App. 3:18-21, 9:9-17, 69:12-103:23.

Legislature reaffirmed the essential requirement that the ballot envelope certificate must be fully and accurately completed by the voter and the witness. 2015 Wis. Act 261, § 78 (creating Wis. Stat. § 6.87(6d)).

The Legislature provided one, and only one, legal method for remedying an improperly completed absentee ballot certification (such as a certification lacking the witness's address), and that is to return it to the elector:

If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot . . .

Wis. Stat. § 6.87(9).

iii. Unless an Elector is “Elderly, Infirm or Disabled and Indefinitely Confined” Absentee Ballots Cannot Be Issued Without the Elector Providing Photo Identification.

Wisconsin statutory law expressly requires that all eligible electors must provide proof of identification in order to register to vote, and each time they vote. Wis. Stat. §§ 6.79(2)(a), (3), and 6.87(1). Photo identification is also required when requesting to vote by absentee ballot. Wis. Stat. §§ 6.86(1)(ac), (ar) and 6.87(1).

There are very limited exceptions to the requirement that an elector must provide photo identification with any application for an absentee ballot, including an exception if an elector certifies that he or she is “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period . . .” Wis. Stat. § 6.86(2)(a). In fact, in order to qualify for the exception, an elector must be “elderly, infirm or disabled *and* indefinitely confined.” *Frank v. Walker*, 17 F. Supp.

3d 837, 844 (E.D. Wis. Apr 29, 2014) (emphasis added), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014). An elector who meets the strict definition of “indefinitely confined” in Wis. Stat. § 6.86(2)(a) must sign a statement to that effect, and then “the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement . . . which contains the name and address of the elector and verifies that the name and address are correct.” Wis. Stat. § 6.87(4)(b)2.

This exception is not limitless. Municipal clerks are expressly charged with the responsibility to review and expunge from the voter rolls those claiming “indefinitely confined” status when the Clerk has “reliable information that [the]... elector no longer qualifies for the service.” Wis. Stat. § 6.86(2)(b). Moreover, electors who claimed they were indefinitely confined, but are no longer indefinitely confined or physically ill, infirm, elderly, or disabled are obligated to take steps to be removed from such status. Wis. Stat. § 6.86(2)(a) (“If any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.”). *See* Aff. Kyle J. Hudson (Nov.25, 2020) ¶2, Exs. A-G. App. 242-258.

iv. Municipal Clerks Cannot Create Multiple Offices to Conduct Absentee Voting, Receive Ballots, Witness Envelopes And The Like at Times of Their Choosing.

Wisconsin does not allow advance voting; instead, it has created a system of carefully tailored statutes for absentee voting. Among the issues addressed in the statutes are matters related to how a municipal clerk must act in advance of the election. So, for example, a municipal clerk must have only one place where ballots

are received and if an alternate location is preferable, for in-person voting and the like, then the clerk must comply with very stringent rules described in Wis. Stat. 6.855(1), including authorization from the governing body and creation of only one such alternate office. That law comports with prior decisions of this Court, under a predecessor statute, excluded absentee ballots delivered to a location other than the appropriate municipal clerk's office. *Olson v. Lindberg*, 2 Wis. 2d 229, 236, 85 N.W.2d 775, 780 (1957)

B. Wisconsin Statutes Expressly Provide for Limited Methods of Delivery of Absentee Ballots Pursuant to Wis. Stat. § 6.87(4)(b)(Providing for Mail or In-Person Delivery).⁴

The 2020 Election involved unprecedented amounts of mail-in absentee balloting because of the COVID-19 Pandemic. Interestingly, substantially fewer absentee voters completed ballots in-person at clerks' offices in 2020 than in the 2016 November General Election. *Compare* WEC, Absentee Voting Statistics for the November 3, 2020 General Election, *available at* <https://elections.wi.gov/index.php/node/7236> *with* WEC, 2016 General Election Summary Statistics, *available at*

⁴ Although colloquially referred to as "early voting," Wisconsin law does not actually permit early voting. Instead, Wisconsin law authorizes a 14-day window preceding an election during which electors are authorized to request their absentee ballot in person at their clerk's office and during which the clerk is authorized to act as the witness on an elector's absentee ballot envelope. Wis. Stat. § 6.86(1)(b). Once the completed absentee ballot envelope is witnessed by the clerk, an elector's absentee ballot is added to any absentee ballots the clerk has received by mail and processed and counted in the same manner as all other absentee ballots in the elector's ward. *Id.* These in-person absentee ballots are, as a matter of law, no different than any other absentee ballot and are treated as such.

https://elections.wi.gov/sites/elections.wi.gov/files/publication/2016_general_election_summary_statistics_pdf_15354.pdf.

108,947 absentee ballots were issued by municipalities within Milwaukee County and an additional 61,193 absentee ballots were issued by municipalities in Dane County, during the “in-person absentee voting” period pursuant to Wis. Stat. § 6.86(1)(b) (the “In-Person Absentee Ballots”). Milwaukee Cty. Trans. 11/21/20 at 184:14-187:22; Dane Cty. Trans. 11/22/20 at 57:23-59:13; App. 61:14-64:22, 144 at 57:23 to 145 at 59:13.

None of the 170,140 in-person absentee ballots issued in Milwaukee and Dane Counties during the in-person period under Wis. Stat. § 6.86(1)(b) had an associated written application. Instead, in both Dane and Milwaukee County, the Canvassing Boards during the Recount found that the Clerk’s receipt of form EL-122 (the “Envelope” in which the absentee ballot is placed by the elector), was sufficient to satisfy the statutory written application requirement. *See e.g.*, Milwaukee Cty. Trans. 11/20/20 at 35:18-25; Dane Cty. Trans. 11/22/20 at 58:19-21; Aff. Claire Woodall-Vogg ¶ 16. App. 9:18-25, 145 at 58:19-21, 182-183, 259, 264-267. Other municipalities, outside of Dane and Milwaukee County, did comply with the statute by requiring a written application, in accordance with the Statutes. Dane Cty. Trans. 11/28/20 at 7:7-25; Aff. Lori Opitz ¶¶ 2-4; App. 115 at 6:7-25, 222-223.

During the Recount Petitioners objected to all In-Person Absentee Ballots issued without a corresponding written application and requested that the Board of

Canvassers reject those ballots. Milwaukee Cty. Trans. 11/22/20 at 4:20-24; Dane Cty. Trans. 11/20/20 at 15:9-18:14. App. App. 68:20-24, 126 at 15:9 to 127 at 18:14. Both the Milwaukee County and Dane County Boards of Canvassers overruled Petitioners' objections. Milwaukee Cty. Trans. 11/21/20 at 186:11-187:10; Dane Cty. Trans. 11/20/20 at 36:15-40:25. App. 63:11-64:10, 129 at 36:15 to 130 at 40:25. As a result, the absentee ballots cast during the in-person period, without an application, were included in the Recount totals.⁵ Petitioners have filed this original action to rectify the Milwaukee County and Dane County Boards of Canvassers' erroneous inclusion of In-Person Absentee Ballots issued without a corresponding written application in the Recount.

C. Accepting Incomplete Absentee Ballot Certifications and Altering Absentee Ballot Certifications in the 2020 Election.

The sole statutorily-authorized remedy for an incomplete absentee ballot certification is for the clerk to send it back to the elector (with a new certification envelope, if necessary) so that the missing address can be supplied by the proper person — a person that is obviously not the clerk. Wis. Stat. § 6.87(9) ("If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary,

⁵ To avoid administrative concerns arising from incorrect findings and conclusions by the Canvassing Boards, Petitioners argued to exclude the questionable ballots and then complete the process both with and without counting those ballots. Petitioners' request was denied. *See e.g.*, Dane Cty. Trans. 11/20/20 at 63:19-65:11 App. 135 at 63:19 to 65:11.

whenever time permits the elector to correct the defect and return the ballot . . .”).⁶ No municipal or county clerk is authorized to alter an elector’s certificate envelope. Yet for the 2020 Election, clerks in municipalities throughout Milwaukee and Dane Counties altered absentee ballot certifications rather than following the correct procedure under Wis. Stat. § 6.87(9). Milwaukee used red ink to signify an address had been added or altered by the clerk’s office. Milwaukee Cty. Trans. 11/20/20 at 115:11-128:17. App. 28:11-41:17. *See also* Youtube.com, *Milwaukee Central Count Training Video* (April 1, 2020), <https://www.youtube.com/watch?v=hbm-pPaYIqk> (last visited November 25, 2020)(City of Milwaukee training video indicating, from 10:40 to 11:15 of the video, that election officials may insert a missing witness address in “red ink,” which is contrary to law). In other municipalities, the clerks initialed the certification next to the addresses they added. The total of those incomplete and altered certifications was 5,517. Aff. Kyle Hudson (Nov. 30, 2020) ¶ 4; Aff. Joe Voiland (Nov. 30, 2020) ¶ 4; Aff. Joe Voiland ¶¶ 3-4 (Nov. 30, 2020). App. 268, 271-273.⁷ In other instances, certifications were incomplete or otherwise defective, but the Boards nonetheless counted them on the same basis. Milwaukee Cty. Trans. 11/20/20 at 68:1-74:8; 11/24/20 at 64:11-65:10;

⁶ It appears the Wisconsin Elections Commission has incorrectly instructed clerks to alter absentee ballot certifications in direct contravention of our statutes. When the elector's absentee ballot certification lacks the witness's address, WEC suggests clerks engage in original research to discover the address and then fill it in. *See* WEC, *Spoiling Absentee Ballot Guidance* dated October 19, 2020, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Spoiling%20Ballot%20Memo%2010.2020.pdf>.

⁷ The referenced affidavits summarize the total ballots objected to due to incomplete in a variety of ways and altered certifications as indicated in the Recount transcripts. At the time of this filing the actual exhibits were not in Petitioners’ possession, but Petitioners will supplement a complete tally when the final tally is obtained.

App. 21:1-27:8, 113:11-114:10. In total, the Boards, together, counted 5,517 certifications that were either altered by clerks or that were incomplete or otherwise defective. Aff. Kyle Hudson (Nov. 30, 2020) ¶ 4; Aff. Joe Voiland (Nov. 30, 2020) ¶ 4. App. 268, 271-273. The Milwaukee County Board of Canvassers segregated these altered absentee ballot certifications. Milwaukee Cty. Trans. 11/20/20 at 57:14-23, 58:8-67:7; App. 10:14-23, 11:8-20:7.

During the Recount Petitioners objected to the canvassers counting Incomplete and Altered-Certification Absentee Ballots and requested that such ballots be rejected. Dane Cty. Trans. 11/20/20 at 48:25 – 49:8; Milwaukee Cty. Trans. 11/23/20 at 25:19-27:21; App. 91 at 48:25-49:8, 69:19-71:21. Both the Milwaukee County and Dane County Boards of Canvassers overruled Petitioners’ objections to the counting of Incomplete and Altered-Certification Absentee Ballots and continued counting those ballots as part of the Recount. Dane Cty. Trans. 11/20/20 at 60:1-65:14; Milwaukee Cty. Trans. 11/20/20 at 115:11-128:17. App. 344 at 60:1-65:14, 28:11-41:17. As a result, both Boards of Canvassers, over Petitioners’ objections, counted ballots on which the witness certification was missing entirely or was otherwise incomplete.

Petitioners have filed this original action to rectify the Milwaukee County and Dane County Boards of Canvassers’ erroneous inclusion of Incomplete and Altered-Certification Absentee Ballots in the Recount.

D. “Indefinitely Confined” Voters in the 2020 Election.

The 2020 Election involved unprecedented numbers of electors claiming that they qualified for issuance of an absentee ballot without providing photo identification because they were “indefinitely confined” pursuant to Wis. Stat. § 6.86(2)(a). In fact, since 2019 the number of electors claiming “indefinitely confined” status and thereby obtaining an absentee ballot without the otherwise required photo identification increased to nearly 250,000 from 72,000. MACIVERNEWS, *A Quarter-Million Wisconsin Voters Claim to be “Indefinitely Confined” and Not Bound By Voter ID*, Oct. 29, 2020, available at <https://www.maciverinstitute.com/2020/10/a-quarter-million-wisconsin-voters-claim-to-be-indefinitely-confined/>.

The numbers for Milwaukee and Dane County alone are concerning. In total there were 15,102 electors in Dane County and 31,396 electors in Milwaukee County who claimed to be “indefinitely confined” for the November 3, 2020 election and then voted without supplying any identification. Milwaukee Cty. Trans. 11/27/20 at 19:23-22:3; Dane Cty. Trans. 11/28/20 at 7:2-12:6; Aff. Jordan Moskowitz (dated 11/27/20) ¶¶ 2-6, Exs. 1-4; Aff. Jordan Moskowitz (dated 11/25/20) ¶ 2-6. App. 118:23-121:3, 155 at 7:2 to 156 at 12:6, 224-233, 240-241. It is also clear that these numbers swelled after the March 25, 2020 public statements by the clerks of both Dane and Milwaukee County that any elector could claim this status in light of the Governor’s Safer at Home Order. *See, e.g.*, App. 235-237, March 31, 2020 Order, *Jefferson v. Dane*, No. 2020AP557-OA at 2 (explaining that the Dane County and Milwaukee County Clerks indicated that “all Dane [and

Milwaukee] County voters could declare themselves to be ‘indefinitely confined’ under Wis. Stat. § 6.86(2)” because of the Safer at Home Order, “thereby avoiding the legal requirement to present or upload a copy of the voter’s proof of identification when requesting an absentee ballot” and concluding that such “advice was legally incorrect.”). Of the electors claiming to be indefinitely confined in Milwaukee County, 19,488 of them claimed the status after March 25th. Milwaukee Cty. Trans. 11/27/20 at 19:23-22:3; App. 118:23-121:3. In Dane County the corresponding number is 8,907. Dane Cty. Trans. 11/28/20 at 7:2-12:6; Aff. Jordan Moskowitz (dated 11/27/20) ¶¶ 2-6, Exs. 1-4; App. 155 at 7:2 to 156 at 12:6, 224-233.

This Court enjoined the clerks from making certain statements and clarified that the existence of the Governor’s Order alone was not a sufficient basis to claim indefinitely confined status. *Id.* at 3. However, it is clear that municipal clerks took no steps to investigate or to correct the voter rolls. Aff. Jordon Moskowitz (dated 11/27/20) Exs. 3-4. App. 230-233

Petitioners objected to the inclusion of all absentee ballots issued to electors claiming to be indefinitely confined after March 25, 2020 who did not otherwise have photo identification on file with their clerk. Dane Cty. Trans. 11/20/20 at 53:22-55:20, Milwaukee Cty. Trans. 11/27/20 at 19:23-22:2; App. 132 at 53:22 to 133 at 55:20, 118:23-121:2. Both Boards of Canvassers rejected the objections and counted the ballots. Dane Cty. Trans. 11/28/20 at 28:3-6; Milwaukee Cty. Trans. 11/27/20 a 21:7-22:2t; App. 160 at 28:3-6, 120:7-121:2.

E. “Democracy in the Park.”

Apparently to avoid numerous restrictions imposed by the statutes, the City of Madison invented “Democracy in the Park.” By this scheme the City placed poll workers in 206 locations on September 26 and October 3 (Dane Cty. Trans. 11/24/20 at 52:16-56:15; Aff. Kyle J. Hudson (11/23/20) ¶¶3-6, Exs. B-E; App. 148 at 52:16 to 149 at 56:15, 163-175), mimicked polling places by putting up signs identical to those for elections (*Id.* at 57:11-58:16; App. 149 at 57:11 to 150 at 58:16, 163-164, 168-169, 175-183), and then acted in every way as if it were an election excepting only that they did not distribute ballots. *Id.* at 52:16-64:10; App. 148 at 52:16 to 151 at 64:10.

While the audacity of the scheme might be lauded by the Biden campaign—it was heavily promoted by them (*Id.* at 57:11-58:16; Aff. Kyle J. Hudson (11/23/20) ¶2, Ex. A; App. 149 at 57:11 to 110 at 58:16, 163-166)—it flagrantly violates a host of election laws. If, for example, these locations are “extensions” of the Clerk’s Offices, they are barred by prior rulings of this Court *Olson v. Lindberg*, 2 Wis. 2d 229, 236, 85 N.W.2d 775, 780 (1957) (excluding absentee ballots delivered to a location other than the appropriate municipal clerk’s office under a prior version of the statute).

These “Democracy in Park” locations were not legally established alternate absentee ballot sites because they were not established by the City of Madison Common Council; instead they were “created by, planned by, staffed by, and paid for by the City Clerk’s Office.” City of Madison, Statement of Madison City Clerk

Maribeth Witzel Behl Regarding Democracy in the Park (Sept. 25, 2020), *available at* <https://www.cityofmadison.com/clerk/news/statement-of-madison-city-clerk-maribeth-witzel-behl-regarding-democracy-in-the-park>. *See also* App. 176-184 (City of Madison post regarding “Democracy in the Park”).

Alternate absentee ballot sites, however, may only be established by the “governing body of a municipality” and, if such a site is designated by the governing body of a municipality, then “no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.” Wis. Stat. § 6.855(1). There can be only one such site, but here there were 206, and the single site must be “as near as practicable” to the original office—something all 206 could not have been. *Id.*

Moreover, Wisconsin Statutes contemplate only limited ways in which an absentee ballot may be returned. It is either mailed or it is delivered in person to the clerk’s office. Wis. Stat. § 6.87(4)(b). So, the dilemma for Madison was that these sites were either considered additional clerk’s offices, in which case they were barred by Wis. Stat. § 6.855(1), or they were not clerk’s offices, in which case they run afoul of the allowable methods for delivery of such ballots and run afoul of rules barring ballot delivery at places other than the clerk’s office. Wis. Stat. § 6.87(4)(b); *Olsen*. Either way, the ballots received at “Democracy in the Park” violate the law and must not be counted.

STANDARD OF REVIEW

Although there is no decision below for this Court to review, statutory interpretation presents a pure question of law. *Moustakis v. State of Wis. Dep't of Justice*, 2016 WI 42, ¶ 16, 368 Wis. 2d 677, 880 N.W.2d 142.

This Court has *de novo* review over Respondents' erroneous interpretation of law. Specifically, this "[C]ourt *shall* set aside or modify the determination if it finds that the board of canvassers or chairperson has erroneously interpreted a provision of law and a correct interpretation compels a particular action." Wis. Stat. § 9.01(8); *see also Lee*, 2001 WI App 19, ¶ 4.

SUMMARY OF THE ARGUMENT

This Court should grant the Petition for Original Action, under well-established standards for deciding issues of great, statewide (and national) importance, where prompt, purely legal resolution is in the public interest. The Milwaukee County and Dane County Boards of Canvassers failed to correctly apply clear and unambiguous statutory law by including unauthorized and otherwise unlawful absentee ballots in the Recount. Prompt resolution of this legal dispute is of the essence to the public interest because, absent this Court's action, the Election will be certified and/or a Certificate of the Election prepared and signed by the Governor using results that improperly include unauthorized and otherwise unlawful absentee ballots that, by law, shall not be counted. *See* Wis. Stat. § 7.70(5)(a) (prohibiting the governor or chair of WEC from issuing "a certificate of

election until the recount has been completed and the time allowed for filing an appeal has passed, or if appealed until the appeal is decided”).⁸ 170,140 In-Person Absentee Ballots issued without the required written application, 5,517 Incomplete and Altered-Certification Absentee Ballots, 28,395 Indefinitely Confined Absentee Ballots, and 17,271 Absentee Ballots received at Democracy in the Park must, by statutory procedures, be withdrawn from the total ballots before any certificate is issued for the Election.

Specifically, Respondents’ decision to count and include in the Election results In-Person Absentee Ballots issued without the required written application is directly contrary to clear and unambiguous statutory law. The privilege of casting an absentee ballot requires the elector to “make *written application* to the municipal clerk,” and even if the absentee balloting procedures take place in person at the clerk’s office, “the municipal clerk *shall not issue an absentee ballot unless the clerk receives a written application therefor* from a qualified elector of the municipality.” Wis. Stat. §§ 6.86(1)(a) and (1)(ar).

Because the In-Person Absentee Ballots at issue in this matter were issued in direct contravention of Wis. Stat. § 6.86, they “*may not be counted*” and “*may not be included in the certified result of any election.*” Wis. Stat. § 6.84(2) (emphasis added).

⁸ In the event more time is required to reach a complete tabulation, the Court can Order the appointment of both Trump and Biden electors prior to December 14, 2020. Once the result is known, the correct slate may be counted when the Electoral College votes are opened on January 6, 2020. 3 U.S.C. § 15.

Likewise, Respondents' decision to count and include in the Election results Incomplete and Altered-Certification Absentee Ballots is directly contrary to statutory law.

Again, because absentee balloting is a privilege, its requirements and procedures (as contained in Wis. Stat. §6.86 and § 6.87(3)-(7)) are mandatory and strictly construed. A witness is necessary for an elector to vote an absentee ballot, and such witness must sign *and provide his or her address on a certification*. Wis. Stat. § 6.87(2) (emphasis added). An absentee ballot received by a municipal or county clerk without the witness's address is defective and can only be cured by returning the ballot to the elector so the elector may have the witness supply the address. Wis. Stat. § 6.87(9). There is no authority in the Wisconsin Statutes for clerks to alter absentee ballot envelopes and Wis. Stat. § 6.87(6d) expressly states that "[i]f a certificate is missing the address of a witness, *the ballot may not be counted.*" (emphasis added). Those same rules apply if the ballot envelope is incomplete or corrected by a clerk.

Respondents' decision to count and include in the Election results *all* Indefinitely Confined Absentee Ballots issued without the required photo identification is also contrary to clear and unambiguous statutory law. In order to qualify for the exceptions, an elector must be "elderly, infirm or disabled *and* indefinitely confined." *Frank*, 17 F. Supp. 3d 837, 844 (E.D. Wis. Apr 29, 2014) (emphasis added), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014). Voters who claimed they were "indefinitely confined," but were not themselves physically, ill, infirm, elderly, or disabled, provided a false

certification on their absentee ballot application and such ballots “*may not be counted*” and “*may not be included in the certified result of any election.*” Wis. Stat. § 6.84(2) (emphasis added).

The inclusion of absentee ballots received at “Democracy in the Park” events violates many of the essential principals underlying Wisconsin’s choice to allow only absentee voting in advance of Election Day. The City of Madison’s scheme either violates laws barring the creation of more than one location to receive ballots (Wis. Stat. § 6.855(1)) or violates laws authorizing only two methods for the voter to deliver an absentee ballot. Wis. Stat. § 6.87(4)(b). Just as it did in *Olson*, this Court must exclude absentee ballots collected at locations other than the clerk’s office.

The questions raised in the Petition will impact whether clear statutory law is followed in every future election in this State. The Petition presents these questions in the context of a live, justiciable action that will allow this Court to clarify the law not only in this election, but in the process provide guidance for future elections, as well. This case presents substantial legal issues, and, in several instances, matters of first impression. These are legal issues of statutory interpretation, meaning that no fact finding by this Court is necessary.

ARGUMENT

I. The Proper Exclusion of Illegal and Defective Absentee Ballots From the Recount Is An Issue Of Great Public Importance, Warranting This Court’s Assertion Of Its Original Action Authority.

Of the several considerations governing the decision to grant a petition for original action pursuant to Wis. Const. art. VII, § 3 and Wis. Stat. § 809.70, the most

important factor is whether “the questions presented are of [great, statewide] importance,” such as issues that are “*publici juris*.” *Petition of Heil*, 230 Wis. 428, 443–46, 284 N.W. 42 (1939). Cases raising issues of the proper application of election law and election integrity have often met this standard. *See, e.g.*, *Am. Order, Wis. Legislature v. Evers*, No. 2020AP608-OA, at 4 (granting an original action “in light of the extraordinary circumstances and importance of the issues” raised with regard to the April 2020 Primary Election); *see also* March 31, 2020 Order, *Jefferson v. Dane*, No. 2020AP557-OA (at App. 235-237).

This Court also considers whether the issue presented by the petition is a matter of some “exigency.” *Heil*, 230 Wis. at 447. Moreover, this Court is more likely to grant a petition where a “speedy and authoritative resolution” is possible due to limited material factual disputes, *id.* at 446, such that “no fact-finding procedure is necessary,” *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 683, 264 N.W.2d 539 (1978).

The purely legal questions presented by this Petition qualify for this Court’s original action jurisdiction. Most importantly, “the questions presented are of [great, statewide (and even national)] importance,” such that these issues are unquestionably “*publici juris*.” *Heil*, 230 Wis. at 446–48.

The unofficial results of the Presidential Election in Wisconsin indicate that a fraction of a single percentage point and only approximately 20,000 votes statewide separate the candidates. WEC, Unofficial Results for the November 3,

2020 General Election, available at <https://elections.wi.gov/node/7234>. The Recount counted more than one hundred thousand unauthorized and otherwise unlawful absentee ballots, and these unlawful absentee ballots will determine the outcome of the Election, unless this Court exercises its original jurisdiction to ensure they are excluded. This Court's immediate intervention is necessary to preserve the integrity of, and confidence in, this and future Elections. This is an “exceptional case[] in which a judgment by the court [would] significantly affect[] the community at large.” *Wisconsin Professional Police Ass’n v. Lightbourn*, 2001 WI 59, ¶4, 243 Wis. 2d 512, 627 N.W.2d 807.

Granting this Petition is also important because the people of this state and the nation will benefit from a “speedy and authoritative determination” of the correct Election results. *Heil*, 230 Wis. at 446. Absent this Court’s speedy holding and final declaration that Respondents acted contrary to clear statutory law, the Petitioners, as well as the people of Wisconsin, will suffer irreversible harm by allowing the Election to be decided by the inclusion of unauthorized or otherwise unlawful absentee ballots.

The recount procedures set forth in Chapter 9 are the exclusive remedy for “an alleged irregularity, defect or mistake committed during the voting or canvassing process.” Wis. Stat. § 9.01(11). That exclusive remedy includes judicial review and, ultimately, review by this Court. *See* Wis. Stat. §§ 9.01(6)-(9). The normal judicial process is not possible in this case, with both Petitioners and the State of Wisconsin under significant time constraints. The Electoral College will

meet and cast their votes for President and Vice President on December 14, 2020. Wis. Stat. § 7.75(1). If this Court does not immediately take this case, Wisconsin is at serious risk of having no representation at the Electoral College or of having the wrong slate of electors cast Wisconsin's votes. Moreover, Petitioners will have their legitimate concerns decided long after the decision could have any impact on their rights. In this case, there is not enough time to follow the normal judicial procedure without this Court asserting its original jurisdiction authority immediately.

If this were a more typical situation, involving a state or local office, perhaps there would be adequate time to complete a recount and for all three levels of judicial review to play out. But here, there are hard deadlines which are incompatible with the normal time for judicial review. Therefore, immediate relief is necessary, both to ensure Petitioners are treated fairly and are given adequate time to pursue all available judicial remedies, and to ensure that the public interest in fair and orderly process in an election of national importance is satisfied. The deadline for the Governor to sign a certificate of election for the Election and deliver to the state's presidential electors is Monday, December 14, 2020, Wis. Stat. § 7.70(5)(b), and Wisconsin's presidential electors are required to then meet and give their votes at the State Capitol on Monday, December 14, 2020. Wis. Stat. § 7.75(1); *see also* 3 U.S.C. § 7. These deadlines make it impossible to follow appeal procedures in lower courts. *See, e.g. Underwood v. Karns*, 21 Wis. 2d 175, 179-80, 124 N.W.2d 116, 118-19 (1963) (holding that if "a statute relating to an administrative agency provides a direct method of judicial review of agency action, such method of review

is generally regarded as exclusive,” but adding that such exclusivity must take into account whether “the statutory remedy is plain, speedy, and adequate”). If this Court does not assert its original jurisdiction and decide these issues of great statewide and national importance, Petitioners will have no remedy and the people of this State will have little faith in the integrity of the Election. This is precisely the type of case that gave rise to the maxim that justice delayed is justice denied.

Finally, the questions that are presented here are issues of purely legal, statutory interpretation, where “no fact-finding procedure is necessary.” *Klecza*, 82 Wis. 2d at 683. The statutory remedies, such as a “drawdown” under Wis. Stat. § 9.01(1)(b), are explicit and can be completed expeditiously. Importantly, the parties do not dispute that In-Person Absentee Ballots were cast without the corresponding application, that clerks altered the witness certification for absentee ballots and other certifications were incomplete. The Indefinitely Confined Absentee Ballots at issue have been explicitly named and the exact number of ballots received at “Democracy in the Park” events was recorded.⁹

⁹ Apparently recognizing the questionable character of “Democracy in the Park,” the City of Madison chose to commingle ballots witnessed and ballots received at the event. In addition, though completely separated prior to delivery to the City Clerk, that Clerk chose to then further commingle those absentee ballots with other absentee ballots. Dane Cty. Trans. 11/24/20 at 52:16-56:15. App. 148 at 52:16 to 149 at 56:15. Such a willful attempt to preclude further identification ought not be condoned.

II. Respondents' Decisions to Count and Include in the Election Results In-Person Absentee Ballots Without The Required Application, Incomplete and Altered-Certification Absentee Ballots, Indefinitely Confined Absentee Ballots, and "Democracy in the Park" Absentee Ballots Are Legally Wrong.

"[S]tatutory interpretation begins with the language of the statute." If the meaning of that language is plain, that ends the inquiry. *Kalal v. Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* In this case the applicable statutory law is plain on its face and unambiguous given the common ordinary and accepted meaning of its terms. As a result, Respondents are plainly wrong, as a matter of law, in their failure to exclude defective In-Person Absentee Ballots, Incomplete and Altered-Certification Absentee Ballots, Certain Indefinitely Confined Absentee Ballots and Democracy in the Park Absentee Ballots. These are not decisions to be made at the whim of a municipal or county clerk, or for that matter by WEC. Such decision making, not premised in the statutes themselves, invites disparate treatment of voters and, if followed, would call into question the entire election. *Bush v. Gore*, 531 U.S. 98, 104-110, 121 S. Ct. 525 (2000). The goal of attempting to cure defective ballots, however laudable, does not permit Respondents, municipal clerks or courts to "make stuff up." *See Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶77, 390 Wis. 2d 266, 938 N.W.2d 493 ("It reminds me of the two rules Justice Neil Gorsuch tells his law clerks. The first rule is, "Don't make stuff up." The second

rule is, "When people beg, and say, 'Oh the consequences are so important,' and when they say, 'You're a terrible, terrible person if you don't,' just refer back to Rule No. 1.") (Hagedorn, J., concurring).

A. Respondents' Decision to Count In-Person Absentee Ballots Issued Without The Required Written Application Is Directly Contrary To Clear And Unambiguous Statutory Law.

Section 6.86(1)(a) of the Wisconsin Statutes directs that an eligible voter seeking to vote by absentee ballot “may make *written application* to the municipal clerk of that municipality for an official ballot,” including by mail and in person at the municipal clerk’s office. (emphasis added). In-person absentee balloting is often mischaracterized as “early voting,” but this procedure is simply a method by which an elector may conveniently obtain and vote an absentee ballot in person, rather than waiting to receive the ballot in the mail. As especially relevant here, all of the absentee balloting requirements apply to this process just as they apply to all other methods for requesting and issuing absentee ballots.

Neither Dane nor Milwaukee Counties obtained an application prior to delivering a ballot to in-person absentee voters. *See e.g.*, Milwaukee Cty. Trans. 11/20/20 at 35:18-25; Dane Cty. Trans. 11/22/20 at 58:19-21. App. 9:18-25, 145 at 58:19-21. This practice is plainly contrary to Wis. Stat. § 6.86(1)(a) (“Any elector of a municipality who is registered to vote whenever required and who qualifies under §§ 6.20 and 6.85 as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods....”). This principle is confirmed in § 6.86(1)(b), that confirms for the period

of the in-person absentee voting, “the application shall be made.” Finally, § 6.86(ar) leaves no doubt whatsoever that a written application is required to obtain an absentee ballot. “[T]he municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality” and the clerk is required to “retain each absentee ballot application.” Wis. Stat. § 6.86(1)(ar).¹⁰

In an attempt to explain their behavior, Dane and Milwaukee County take the position that Form EL-122 (the certificate envelope into which an absentee elector places the ballot) constitutes the application described in the Statute. App. 259. This is plainly wrong as it requires reading language out of the Statute and requires one to ignore the structure imposed by the statutes. It is even contradicted by WEC’s own guidance.

Consider, for example, the statutory language expressly addressing in person voting. It begins by noting that “If the application is made in person, the application shall be made no earlier than 14 days preceding the election and no later than the Sunday preceding the election.” § 6.86(1)(b). The statute then describes, as a separate matter, that “The municipal clerk or an election official shall witness the certificate for an in-person absentee ballot cast.” The “certificate” (*i.e.* ballot envelope) and the “application” are distinctly different documents treated differently in the statute.

This reading of § 6.86 is confirmed even more emphatically if one considers the requirements related to the certificate envelope (EL-122) and the application. The

¹⁰ Form EL-121 can satisfy this requirement. App. 161. It contains a specific box to be checked when it is submitted during the in person voting period. *Id.*

municipal clerk is, by law, required to “retain each absentee ballot application.” Wis. Stat. § 6.86(1)(ar). Yet, the certificate envelopes are expressly not retained by the municipal clerk, but must, instead, be delivered to the County. Wis. Stat. § 7.52(4)(i)(“...the municipal clerk shall transmit the used envelopes to the county clerk”). WEC even provides a form for the delivery of those the EL-122 to the County, and sets out post-election procedures describing that same process. WEC, Used Certificate Envelopes of Absentee Electors, *available at: https://elections.wi.gov/sites/elections.wi.gov/files/gab_forms/4/el_103_used_certificate_envelope_pdf_13716.pdf*. WEC emphasizes the statutory requirement to forward the absentee ballot envelopes to the County in its explicit advice to municipal clerks on how to conclude election reporting. WEC, Election Day Manual for Wisconsin Election Officials (Sept 2020), p. 140, *available at: <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Election%20Day%20Manual%20%282020-09%29.pdf>*. One cannot square those two statutory provisions, or WEC’s own forms and instructions, with the suggestions now made by the Dane and Milwaukee County Canvassing Boards. However, if the application is a distinct, separate document, then the two provisions, and WEC’s forms and instructions, are entirely consistent.

Interestingly, WEC’s Recount Manual also confirms that the EL-122 is not the application required by the statute. First, it, like the statutory language, recognizes that “the absentee ballot certificate envelopes” are a distinct document to be reviewed in order

to determine the number of voters. WEC, Recount Manual November 2020,¹¹ at pp. 7-8 available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Recount%20Manual%20Final%20%2811-2020%29%20highlight.pdf>. App. 194-195. Indeed, in the immediately following section it separately deals with the Applications.

Moreover, in attempting to justify the situation where the “separate application” is missing, WEC makes no mention whatsoever of the Certificate Envelope (Form EL-122), but instead simply explains other reasons to ignore the absence of the required Application. If, as the Canvassing Boards suggest, the EL-122 is the Application, then there would never be a need to look for a separate Application, because, by law, every absentee ballot must be delivered in a sealed, ballot certificate envelope. Wis. Stat. § 6.87(4)(b)1.

Indeed, the actual Application form, EL-121, contains a specific box to be checked for in person absentee voters. App. 161. Again, there would be no need for that box on the form if, as is now suggested, the certificate envelope was the application. Necessarily that same voter will be completing the certificate envelope whether they vote in person at the clerk’s office or vote through the mail.

Certain practical aspects of the process also confirm the need for a separate application. The law expressly requires that “the clerk shall not issue the elector an

¹¹ A prior version of the Recount Manual, published in August 2018, contained identical information. WEC, Recount Manual August 2018, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf>.

absentee ballot unless the elector presents proof of identification. The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application ...” Wis. Stat. § 6.86(1)(ar). If the application and the certificate are one document, there would be no point making the comparison. Moreover, the application must be received before the ballot is provided. Recall the language of the statute, “[T]he municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality”. *Id.* If the EL-122 is the application, then it would need to be completed and returned to the clerk before the ballot is provided. But, the EL-122 is not given to the clerk until after the elector has voted, the ballot is placed in the sealed certificate envelope and only then is the certificate envelope handed back to the clerk. The clerk has not received it in the time frame expressly required by the statute.

Pursuant to Wis. Stat. § 6.84(2), the requirements of § 6.86 are expressly mandatory. “Ballots cast in contravention of [§ 6.86] ***may not be counted***” and “***may not be included in the certified result of any election.***” Wis. Stat. § 6.84(2) (emphasis added); *Accord Lee v. Paulson*, 2001 WI App 19, 241 Wis. 2d 38, 623 N.W.2d 577..

The Court of Appeals has already ruled that, based on the statutes cited above, absentee ballots cast without an associated written application must be excluded. In *Lee v. Paulson (in re Ballot Recount)*, a local county supervisor’s race during the November 2000 general election went to a recount. 2001 WI App 19, ¶¶ 1-3. During the recount, the Polk County Board of Canvassers concluded that Walter Lee received 159 votes and that David Paulson received 161 votes, but during the recount the board found that five

absentee ballots did not have the required application. *Id.* ¶ 2. Nevertheless, the Board of Canvassers decided to include the absentee ballots without applications. *Id.* ¶ 3.

On review of the Board of Canvassers' results, the Wisconsin Court of Appeals held that any and all absentee ballots issued without a written application cannot be counted pursuant to Wis. Stat. §§ 6.84(1)-(2) & 6.86(1)(ar) and since all of the defective absentee ballots were cast for Mr. Paulson five votes were deducted from his totals and Mr. Lee prevailed with 159 votes to Mr. Paulson's 156 votes. *Id.* ¶ 11.

This is not news to WEC. In a remarkably disingenuous section of its Recount Manual (discussed earlier in the context of the separate character of the application and certificate envelope), WEC suggests that the Board of Canvassers should ignore both the statutes and *Lee v. Paulson*, and instead follow the informal opinion of WEC's staff attorney. WEC, Recount Manual November 2020, at pp. 7-8, n. 5, *available at* <https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf> (stating that “[t]here should be a written application for each absentee ballot envelope except those issued in-person in the clerk’s office,” instructing canvassers to “not reject an absentee ballot if there is no separate written application,” and noting as contrary authority for these instructions both Wis. Stat. § 6.84(2) and the *Lee v. Paulson*); App. 194-195. Of course, WEC avoids any responsibility for this patently incorrect advice by explaining that the Boards of Canvassers must make their own legal decisions. *Id.* at Appx. 14-15; App. 217-218.

During the Recount, Petitioners identified 170,140 In-Person Absentee Ballots that were issued and cast without the required written application in Milwaukee County

and Dane County. Milwaukee Cty. Trans. 11/21/20 at 184:14-187:22; Dane Cty. Trans. 11/22/20 at 57:23-59:13; App. 61:14-64:22, 144 at 57:23 to 145 at 59:13. Petitioners objected to counting any of these ballots and requested that they be excluded from the results. Milwaukee Cty. Trans. 11/22/20 at 4:20-24; Dane Cty. Trans. 11/20/20 at 15:9-18:14. App. 68:20-24, 126 at 15:9 to 127 at 18:14. However, despite the clear law requiring that those In-Person Ballots must not be counted, Respondents overruled Petitioners' objections and continued illegally counting such ballots as part of the Recount. Milwaukee Cty. Trans. 11/21/20 at 186:11-187:10; Dane Cty. Trans. 11/20/20 at 36:15-40:25. App. 63:11-64:10, 129 at 36:15 to 130 at 40:25.

This Court should exercise its original jurisdiction, declare that absentee ballots lacking a corresponding application may not be counted, and enjoin the inclusion of any such ballot in the results and certification of the Election.

B. Respondents' Decision to Include and Count Incomplete and Altered-Certification Absentee Ballots is Contrary to Law.

Because absentee balloting is a privilege and not a right, an elector voting absentee must strictly comply with all mandatory procedures contained in the Wisconsin Statutes or the ballot cannot be counted. Wis. Stat. § 6.84(2).

When casting an absentee ballot, the elector places his or her ballot inside the ballot certification envelope and seals it. The process must be witnessed, and the certification on the outside of the envelope provides a place where the witness must sign and provide his address. Wis. Stat. § 6.87(2). If the certification lacks the witness's address, it may not be counted: *"If a certificate is missing the address of*

a witness, the ballot may not be counted.” Wis. Stat. § 6.87(6d) (emphasis added). Lest there be any doubt about whether this is directory or mandatory, this provision falls within the scope of those provisions that § 6.84(2) says is mandatory.

The Wisconsin Statutes provide that the only method of correcting an incomplete absentee ballot certification is for the clerk to return it to the elector so the elector, not the clerk, can remedy the problem. Wis. Stat. § 6.87(9) (“If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot . . .”).

In this case, the Recounts have identified 5,517 Incomplete and Altered-Certification Absentee Ballots. Aff. Kyle Hudson (Nov. 30, 2020) ¶ 4; Aff. Joe Voiland (Nov. 30, 2020) ¶ 4. App. 268, 271-273. Petitioners objected to the counting of those ballots and requested that such ballots be rejected. Dane Cty. Trans. 11/20/20 at 48:25–49:8; Milwaukee Cty. Trans. 11/23/20 at 25:19-27:21; App. 131 at 48:25 to 49:8, 106:19-108:21. However, despite the clear law requiring that these Incomplete and Altered-Certification Absentee Ballots not be counted, Respondents overruled Petitioners’ objections and those ballots are a part of the Recount totals. Dane Cty. Trans. 11/20/20 at 60:1-65:14; Milwaukee Cty. Trans. 11/20/20 at 115:17-128:17; App. 134 at 60:1 to 135 at 65:14, 28:17-41:17.

This Court should exercise its original jurisdiction to declare that Incomplete and Altered-Certification Absentee Ballots may not be counted and enjoin the inclusion of any such ballot in the results and certification of the Election.

C. Respondents’ Decision to Count and Include In The Results All Indefinitely Confined Absentee Ballots Issued Without The Required Photo Identification Is Improper.

Wisconsin statutory law expressly requires that all eligible electors must provide proof of identification in order to register to vote, and each time they vote. Wis. Stat. §§ 6.79(2)(a), 6.87(1). Photo identification is also required when requesting to vote by absentee ballot. Wis. Stat. §§ 6.86(1)(ac), (ar), 6.87(1).

Because voting by absentee ballot, rather than in person, is a “privilege,” the statutory requirements for absentee balloting are strictly applied. Wis. Stat. §§ 6.84(1) (requiring that “the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud and abuse . . .”), and (2) (requiring that “matters relating to the absentee ballot process,” including Wis. Stat. §§ 6.86 and 6.87(3) to (7) “shall be strictly construed as mandatory.”).

There are very limited exceptions to the requirement that an elector must provide photo identification with any application for an absentee ballot, including an exception if an elector certifies that he or she is “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period.” Wis. Stat. § 6.86(2)(a). In fact, in order to qualify for the exceptions, an elector must be “elderly, infirm or disabled **and** indefinitely confined.” *Frank*, 17 F. Supp. 3d at 844 (emphasis added), *rev’d on other grounds*, 768 F.3d 744 (7th Cir. 2014).

An elector who meets the strict definition of “indefinitely confined” in Wis. Stat. § 6.86(2)(a) must sign a statement to that effect, and then “the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement . . . which contains the name and address of the elector and verifies that the name and address are correct.” Wis. Stat. § 6.87(4)(b)2.

For the Election, the number of electors claiming “indefinitely confined” status and thereby obtaining an absentee ballot without the otherwise required photo identification increased massively. In Milwaukee and Dane Counties alone 46,498 absentee ballots were issued to electors claiming such status without identification and who returned an absentee ballot. Dane Cty. Trans. 11/28/20 at 7:2-12:8 (Dane County had 15,102 voters in this category and 8,907 claimed such status after March 25th); Milwaukee Cty. Trans 11/27/20 at 19:23-22:2 (Milwaukee County had 31,296 voters in this category and 19,488 claimed such status after March 25th); App. 155 at 7:2 to 166 at 12:8, 188:23-221:2. As noted earlier, the number of those claiming to be indefinitely confined in Dane and Milwaukee Counties ballooned after the clerks of both counties issued public statements that all electors could claim this status based solely on the Governor’s Safer at Home Order. This Court conclusively declared that such advice was incorrect. *See*, March 31, 2020 Order, *Jefferson v. Dane County*, No. 2020AP557-OA at 2 at App. 235-237 (explaining that the Dane County and Milwaukee County Clerks indicated that “all Dane [and Milwaukee] County voters could declare themselves to be ‘indefinitely confined’ under Wis. Stat. § 6.86(2)” because of the Safer at Home Order “thereby avoiding the legal

requirement to present or upload a copy of the voter’s proof of identification when requesting an absentee ballot” and concluding that such “advice was legally incorrect.”).

As the Recount demonstrated, the damage was already done. This Court could have taken solace that so long as the clerks did their job under the statutes, the voter rolls would be cleared of those who were not qualified for the status. The clerks and the electors each had an obligation to act. Municipal clerks are expressly charged with the responsibility to review and expunge from the voter rolls those claiming to be Indefinitely Confined Voters when the Clerk has “reliable information that [the]... elector no longer qualifies for the service.” Wis. Stat. § 6.86(2)(b). Moreover, electors who claimed they were Indefinitely Confined, but were not physically ill, infirm, elderly, or disabled were obligated to take steps to remove themselves from that status prior to the November 3, 2020 election. Wis. Stat. § 6.86(2)(a) (“If any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.”) The Dane County Clerk acknowledged this obligation. *Aff. Jordan Moskowitz* (11/27/20) ¶8, Ex. 6. App. 224-225, 238-239. Unfortunately, no action was taken. *See id.* ¶ 6, Ex. 4. App. 224, 223.

Indefinitely Confined Absentee Ballots issued without the required photo identification to electors that were not “elderly, infirm or disabled and indefinitely confined” were issued in violation of clear and unambiguous law and must be excluded from any certified results of the Election. Wis. Stat. § 6.86(2)(a); *Frank*, 17 F. Supp. 3d at 844. During the Recount, Petitioners identified with

specificity Indefinitely Confined Absentee Ballots that were issued after the improper March 25, 2020 statements by the Dane County and Milwaukee County Clerks. Dane Cty. Trans. 11/28/20 at 7:2-12:8; Milwaukee Cty. Trans 11/27/20 at 19:23-22:2. App. 155 at 7:2 to 156 at 12:8, 117:23-221:2. Petitioners isolated only those claiming the status after March 25 (the date of the offending Facebook post discussed by this Court in *Jefferson v. Dane County*, No. No. 2020AP557-OA) who had no identification on file and who did not vote in specific locations where their identity would have been noted. Petitioners objected to counting any of these ballots and requested that they be excluded from the results. Dane Cty. Trans. 11/20/20 at 53:22-55:20, Milwaukee Cty. Trans 11/27/20 at 19:23-22:2. App. 132 at 53:22 to 133 at 55:20, 118:23-221:2. However, despite the statutes requiring photo identification, the Boards overruled Petitioners' objections and continued improperly counting those ballots as part of the Recount. Milwaukee Cty. Trans. 11/27/20 at 20:5-22:2; Dane Cty. Trans. 11/20/20 at 53:22-66:9; App. 119:5-221:2, 132 at 53:22 to 96 at 66:9.

This Court should exercise its original jurisdiction, declare that absentee ballots issued without photo identification to any elector that was not “elderly, infirm or disabled *and* indefinitely confined” are invalid, and enjoin the inclusion of at least the narrowest subset of that group, 28,395, in the results and certification of the Election.

D. Receipt of Ballots and Other Activities by the City of Madison at “Democracy in the Park” Events Violate Wisconsin Election Laws.

Wisconsin laws are designed to prohibit the very activities the City of Madison engaged in during “Democracy in the Park” events. Wisconsin is not an early voting state, yet the City of Madison did everything it could to treat Madison voters as if it were just that.

By creating 206 polling locations—that is locations manned by poll workers, with signage for polling places, providing witnesses for absentee ballots and otherwise acting in virtually every way like a place an elector could cast a ballot prior to election day and even prior to the limited 14 day period authorized by statute for in-person absentee balloting—the City of Madison ignored the prohibition on receiving ballots anywhere other than the clerk’s office. Wis. Stat. § 6.87(4)(b)1; *Olson*, 2 Wis. 2d at 236; Dane Cty. Trans. 11/24/20 at 52:16-56:15; Aff. Kyle J. Hudson ¶¶3-6, Exs. B-E; App. 148 at 52:16 to 149 at 56:15, 163-175. It failed to comply with virtually every substantive provision of Wis. Stat. § 6.855(1) (e.g. no Governing authority approval, multiple offices when only one is allowed) to establish an alternative clerk’s office. If, in the alternative, the City of Madison believes it can simply receive ballots anywhere it chooses, at any times it chooses, through anyone it chooses, then it is wrong. This Court (*Olson*, 2 Wis. 2d at 236) and the Statutes (Wis. Stat. § 6.87(4)(b)) plainly do not authorize such actions.

The City's attempt to evade the direct prescriptions of Wisconsin absentee voting requirements must be rejected and the total of the ballots received 17,271, as a result of those actions should be drawn down.

CONCLUSION

This Court should grant the Petition and provide the requested relief by ordering that the results and certification of the Election may not include any In-Person Absentee Ballots without an associated written application, Incomplete and Altered-Certification Absentee Ballots, any absentee ballots issued to persons who claimed to be Indefinitely Confined after March 25, 2020 and who failed to provide photo identification and those ballots received at "Democracy in the Park" events.

Moreover, Court should enter such orders as necessary to enjoin, or otherwise direct, Governor Anthony Evers to rescind and withdraw any prior certification he may have attempted to enter related to the selection of electors.

Dated this 1st day of December, 2020.

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CERTIFICATION

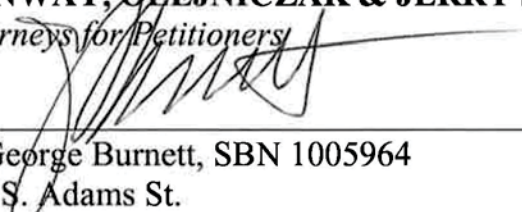
I hereby certify that this memorandum conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this memorandum is 10,784 words, exclusive of the caption, Table of Contents and Authorities, Statement of Issues, signature page, and the Certification.

Dated this 1st day of December, 2020.

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DEC 01 2020

No. _____

CLERK OF SUPREME COURT
OF WISCONSIN

In the Supreme Court of Wisconsin

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

PETITIONERS,

v.

ANTHONY S. EVERS, Governor of Wisconsin in his official capacity,
THE WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, Chair of
the Wisconsin Elections Commission in her official capacity, SCOTT
MCDONELL, Dane County Clerk in his official capacity, ALAN A.
ARNSTEN, Member of the Dane County Board of Canvassers in his
official capacity, JOYCE WALDROP, Member of the Dane County
Board of Canvassers in her official capacity, GEORGE L.
CHRISTENSON, Milwaukee County Clerk in his official capacity,
TIMOTHY H. POSNANSKI, Member of the Milwaukee County Board
of Canvassers in his official capacity, RICHARD BASS, Member of
the Milwaukee County Board of Canvassers in his official capacity,
and DAWN MARTIN, Member of the Milwaukee County Board of
Canvassers in her official capacity,

RESPONDENTS.

PETITION FOR ORIGINAL ACTION PURSUANT TO WIS. STAT. § 809.70

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Counsel for Petitioners

In the Supreme Court of Wisconsin

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

PETITIONERS,

v.

ANTHONY S. EVERS, Governor of Wisconsin in his official capacity,
THE WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, Chair of
the Wisconsin Elections Commission in her official capacity, SCOTT
MCDONELL, Dane County Clerk in his official capacity, ALAN A.
ARNSTEN, Member of the Dane County Board of Canvassers in his
official capacity, JOYCE WALDROP, Member of the Dane County
Board of Canvassers in her official capacity, GEORGE L.
CHRISTENSON, Milwaukee County Clerk in his official capacity,
TIMOTHY H. POSNANSKI, Member of the Milwaukee County Board
of Canvassers in his official capacity, RICHARD BASS, Member of
the Milwaukee County Board of Canvassers in his official capacity,
and DAWN MARTIN, Member of the Milwaukee County Board of
Canvassers in her official capacity,

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ISSUES PRESENTED BY THE CONTROVERSY

1. Whether absentee ballots issued in-person to voters by municipal clerks' offices in Milwaukee County and Dane County without the required written application, pursuant to Wis. Stat. § 6.86(1)(ar), are illegal and invalid.

2. Whether absentee ballots issued by municipal clerks' offices in Milwaukee County and Dane County without the required written application, pursuant to Wis. Stat. § 6.86(1)(ar), should be excluded from the Presidential Election results in Wisconsin as required by Wis. Stat. § 6.84(2).

3. Whether absentee ballots accompanied by incomplete certifications or on which municipal clerks added missing information in contravention of Wis. Stat. §§ 6.84(2) and 6.87(6d) are illegal and invalid.

4. Whether absentee ballots accompanied by incomplete certifications or on which municipal clerks added missing information in contravention of Wis. Stat. §§ 6.84(2) and 6.87(6d) should be excluded from the Presidential Election results in Wisconsin as required by Wis. Stat. § 6.84(2).

5. Whether absentee ballots cast by electors claiming Indefinite Confinement status, which status was claimed on or after March 25, 2020, for which there was no voter identification provided are illegal and invalid.

6. Whether absentee ballots cast by electors claiming Indefinite Confinement status, which status was claimed on or after March 25, 2020, for which there was no voter identification provided should be excluded from the Presidential Election results in Wisconsin.

7. Whether stationing poll workers, receiving ballots, witnessing ballot certifications and other clerk's office activities in Madison's "Democracy in the Park" events complied with Wisconsin Election laws.

8. Whether relief by drawdown is appropriate for legal violations committed at the "Democracy in the Park" events.

INTRODUCTION¹

The 2020 Presidential Election (the "Election") is one of the closest contests in history, with Wisconsin and other states reporting results within a single percentage point. Recounts or other actions have been undertaken in Georgia, Pennsylvania, Michigan, Arizona, and Nevada as well as in Wisconsin, and the outcome of the Election hangs in the balance.

The unofficial results of the Election in Wisconsin reported by the Wisconsin Elections Commission ("WEC") indicate that President Donald J. Trump and Vice President Michael R. Pence received 1,610,076 votes and

¹ Citations to "App. ___" refer to the page(s) of the Appendix filed with Petitioners' Petition for Original Action 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]."

Joseph R. Biden and Senator Kamala D. Harris received 1,630,503 votes, a difference of 20,427 votes or 0.620%. WEC, Unofficial Results for the November 3, 2020 General Election, *available at* <https://elections.wi.gov/node/7234>. The final results of the recount and statewide canvas were made by WEC on Monday, November 30, 2020 in the late afternoon. The final totals relevant to this Petition were President Donald J. Trump and Vice President Michael R. Pence 1,610,184 and Joseph R. Biden and Senator Kamala D. Harris 1,630,866. Milwaukee Cty. Trans. 11/27/20 at 27:11-28:7, App. 122-123; Dane Cty. Trans. 11/29/20 at 12:15-13:5, App. 263; WEC, Signed Canvass for President – Vice President, *available at* <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20President%20-%20Vice%20President.pdf>.

Petitioners, President Donald J. Trump and Vice President Michael R. Pence, as candidates for the offices of President and Vice President of the United States, requested a recount of the results in both Milwaukee County and Dane County pursuant to Wis. Stat. § 9.01(1)(a)1. (the “Recount”). The Recount Petition details mistakes, irregularities and illegal behavior affecting more than enough votes to alter the outcome of the Election. WEC, Trump Campaign Recount Petition, *available at* <https://elections.wi.gov/sites/elections.wi.gov/files/2020->

verified those claims.

While there was a pattern of activities improperly undertaken that affected the Election, four stand out: (1) a total of at least 170,140 absentee ballots were improperly counted as they were issued without the elector having first submitted a written application as expressly required by Wis. Stat. § 6.86(1)(ar); (2) no less than 5,517 absentee ballots were improperly counted as the certifications were, when received by the clerks' offices, incomplete and, as to a substantial proportion, the clerks' offices subsequently altered the certifications by inserting missing information; (3) 28,395 absentee ballots were counted that were improperly cast by individuals claiming Indefinite Confinement status even as there was "reliable information that [the]... elector no longer qualifies for the service." Wis. Stat. 6.86(2); and (4) 17,271 absentee ballots were improperly cast or received at "Democracy in the Park" events.

Despite clear law to the contrary and the express objections by Petitioners to the inclusion of the ballots identified in the Recount totals, the Milwaukee County and Dane County Boards of Canvassers improperly included those ballots in their Recount totals. The Milwaukee County and Dane County Boards of Canvassers' decisions are in direct conflict with applicable Wisconsin Statutes and case law and implicate an urgent matter

of state-wide and national importance.

The matter has been made even more urgent by Governor Evers' illegal attempt to certify the election and name Wisconsin's electors prior to the closing of the post-recount appeal deadline allowed to Petitioners. *See* Wis. Stat. § 7.70(5)(a) (“When a valid petition for recount is filed ... the governor or commission may not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed, or if appealed until the appeal is decided.”); Wis. Stat. § 9.01(6) (“within 5 business days after completion of the recount determination by the commission chairperson ... any candidate ... aggrieved by the recount may appeal ...”).

This matter warrants the Court's exercise of its original jurisdiction.

STATEMENT OF FACTS

1. Petitioner, Donald J. Trump, is the sitting President of the United States. President Trump is a resident of the State of Florida.

2. Petitioner, Michael R. Pence, is the sitting Vice President of the United States. Vice President Pence is a resident of the State of Indiana.

3. Petitioner, Donald J. Trump for President, Inc. (the “Trump Campaign”), is the Presidential Campaign of the sitting President of the United States. The Trump Campaign's principal office is located at 725 Fifth

Avenue, New York, NY 10022 and the Trump Campaign has numerous local offices throughout the State of Wisconsin.

4. Respondent Anthony S. Evers is the Governor of the State of Wisconsin, with his principal office, in his official capacity, located at 115 East, State Capitol, Madison, WI 53702.

5. The Wisconsin Elections Commission is an agency of the State of Wisconsin established to administer and enforce state election laws, with its principal office located at 212 East Washington Ave., Third Floor, Madison, WI 53707.

6. Respondent Ann S. Jacobs is the Chair of the Wisconsin Elections Commission, with her principal office, in her official capacity, located at 212 East Washington Ave., Third Floor, Madison, WI 53707.

7. Respondent Scott McDonell is the Dane County Clerk and a Member of the Dane County Board of Canvassers, with his principal office, in his official capacity, located at 210 Martin Luther King Jr. Blvd., Madison, WI 53703.

8. Respondent Alan A. Arnsten is a Member of the Dane County Board of Canvassers, with his principal office, in his official capacity, located at 210 Martin Luther King Jr. Blvd., Madison, WI 53703.

9. Respondent Joyce Waldrop is a Member of the Dane County Board of Canvassers, with her principal office, in her official capacity,

located at 210 Martin Luther King Jr. Blvd., Madison, WI 53703.

10. Respondent George L. Christenson is the Milwaukee County Clerk, with his principal office, in his official capacity, located at 901 North 9th Street, Milwaukee, WI 53233.

11. Respondent Timothy H. Posnanski is a Member of the Milwaukee County Board of Canvassers, with his principal office, in his official capacity, located at 901 North 9th Street, Room 105, Milwaukee, WI 53233.

12. Respondent Richard Bass is a Member of the Milwaukee County Board of Canvassers, with his principal office, in his official capacity, located at 901 North 9th Street, Milwaukee, WI 53233.

13. Respondent Dawn Martin is a Member of the Milwaukee County Board of Canvassers, with her principal office, in her official capacity, located at 901 North 9th Street, Milwaukee, WI 53233.

14. The unofficial results of the Election in Wisconsin indicate that President Donald J. Trump's and Vice President Michael R. Pence's electors received 1,610,076 votes and Joseph R. Biden's and Senator Kamala D. Harris' electors received 1,630,503 votes, a difference of 20,427 votes or 0.620%. The Wisconsin Elections Commission, Unofficial Results for the November 3, 2020 General Election, *available at* <https://elections.wi.gov/node/7234>. The totals following the recount and

canvas reported by WEC on November 30, 2020 were President Donald J. Trump's and Vice President Michael R. Pence's electors received 1,610,184 votes and Joseph R. Biden's and Senator Kamala D. Harris' electors received 1,630,866 votes. WEC, Signed Canvass for President – Vice President, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20President%20-%20Vice%20President.pdf>.

15. Petitioners, President Trump and Vice President Pence, requested, and the respective Boards of Canvassers have now completed, a recount of the results in both Milwaukee County and Dane County for the Election, pursuant to Wis. Stat. § 9.01(1)(a)1. (the “Recount”).

16. The Recount began on Friday, November 20, 2020 and was completed on Sunday, November 29, 2020. The Wisconsin Election Commission completed its review of the recount on November 30, 2020.

17. In what appears to be an attempt to deny Petitioners their right to appeal the determination of the recount, Governor Evers publicly stated: “Today I carried out my duty to certify the November 3rd election, and as required by state and federal law, I've signed the Certificate of Ascertainment for the slate of electors for President-elect Joe Biden and Vice President-elect Kamala Harris,” *See*

<https://www.jsonline.com/story/news/politics/elections/2020/11/30/showdo>

18. The Governor’s actions violate Wisconsin statutory law and the due process rights of the Petitioners under both the Wisconsin and U.S. Constitutions. *See* Wis. Stat. § 7.70(5)(a)(“When a valid petition for recount is filed ... the governor or commission may not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed, or if appealed until the appeal is decided.); Wis. Stat. § 9.01(6)(“within 5 business days after completion of the recount determination by the commission chairperson ... any candidate ... aggrieved by the recount may appeal ...”). These actions must not be allowed to stand.

19. A total of 170,140 absentee ballots were issued and cast in Milwaukee (108,947) and Dane (61,193) Counties during the 14-day period in which in-person absentee balloting was allowed, pursuant to Wis. Stat. § 6.86(1)(b) (the “In-Person Absentee Ballots”)². Milwaukee Cty. Trans. 11/21/20 at 184:14-187:22, App. 61-64; Dane Cty. Trans. 11/22/20 at 57:23-59:13; 59:14-62:22, App. 144-145.

20. Despite the fact that Wis. Stat. § 6.86(1)(ar) expressly prohibits

² Although colloquially referred to as “early voting,” Wisconsin law does not actually permit early voting. Instead, Wisconsin law authorizes a 14-day window preceding the election during which electors are authorized to apply for their absentee ballot in person at their clerk’s office and during which the clerk is authorized to act as the witness on an elector’s absentee ballot envelope. Wis. Stat. § 6.86(1)(b). Once the completed absentee ballot envelope is witnessed by the clerk, an elector’s absentee ballot is added to any absentee ballots the clerk has received by mail and processed and counted in the same manner as all other absentee ballots in the elector’s ward. *Id.* These are, as a matter of law, no different than any other absentee ballot and are treated as such.

a clerk from issuing an absentee ballot without having first received a written application, both the Milwaukee and Dane County Clerks did not require voters to submit a written application in order to receive an absentee ballot during the 14-day in-person absentee voting period. Instead, in both Dane and Milwaukee Counties, the Canvassing Boards found that the Clerk's receipt of form EL-122 (the "Envelope" in which the absentee ballot is placed by the elector after it has already been received by the elector and after it has been completed) was sufficient to satisfy the statutory written application requirement. Milwaukee Cty. Trans. 11/20/2020 at 57:1-66:2, App. 10-19; Dane Cty. Trans. 11/22/2020 at 58:7-59:7. Other municipalities, outside of Dane and Milwaukee County followed the statute by requiring a written Application. Dane Cty. Trans. 11/28/20 at 7:7-25; Aff. Lori Opitz; App. 115 at 6:7-25, 182-183.

21. A total of 5,517 ballots were cast in Milwaukee (2,215) and Dane (3,302) Counties with incomplete or incorrect EL-122 Ballot Envelopes. Aff. Joseph Voiland at ¶4, App. 271; Aff. Kyle Hudson dated 11/30/2020 at ¶4, App. 268. Clerks changed the Ballot Envelopes after they had been submitted by supplying missing witness address information or Ballot Envelopes were left incomplete but nonetheless counted (collectively, the "Altered-Certification Absentee Ballots"). *Id.*; Aff. Claire Woodall-Vogg at ¶¶5-8. All of these ballots were improperly counted.

22. The Wisconsin Legislature recently reaffirmed via the passage of 2015 Wis. Act 261 the long-held legal position of the State, that explicitly prohibits those actions of the Clerks and requires the exclusion of ballots contained in incomplete or improperly completed Ballot Envelopes. Wis. Stat. § 6.87(6d) (“If a certificate is missing the address of a witness, the ballot may not be counted.”); *see also* 2015 Wis. Act 261, § 78 (creating Wis. Stat. § 6.87(6d)).

23. 28,395 Indefinitely Confined Absentee Ballots issued to those claiming that status after March 25, 2020, without the required photo identification, were cast in violation of law and must be excluded from any certified results of the Election. Milwaukee Cty. Trans. 11/27/20 at 19:23-22:3, App. 118-121; Dane Cty. Trans. 11/28/20 at 7:2-12:6, App. 155-156; Aff. Jordan Moskowitz (dated 11/27/20) ¶¶ 2-6, Exs. 1-4, App. 224-233.

24. Municipal Clerks are expressly charged with the responsibility to review and expunge from the voter rolls those claiming to be Indefinitely Confined Voters when the Clerk has “reliable information that [the]... elector no longer qualifies for the service.” Wis. Stat. 6.86(2)(b). Electors who claimed they were Indefinitely Confined, but were not themselves physically, ill, infirm, elderly, or disabled were also obligated to take steps to be removed from that status prior to the November 3, 2020, election. Wis. Stat. § 6.86(2)(a). Those registering for such status after March 25, 2020

were necessarily suspect and include numerous persons easily identified. Milwaukee Cty. Trans. 11/27/20 at 19:23-22:3; App. 118-121; Dane Cty. Trans. 11/28/20 at 7:2-12:6, App. 155-156; Aff. Jordan Moskowitz (dated 11/27/20) ¶¶ 2-6, Exs. 1-4, App. 224-233.

25. 17,271 absentee ballots were completed and/or delivered to employees of the City of Madison on September 26, 2020, and October 3, 2020, at 206 separate locations in an event dubbed “Democracy in the Park.” Dane Cty. Trans. 11/24/20 at 52:16-56:15, App. 148-149; Aff. Kyle J. Hudson (11/23/20) ¶¶3-6, Exs. B-E, App. 163-184. The Biden Campaign widely advertised the event (Dane Cty. Trans. 11/24/20 at 57:11-58:16, App. 149-150; Aff. Kyle J. Hudson (11/23/20) ¶2, Ex. A, App. 163-166), as did the Madison City Clerk. (City of Madison, Statement of Madison City Clerk Maribeth Witzel Behl Regarding Democracy in the Park (Sept. 25, 2020), *available at* <https://www.cityofmadison.com/clerk/news/statement-of-madison-city-clerk-maribeth-witzel-behl-regarding-democracy-in-the-park>; *See also* App. 168-184 (City of Madison post regarding “Democracy in the Park”). The representatives of the City Clerk’s Office registered voters, received ballots, helped in the completion of Ballot Envelopes, instructed on the ballot process, and acted as witnesses for voters. Dane Cty. Trans. 11/24/20 at 52:16-64:10, App. 148-151.

26. The creation of 206 separate locations for the Clerk’s Office

did not comply with Wis. Stat. 6.855(1) in numerous respects. As such, the activities conducted were illegal. In the alternative, if the recipients of the ballots were not representatives of the Clerk's Office, then their actions did not comply with the requirement that ballots must be returned by mail or delivered in person to the municipal clerk. Wis. Stat. 6.87(4)(b).

27. Absentee balloting, as opposed to voting in person at the polls on election day, is a "privilege." Wis. Stat. § 6.84(1) ("LEGISLATIVE POLICY. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, *voting by absentee ballot is a privilege* exercised wholly outside the traditional safeguards of the polling place. The legislature finds that *the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse. . . .*") (emphasis added).

28. Because of the higher probability that absentee balloting may be subject to "fraud or abuse ... overzealous solicitation of absent electors who may prefer not to participate in an election ... undue influence on an absent elector ... or other similar abuses," the Legislature has made clear that the statutory requirements for absentee balloting are mandatory and must be strictly applied. *Id.*; Wis. Stat. § 6.84(2) (requiring that "matters relating to the absentee ballot process," including Wis. Stat. §§ 6.86 and 6.87(3) to (7) "shall be strictly construed as mandatory.").

The In-Person Absentee Ballots

29. During the Recount, representatives and/or agents of Petitioners objected to the counting of any In-Person Absentee Ballots issued without a corresponding written application and requested that such ballots be rejected. Milwaukee Cty. Trans. 11/22/20 at 4:20-24, App. 68; Dane Cty. Trans. 11/20/20 at 15:9-18:14, App. 126-127.

30. Both the Milwaukee County and Dane County Boards of Canvassers overruled Petitioners' objections to the counting of In-Person Absentee Ballots without a corresponding written application, and such ballots were included and counted in the Recount. Milwaukee Cty. Trans. 11/21/20 at 186:11-187:10, App. 63-64; Dane Cty. Trans. 11/20/20 at 36:15-40:25, App. 129-130.

31. The Milwaukee County and Dane County Boards of Canvassers were wrong, as a matter of law, to include in the Recount In-Person Absentee Ballots issued without a corresponding written application.

32. Wisconsin's statutes forbid clerks from issuing an absentee ballot to an elector unless the elector first submits a written application therefor: "[T]he municipal clerk ***shall not issue an absentee ballot unless the clerk receives a written application therefor*** from a qualified elector of the municipality." Wis. Stat. § 6.86(1)(ar) (emphasis added).

33. The clerk must retain the written applications for absentee

ballots. Wis. Stat. § 6.86(1)(ar) ("The clerk shall retain each absentee ballot application until destruction is authorized under s. 7.23 (1).").

34. Our Statutes not only allow an elector to submit a written application for an absentee ballot in person, they require it.

Any elector of a municipality who is registered to vote whenever required and who qualifies under ss. 6.20 and 6.85 as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods:

* * *

2. In person at the office of the municipal clerk or at an alternate site under s. 6.855, if applicable.

Wis. Stat. § 6.86(1)(a).

35. Likewise, the Statutes dispel the notion that a *written* application is not required when an elector applies in person. Indeed, when an elector applies for an absentee ballot in person, the clerk must compare the name on the written application to the name on the proof of identification produced by the elector: "The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application and shall verify that any photograph appearing on that document reasonably resembles the elector." Wis. Stat. § 6.86(1)(ar); *see also* WI Application for Absentee Ballot, Form EL-121, App. 161-162 ("If in-person voter, check here:").

36. Compliance with the rules for absentee balloting is mandatory, and ballots cast in violation of those rules must not be counted:

Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. **6.86**, 6.87 (3) to (7) and 9.01(1)(b) 2. and 4. **shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.**

Wis. Stat. § 6.84(2) (emphasis added); *see also Lee v. Paulson*, 2001 WI App 19, 241 Wis.2d 38, 623 N.W.2d 577 (excluding 5 absentee ballots from the certified election results because there was no corresponding written application, and the removal of the 5 ballots changed the outcome of the election).

37. Clear and unambiguous statutory law and associated case law dictates that all In-Person Absentee Ballots issued by municipalities without the required application “*may not be counted*” and if such ballots were erroneously counted, they “*may not be included in the certified result of any election.*” *Id.* (emphasis added).

38. The Boards of Canvassers for Dane and Milwaukee County, however, in direct contravention of the unambiguous law, improperly included in the Recount totals the In-Person Absentee Ballots despite the lack of a written application. Municipal clerks elsewhere followed the law and required a separate application. Aff. Lori Opitz; App. 222-223.

Altered-Certification Absentee Ballots

39. During the Recount, the Petitioners objected to the counting of any Incomplete or Altered-Certification Absentee Ballots. Dane Cty. Trans.

11/20/20 at 48:25-49:8, App. 131; Milwaukee Cty. Trans. 11/23/20 at 25:19-27:21, App. 106-108.

40. Both the Milwaukee County and Dane County Boards of Canvassers overruled Petitioners' objections to the counting of Altered-Certification Absentee Ballots, and such ballots were counted and included in the Recount. Dane Cty. Trans. 11/20/20 at 60:1-65:14, App. 134-135; Milwaukee Cty. Trans. 11/20/20 at 115:11-128:17, App. 28-41.

41. The Milwaukee County and Dane County Boards of Canvassers were wrong, as a matter of law, to include Altered-Certification Absentee Ballots in the Recount.

42. When casting an absentee ballot, the elector completes his or her ballot, places it inside the ballot certification envelope and seals it, which process must be witnessed, and the certification on the outside of the envelope requires the witness to sign *and provide his or her address*. Wis. Stat. § 6.87 (2) (emphasis added).

43. Without the witness's address on the certification, the absentee ballot may not be counted: "If a certificate is missing the address of a witness, the ballot *may not be counted*." Wis. Stat. sec. 6.87 (6d) (emphasis added).

44. There is only one statutorily authorized method for remedying an improperly completed absentee ballot certification (such as a certification lacking the witness's address), and that is to return it to the elector: "If a

municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot . . .” Wis. Stat. § 6.87 (9).

45. The Boards of Canvassers for Dane and Milwaukee County improperly included in the recount totals from the Incomplete and Altered-Certification Absentee Ballots.

Improper Indefinitely Confined Ballots.

46. Municipal Clerks are expressly charged with the responsibility to review and expunge from the voter rolls those claiming to be Indefinitely Confined Voters when the Clerk has “reliable information that [the]... elector no longer qualifies for the service.” Wis. Stat. § 6.86 (2) (b). Likewise, electors who claimed they were Indefinitely Confined, but were not themselves physically ill, infirm, elderly, or disabled, are obligated to take steps to be removed from that status prior to the November 3, 2020 election. Wis. Stat. § 6.86(2)(a). Those registering for such status after March 25, 2020 were necessarily suspect and include numerous persons easily identified. Milwaukee Cty. Trans. 11/27/20 at 19:23-22:3, App. 118-121; Dane Cty. Trans. 11/28/20 at 7:2-12:6, App. 155-156; Aff. Jordan Moskowitz (dated 11/27/20) ¶¶ 2-6, Exs. 1-4, App. 224-233.

47. During the Recount, Petitioners objected to the counting of any Indefinitely Confined Absentee Ballots and, as the review of recount materials progressed, objected more narrowly to a specific subset of the group identified. That precise subset included persons claiming the status after March 25 (the date of the Clerk's improper posts) who did vote using the status on November 3 and who had no ID on file. Dane Cty. Trans. 11/20/20 at 53:22-55:20, App. 132-133; Milwaukee Cty. Trans. 11/27/20 at 19:23-22:2, App. 118-121. Petitioners' objection was denied, and all the ballots were counted. Dane Cty. Trans. 11/28/20 at 28:3-6, App. 160; Milwaukee Cty. Trans. 11/27/20 at 21:7-22:2, App. 120-121.

48. Both the Milwaukee County and Dane County Boards of Canvassers overruled Petitioners' objections to the counting of Indefinitely Confined Absentee Ballots and, as a result, such ballots were improperly counted and included during the entire Recount. *Id.*

49. The Milwaukee County and Dane County Boards of Canvassers were wrong, as a matter of law, to include the specific subset of Indefinitely Confined Absentee Ballots in the Recount.

50. Wisconsin statutory law expressly requires that all eligible electors must provide proof of identification in order to register to vote, and each time they vote. Wis. Stat. §§ 6.79(2)(a), 6.87(1).

51. Photo identification is also required when requesting to vote by

absentee ballot. Wis. Stat. §§ 6.86(1)(ac), (ar), and 6.87(1).

52. There are very limited exceptions to the requirement that an elector must provide photo identification with any application for an absentee ballot, including an exception if an elector certifies that he or she is “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period.” Wis. Stat. § 6.86(2)(a). In order to qualify for this exception, an elector must be “elderly, infirm or disabled *and* indefinitely confined.” *Frank v. Walker*, 17 F. Supp. 3d 837, 844 (E.D. Wis. Apr 29, 2014) (emphasis added), *rev’d on other grounds*, 768 F.3d 744 (7th Cir. 2014).

53. An elector who meets the strict definition of “indefinitely confined” in Wis. Stat. § 6.86(2)(a) must sign a statement to that effect, and then “the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement . . . which contains the name and address of the elector and verifies that the name and address are correct.” Wis. Stat. § 6.87(4)(b)2.

54. For the Election, the number of electors claiming “indefinitely confined” status and thereby obtaining an absentee ballot without the otherwise required photo identification increased massively in Milwaukee and Dane Counties.

55. In *Jefferson v. Dane*, No. 2020AP557-OA, this Court issued an

Order addressing certain concerns about the Indefinitely Confined status. In that Order the Court acknowledged that on March 25, 2020, the Dane County Clerk, and the Milwaukee County Clerk as well, publicly approved the use of Indefinitely Confined status by all voters due to the pandemic.³ See, e.g., App. 235-237, March 31, 2020 Order, *Jefferson v. Dane*, No. 2020AP557-OA at 2 (explaining that the Dane County and Milwaukee County Clerks indicated that “all Dane [and Milwaukee] County voters could declare themselves to be ‘indefinitely confined’ under Wis. Stat. § 6.86(2)” because of the Safer at Home Order, “thereby avoiding the legal requirement to present or upload a copy of the voter’s proof of identification when requesting an absentee ballot” and concluding that such “advice was legally incorrect.”). The total number of voters claiming that status after that date was 28,395 for those two counties. Milwaukee Cty. Trans. 11/27/20 at 19:23-22:3, App. 118-121; Aff. Jordan Moskowitz (dated 11/25/20) ¶4, Exs. 1-2, App. 240; Dane Cty. Trans. 11/28/20 at 7:2-12:6, App. 155-156; Aff. Jordan Moskowitz (dated 11/27/20) ¶¶ 2-6, Exs. 1-4, App. 224-233. Excluding all those with that status who otherwise had IDs on file, those that did not cast a ballot and those that voted in a manner consistent with legitimately claiming

³ It is also true that claiming to be indefinitely confined was not necessary for any elector who wished to participate in the election and avoid excess contact with others. Any elector could have applied for an absentee ballot, voted that ballot and mailed that ballot back to the clerk without leaving their home. Claiming to be indefinitely confined, however, did allow tens of thousands of electors to vote without providing the legally required photo identification.

the status, the remaining voters totaled 15,102. *Id.*

56. Though expressly required by statute to take appropriate measures to insure the legitimacy of the voting rolls, Wis. Stat. §§ 6.50 and 9.01(1)(b)1., and to examine suspect Indefinitely Confined Voters, Wis. Stat. § 6.86(2)(b) and 9.01(1)(b)2., no effort was made by the clerks to verify the legitimate status of the Indefinitely Confined Voters as evidenced by the cumulative numbers from March 25 through the election. Aff. Jordan Moskowitz (dated 11/27/20) ¶¶ 2-6, Exs. 1-4, App. 224-233; Aff. Kyle J. Hudson (dated 11/25/20) ¶2, Exs. A-G, App. 242-258.

57. All Indefinitely Confined Absentee Ballots issued to those claiming that status after March 25, 2020, without the required photo identification, were issued in violation of law and must be excluded from any certified results of the Election. Wis. Stat. § 6.86(2)(a); *Frank*, 17 F. Supp. 3d at 844), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014). The Boards of Canvassers for Dane and Milwaukee County improperly included those ballots in the Recount totals.

58. During the Recount, the Petitioners objected to the counting of ballots collected during the “Democracy in the Park” events. Dane Cty. Trans. 11/24/20 at 52:3 – 56:15, App. 148-149. 17,271 ballots were collected at those events. *Id.* at 56:13, App. 149.

59. As a matter of law, these absentee ballots cannot be counted.

Wisconsin’s careful regulation of absentee balloting requires that all absentee ballots must “be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” Wis. Stats. § 6.87(4)(b)1; *accord Olson v. Lindberg*, 2 Wis. 2d 229, 236, 85 N.W.2d 775, 780 (1957) (excluding absentee ballots delivered to a location other than the appropriate municipal clerk’s office under a prior version of the statute).

60. In the alternative, these “Democracy in Park” locations were not legally established alternate absentee ballot sites because they failed to meet many of Wis. Stat. 6.855(1) obligations. For example, the sites were not established by an act of the governing body—the City of Madison Common Council. Alternate absentee ballot sites may only be established by the “governing body of a municipality” and, if such a site is designated by the governing body of a municipality, “no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.” Wis. Stat. § 6.855(1)

61. The Milwaukee County and Dane County Boards of Canvassers’ decision to count In-Person Absentee Ballots without a corresponding written application, count Incomplete and Altered-Certification Absentee Ballots, count all Indefinitely Confined Absentee Ballots and count 17,271 Absentee Ballots received at “Democracy in the

Park” events caused harm to the Trump Campaign because no fewer than 17,271 votes were counted in contravention of the express language of the Wisconsin Statutes and those votes were included in the Recount, thereby directly impacting the outcome of the Election in Wisconsin.⁴

STATEMENT OF RELIEF SOUGHT

If this Court grants the Petition, Petitioners will ask this Court to issue a declaratory judgment, *see, e.g.*, Wis. Stat. § 806.04, which declares the Governor’s certification of the election and naming of the electors void *ab initio* and orders it withdrawn, and declares and orders that the Milwaukee County and the Dane County Boards of Canvassers, WEC and/or the Governor shall exclude as defective from the Recount totals and any certified Election results, or results used to issue a Certificate of Election, In-Person Absentee Ballots without an associated written application, Incomplete and Altered-Certification Absentee Ballots, Indefinitely Confined Absentee Ballots, as defined earlier, and “Democracy in the Park” Absentee Ballots.

Petitioners will also request that this Court provide other appropriate equitable relief, *see, e.g.*, Wis. Stat. § 806.04, including to prohibit and restrain WEC from preparing, and Governor Evers from signing, a Certificate of Election, pursuant to Wis. Stat. § 7.70(5), unless and until such

⁴ If voter rolls are reduced by the number of non-legal voters Petitioners request through drawdowns (Wis. Stat. § 9.01(b)2-4.), then Petitioners would necessarily win Wisconsin.

illegal absentee ballots are excluded from the results of the Election. The Court should take such action as is necessary to maintain the status quo, so that when the Court determines the outcome in this matter, the appropriate set of electors will be duly qualified to cast Wisconsin's electoral votes.

STATEMENT OF THE REASONS WHY THIS COURT SHOULD TAKE JURISDICTION

As discussed in more detail in the Memorandum In Support of Petition for Original Action, this Court should grant this Petition because the matters it raises satisfy the criteria for this Court's exercise of its original jurisdiction under Article VII, Section 3 of the Wisconsin Constitution. This is an "exceptional case[] in which a judgment by the court [would] significantly affect[] the community at large." *Wisconsin Professional Police Ass'n v. Lightbourn*, 2001 WI 59, ¶4, 243 Wis. 2d 512, 627 N.W.2d 807.

This case involves the election for the electors of the Office of President and Vice President of the United States and the outcome of the Recount and this matter will not only decide which candidates obtain Wisconsin's 10 Electoral College Electors, but may very well decide the outcome of the election nationwide. Prompt resolution of this legal dispute is of the essence to the public interest because, absent this Court's action, In-Person Absentee Ballots without a corresponding written application, Incomplete and Altered-Certification Absentee Ballots, all Indefinitely Confined Absentee Ballots, and "Democracy in the Park" Absentee Ballots,

will be included in the results of the Election despite clear and unambiguous law to the contrary.

It is also true that absent action by this Court these violations of Wisconsin's election laws will continue into future elections, casting doubt on the legitimacy of those future elections to accurately and legally give voice to the will of Wisconsin's electorate. This case provides a live, justiciable controversy that will allow this Court to clarify the law and its application to elections.

This case presents only purely legal issues of statutory interpretation, meaning that no fact finding by this Court would be needed.

CONCLUSION

This Court should grant the Petition and issue the requested relief and order strict compliance with clear and unambiguous statutory law requiring the exclusion of In-Person Absentee Ballots, Incomplete and Altered-Certification Absentee Ballots, certain Indefinitely Confined Absentee Ballots and "Democracy in the Park" Absentee Ballots from any certified results of the Election.

Dated this 1st day of December, 2020.

TROUPIS LAW OFFICE LLC

Attorneys for Petitioners

James R. Troupis, SBN 1005341

4126 Timber Ln.

Cross Plains, WI 53528-9786

Phone: [REDACTED]

Email: [REDACTED]@gmail.com

CONWAY, OLEJNICZAK & JERRY S.C.

Attorneys for Petitioners

By: 

R. George Burnett, SBN 1005964

231 S. Adams St.

P.O. Box 23200

Green Bay, WI 54305-3200

Phone: [REDACTED]

Facsimile: [REDACTED]

Email: [REDACTED]@lcojlaw.com

SUBJECT: Quotes from the Wisconsin decision / initial
FROM: [REDACTED]@gmail.com
TO: Reince Priebus <[REDACTED]@gmail.com>
CC: Judge Troupis <[REDACTED]@gmail.com>, Jim Troupis <[REDACTED]@hotmail.com>
DATE: 12/03/2020 13:21

Chief Justice Patience Roggensack (joined in this statement by Justice Annette Ziegler) voting in the minority to take original jurisdiction:

“I also am concerned that the public will misunderstand what our denial of the petition means. Occasionally, members of the public seem to believe that a denial of our acceptance of a case signals that the petition's allegations are either false or not serious. Nothing could be further from the truth. Indeed, sometimes, we deny petitions even when it appears that a law has been violated. *Hawkins v. Wis. Elec. Comm'n*, 2020 WI 75, ¶¶14–16, 393 Wis. 2d 629, 948 N.W.2d 877 (Roggensack, C.J., dissenting).

Justice Hagedorn, conservative who voted in 4-3 majority to send to circuit court:

“Even if this court has constitutional authority to hear the case straightaway, notwithstanding the statutory text, the briefing reveals important factual disputes that are best managed by a circuit court.² The parties clearly disagree on some basic factual issues, supported at times by competing affidavits. I do not know how we could address all the legal issues raised in the petition without sorting through these matters, a task we are neither well-positioned nor institutionally designed to do. The statutory process assigns this responsibility to the circuit court. Wis. Stat. § 9.01(8)(b) (“The [circuit] court shall separately treat disputed issues of procedure, interpretations of law, and findings of fact.”).

“...Following the law governing challenges to election results is no threat to the rule of law. I join the court’s denial of the petition for original action so that the petitioners may promptly exercise their right to pursue these claims in the manner prescribed by the legislature.”

2/28/24, 9:59 AM

SUBJECT: FW: Memorandum--IMPORTANT PLEASE READ

FROM: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>

TO: Judge Troupis <[REDACTED]@gmail.com>

DATE: 12/07/2020 07:25

ATTACHMENTS (20201207-072552-0001433): ["image001.png"](#) , ["Trump v. Biden - WI Circuit Court - Memorandum \(12.06.20 at 1130pm\).docx"](#)

TROUPIS 009886

Jim – this is what I believe is the most recent draft. Nick sent it at 11:45 last night. It has a caption and it appears to have much of the Laches stuff in it.

I have not been able to reach Nick yet, but for the sake of time, I think this would be the draft for you to review.

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com



From: Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>
Sent: Sunday, December 6, 2020 11:45 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Cc: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>; George Burnett <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge <[REDACTED]@gmail.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Chirst Troupis <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>; [REDACTED] <[REDACTED]@outlook.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>
Subject: RE: Memorandum--IMPORTANT PLEASE READ
Importance: High

Jim,

Attached please find the most up-to-date version of the Memo for your review in the morning. This is now in your control.

Nick

Nicholas J. Boerke

Senior Counsel

T [REDACTED] | michaelbest.com



From: Boerke, Nicholas J (12767)
Sent: Sunday, December 6, 2020 11:14 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Cc: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>; George Burnett <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge <[REDACTED]@gmail.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Chirst Troupis <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>; [REDACTED] <[REDACTED]@outlook.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED]

<[REDACTED]@swvalawfirm.com>; [REDACTED]@gmail.com

Subject: RE: Memorandum--IMPORTANT PLEASE READ

Jim,

I have the memo and I am cleaning up formatting, editing and adding final citations. I will send soon and you will have final edits tomorrow morning before sending to Kurt/George to file.

Nick

Nicholas J. Boerke

Senior Counsel

T [REDACTED] | michaelbest.com



From: Judge Troupis <[REDACTED]@gmail.com>

Sent: Sunday, December 6, 2020 11:10 PM

To: Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>

Cc: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>; George Burnett <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge <[REDACTED]@gmail.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Chirst Troupis <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>; [REDACTED] <[REDACTED]@outlook.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>

Subject: Re: Memorandum--IMPORTANT PLEASE READ

Memo---Nick/Kurt--Do I have the final to read? Please send it if you are done. If you are not done, please send when you are. I will get up very early to read it one last time.

Thanks.

Jim

On Sun, Dec 6, 2020 at 9:57 PM Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com> wrote:

Hi Joe,

Yes, I'm reviewing now and should be able to add and if not will reach out for those who can. Goal is to send version that is basically final tonight so Jim/Joe can do final review in AM.

Nick

Nicholas J. Boerke

Senior Counsel

T [REDACTED] | michaelbest.com



From: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>
Sent: Sunday, December 6, 2020 9:40 PM
To: Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>; George Burnett <[REDACTED]@lcojlaw.com>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>; Judge Troupis <[REDACTED]@gmail.com>;
 Stewart Karge <[REDACTED]@gmail.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Chirst Troupis <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>; [REDACTED] <[REDACTED]@outlook.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>
Subject: RE: Memorandum--IMPORTANT PLEASE READ

This latest version of the memo is in very good shape, but there are a few open cites and references to things that need to be added to the FoF. Nick and/or Kurt, can you fill these in?

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com



From: Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>
Sent: Sunday, December 6, 2020 9:25 PM
To: George Burnett <[REDACTED]@lcojlaw.com>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>; Judge Troupis <[REDACTED]@gmail.com>;
 Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Stewart Karge <[REDACTED]@gmail.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Chirst Troupis <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>; [REDACTED] <[REDACTED]@outlook.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>
Subject: Re: Memorandum--IMPORTANT PLEASE READ

The latest version of the memo is attached.

--

Clinton W. Lancaster,
 Partner, Attorney at Law

**LANCASTER & LANCASTER
 LAW FIRM, PLLC**

[REDACTED]@TheLancasterLawFirm.com

Tel: [REDACTED]

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On Sun, Dec 6, 2020 at 6:58 PM George Burnett <[REDACTED]@lcojlaw.com> wrote:

Kurt and nick— pls include as I believe you control the memo. Thanks.

Sent from my iPhone

On Dec 6, 2020, at 6:41 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

URGENT

Jim just asked me to send around again the addition to the laches point he requested, which I originally e-mailed about 12:45 p.m. today.

He wants to make sure it isn't missed.

Here it is again:

Jim's suggestion that the constitutional point at the end of the laches discussion should be beefed up is a very good one.

I've added citations, and some language, to make clear that although our primary point relates to the First Amendment, we're also making a separate due process argument.

I now suggest the following at the end of p. 36:

The cloud of confusion, uncertainty, and ambiguity that this regime would cast over all candidates in all elections would impose a massive burden on the First Amendment right to engage in election advocacy, *e.g.*, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 735-40 (2011); *Randall v. Sorrell*, 548 U.S. 230, 261-63 (2006); *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 834-42 (7th Cir. 2014), and would also violate the void-for-vagueness due process doctrine. *E.g.*, *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253-54 (2012); *Center for*

Individual Freedom v. Madigan, 697 F.3d 464, 478-79 (7th Cir. 2012).

Ken

From: Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>
Sent: Sunday, December 6, 2020 6:32 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Judge Troupis <[REDACTED]@gmail.com>; Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Stewart Karge <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Chirst Troupis <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>; [REDACTED] <[REDACTED]@outlook.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>

Subject: Re: Memorandum--IMPORTANT PLEASE READ

I think they are adding the fact based citations to the memo. When they are done, I can add the editing.

--
Clinton W. Lancaster,
Partner, Attorney at Law

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Tel: [REDACTED]
Fax: [REDACTED]
www.TheLancasterLawFirm.com

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On Sun, Dec 6, 2020 at 4:53 PM Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Oh, I guess every place I suggested "Appellants" and "Appellees," it should actually read "Plaintiffs" and "Defendants"?

The main point is to switch out all, or nearly all, of the references to "Petitioners" and "Respondents," which were from the petition to the Supreme Court, and which I assume are no longer appropriate.

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Sunday, December 6, 2020 5:50 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Cc: Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>; Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Stewart Karge <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Chirst Troupis <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>; [REDACTED] <[REDACTED]@outlook.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>
Subject: Re: Memorandum--IMPORTANT PLEASE READ

Hi, I went by the version that Joe Olson sent, I believe at 12:48 p.m. your time -- which was the 3rd or 4th version sent within the prior hour -- in which he said in his cover memo:

"All – to avoid any further confusion on this, the attached is the latest version of the memo."

Maybe there was a more recent version, on which many of my edits were entered.

I will check whatever version is sent around later tonight, to make sure anything important was entered.

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Sunday, December 6, 2020 5:46 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>; Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Stewart Karge <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>; Boerke,

Nicholas J (12767) <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Chirst Troupis <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>; [REDACTED] <[REDACTED]@outlook.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>

Subject: Re: Memorandum--IMPORTANT PLEASE READ

Ken and All,

Not sure what version you have but EVERY comment you make must be taken care of. Nick and Kurt--PLEASE make these changes.

Earlier today I noted there is much edit type work that needs to get done. I will not touch the document again until that is completed. There are an enormous number of citations that must be added and then checked.

Sorry All--it appears we will have a long night. Please keep me apprised of the status.

I will now go back to the Complaint to see what needs to be done.

Jim

Jim T.

On Sun, Dec 6, 2020 at 4:38 PM Kenneth Chesebro <[REDACTED]@msn.com> wrote:

URGENT

It appears that the handwritten edits I sent yesterday were never reviewed and entered.

I have entered them, again, and have noted other suggested changes -- see attached.

There are many errors, large and small, here that need to be corrected (plus some optional suggestions), so I hope someone can soon go page by page through my edits and enter the ones that seem appropriate.

For example, on page 10, "principal" hasn't even been corrected to "principle."

Also, references to "this Court," in passages borrowed from the petition before the Supreme Court.

Also, references to Trump and Pence are incredibly inconsistent -- "Plaintiffs," "Petitioners," and "Appellants." Shouldn't they all be "Appellants," except when describing the Recount itself, when they were Petitioners?

Ken

From: Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com>
Sent: Sunday, December 6, 2020 5:27 PM
To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>
Cc: Stewart Karge <[REDACTED]@gmail.com>; Judge Troupis <[REDACTED]@gmail.com>; George Burnett <[REDACTED]@lcojlaw.com>; Boerke, Nicholas J (12767) <[REDACTED]@michaelbest.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Chirst Troupis <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>; [REDACTED] <[REDACTED]@outlook.com>; Beauty and the Bees <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@gmail.com>; [REDACTED] <[REDACTED]@swvalawfirm.com>; [REDACTED] <[REDACTED]@gmail.com>

Subject: Re: Memorandum--IMPORTANT PLEASE READ

Attached is the most recent version of the memorandum.

--
Clinton W. Lancaster,
Partner, Attorney at Law

LANCASTER & LANCASTER
LAW FIRM, PLLC
[REDACTED]@TheLancasterLawFirm.com
Tel: [REDACTED]
Fax: [REDACTED]
www.TheLancasterLawFirm.com

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On Sun, Dec 6, 2020 at 3:53 PM Clinton W. Lancaster <[REDACTED]@thelancasterlawfirm.com> wrote:

This email confirms that I am working in the memo to add citations and edits from Jim. I'll forward the updated copy when these edits are

complete.

--

Clinton W. Lancaster,
Partner, Attorney at Law

**LANCASTER & LANCASTER
LAW FIRM, PLLC**

██████████@TheLancasterLawFirm.com

Tel: ██████████

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www.TheLancasterLawFirm.com

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On Sun, Dec 6, 2020 at 3:02 PM Olson, Joseph L (13465)

<██████████@michaelbest.com> wrote:

Footnote regarding drawdown vs. finding specific ballots:

It appears that several clerks (the clerk for the City of Milwaukee and Clear of the city of Wauwatosa in particular) violated the law by writing the voter number of all absentee voters in their wards on the ballots themselves and have opined that if this Court remands the case to for a drawdown that they would once again ignore the law and instead identify specific ballots that can be tied to specific voters for exclusion (R. 11/23/20 at 30:19 - 31:15), the Plaintiffs request a draw down as that is the only legally available remedy. Wis. Stat. sec. 9.01(4)(b)4.b&e.

This should be inserted at the end of the remedy section on page 31.

Joseph L. Olson
Partner

T [redacted] | michaelbest.com

<image001.png>
Michael Best &
Friedrich LLP

From: Stewart Karge <[redacted]@gmail.com>
Sent: Sunday, December 6, 2020 12:09 PM
To: Judge Troupis <[redacted]@gmail.com>
Cc: George Burnett <[redacted]@lcojlaw.com>; Boerke, Nicholas J (12767) <[redacted]@michaelbest.com>; Olson, Joseph L (13465) <[redacted]@michaelbest.com>; Kurt A. Goehre <[redacted]@lcojlaw.com>; Kenneth Chesebro <[redacted]@msn.com>; Chirst Troupis <[redacted]@gmail.com>; Joe Voiland <[redacted]@yahoo.com>; [redacted] <[redacted]@outlook.com>; Beauty and the Bees <[redacted]@gmail.com>; Clinton W. Lancaster <[redacted]@thelancasterlawfirm.com>; [redacted] <[redacted]@gmail.com>; [redacted] <[redacted]@swvalawfirm.com>; [redacted] <[redacted]@gmail.com>

Subject: Re: Memorandum--IMPORTANT PLEASE READ

Regarding the request to find record citation as to how Milwaukee uses that actual ballot number when central counting is used to pull specific ballots, as opposed to a blind drawdown, here is the citation: 11/23/20 at 30:19 - 31:15. Let me know if there are any questions.

Below is the actual transcript cited:

MR. KARGE: Well, I'll state for the record, we assert objections to all remaining ballots that we looked at for missing witness signatures or missing voter signatures as it appeared from our review.

CHAIRMAN POSNANSKI: So that -- that would result in 23 ballots that should not have been counted on election night and have been removed from tally?

MR. KARGE: Yes. I assume there will be a drawdown as a result?

CHAIRMAN POSNANSKI: We -- Melanie, can you please explain how those ballots have, I believe, already been removed?

MS. KOLLMANSBERGER: Yes. So the City of Wauwatosa does central count, and so we are able to identify by the voter number what the ballot was to remove it from the count.

MR. KARGE: And has -- has that occurred?

MS. KOLLMANSBERGER: That has already occurred. Yes.

On Sat, Dec 5, 2020 at 3:56 PM Judge Troupis

<[REDACTED]@gmail.com> wrote:

All

Please see attached memorandum. It took me several more hours to complete as I wanted make sure to cover everything we had discussed. I have likely missed things.

So JOE NOW HAS CONTROL OF THE MEMO. Please direct any redline changes to him to consider. KURT AND NICK-- there is much to 'conform' and clean up from an editing standpoint. Joe can give you the document next.

IMPORTANT--All the team here in Madison and others should be completing the blank cites. Especially, the Laches section (which I now think is coming along nicely). KEN C--Note the Due process argument I have added to our laches defense. I am curious what you think and how we might beef that up.

I will now turn my attention to other documents folks have been sending.

I still have not appeared in the case, so I have no access to filings. Please make sure to send me those filings--KURT.

CALL in AM: ALL< WE MUST TALK IN THE MORNING. I realize you may have church, so if Joe can pick a time that works for him, we'll all make do. We just must be certain we have everything covered tomorrow. Please set that up as early as you are able.

KURT & NICK. By Noon Sunday can you have all the documents pulled on which we rely? I and others MUST look at each one and compare it to the citation. You could put all of them together and scan and send. Or, if you have a reference in the Appendix, then just give us that, along with the others, and I can have someone in Madison pull something together. This is REALLY IMPORTANT because everything depends on the record. We can not leave it to Sunday night to find out we have a big gap.

Thanks.

Enjoy

Jim

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DONALD J. TRUMP, et al.

Plaintiffs-Appellants,

Milwaukee County Case No.: 2020-CV-7092

v.

Dane County Case No.: 2020-CV-2514

JOSEPH R. BIDEN, et al.

Defendants-Appellees,

**MEMORANDUM IN SUPPORT OF JUDGMENT
ON NOTICE OF APPEAL AND COMPLAINT**

VOTING ABSENTEE

(1) LEGISLATIVE POLICY. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

(2) INTERPRETATION. Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2 and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election

Wis. Stat. §§ 6.84(1)-(2).

This matter is straightforward. Are the statutes to be enforced as written? Plaintiffs-Appellants (hereinafter, “Appellants”) argue the statutes mean what they say and so the findings and conclusions of the Boards of Canvassers must be reversed. The Appellees argue that the Wisconsin Elections Commission (WEC) advice, whether or not consistent with the statutes and case law, excuses the violations and the statutory remedy is too harsh, given reliance on that advice.

This Court is bound by the law. The violations are clear.

ARGUMENT¹

The Appellants' Complaint outlines four distinct violations of law:

1. In-person absentee votes cast without a separate application;
2. Incomplete absentee ballot certifications including those altered by the Clerks;
3. Abuse of Indefinitely Confined status; and
4. Democracy in the Park.

As to each, the factual findings in the Record are undisputed as to the events or actions having occurred. The Canvassing Boards, while acknowledging those facts, held the actions involved did not violate the law. Those legal conclusions are reviewed *de novo*. Wis. Stat. § 9.01(8). Both Boards determined there would be no need to address a remedy, having found no violations. All this Court will need to do is apply the plain language of the statutes.

I. Factual Background.

President Donald J. Trump and Vice President Michael R. Pence filed a Verified Petition for Recount. The Wisconsin Election Commission (“WEC”) found the Petition was legally sufficient as the initial margin was .62% and ordered a Recount of the results for President and Vice-President, as requested in Dane and Milwaukee Counties. The Petitioners deposited sufficient funds to reimburse the counties for their expenses. The Recount was completed on Sunday, November 29, 2020 and Appellants’ filed a Notice of Appeal on December 4, 2020, within the five-business-day window, as statutorily required.²

¹ Citations to “P. App. ___” refer to the page(s) of the Appendix filed with this Memorandum; 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].”

² A Petition for Leave to File an Original Action in the Supreme Court of Wisconsin was denied in a 4-3 vote. *See Trump v. Evers*, Dec. 3, 2020 Order, No. 2020AP1971-OA.

While there were many objections made and irregularities found during the Recount, time limitations required Appellants to narrow their claims.³ Facts related to the claims on which the Appellants seek relief are stated within each category.

II. There Were Substantial Absentee Voting Violations in Dane and Milwaukee Counties.

“[S]tatutory interpretation begins with the language of the statute.” If the meaning of that language is plain, that ends the inquiry. *Kalal v. Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). “Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* As more fully detailed throughout this Memorandum, the applicable statutes are plain on their face and unambiguous given the common ordinary and accepted meaning of their terms.

When it comes to our elections, the process of the election and the rules that apply are never based on decisions made at the whim of a municipal or county clerk, or for that matter by WEC. Indeed, following the statutes avoid very serious problems and the failure to do so would violate a host of fundamental rights. *Bush v. Gore*, 531 U.S. 98, 104-110, 121 S. Ct. 525 (2000). However laudable the goal of a municipal clerk or State agency, they must follow the statutes. They must not, as they have done in this case, “make stuff up.” *See Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶77, 390 Wis. 2d 266, 938 N.W.2d 493 (“It reminds me of the two rules

³ In Milwaukee County, several other irregularities include: (a) ballots with no clerk’s initials were allowed to be recounted [Milwaukee Cty. Trans. 11/24/20 at 65:21 – 66:21] in contravention of Wis. Stat. 6.80(2)(d); (b) after requesting access to written applications [Milwaukee Cty. Trans. 11/20/20 at 10:1 – 5] and being told the written applications were on site or being brought on site [Milwaukee Cty. Trans. 11/20/20 at 36:1 – 6], Appellants were refused access to any of the boxes of documents at the Recount site [Milwaukee Cty. Trans. 11/22/20 at 22:12 – 56:23]; (c) Milwaukee Ward 315 “found” 386 unopened certificate envelopes which, over Appellant’s objections, were allowed to be counted.

Justice Neil Gorsuch tells his law clerks. The first rule is: Don't make stuff up. The second rule is: When people beg, and say, 'Oh the consequences are so important,' and when they say, 'You're a terrible, terrible person if you don't,' just refer back to Rule No. 1.") (Hagedorn, J., concurring) (punctuation revised).

The express difference between mandatory provisions, strictly construed and applied, for absentee voting and discretionary provisions applied for non-absentee voting has been accepted in this State for a very long time and it remains a bedrock for understanding and applying the law where one is an absentee voter. *In re Chairman in Town of Worcester*, 29 Wis.2d 674, 684 139 N.W.2d 557 (1996) ("Further, the ballots in question here are absentee ballots. Clearly, the legislature could determine that fraud and violation of the sanctity of the ballot could much more readily be perpetrated by use of an absentee ballot than under the safeguards provided at a regular polling place. While the right of the citizen to vote in elections for public officers is inherent, it is a right nevertheless subject to reasonable regulation by the legislature.");⁴ *Clapp v. Joint School Dist. No. 1 of Villages of Hammond and Roberts*, 21 Wis.2d 473 (Wis. Sup. Ct. 1963); *Sommerfeld v. Board of Canvassers* (1955), 269 Wis. 299, 69 N.W.2d 235 (Wis. Sup. Ct. 1955). *See also Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020). *Accord Lee v. Paulson*, 2001 WI App 19, ¶ 7, 241 Wis.2d 38, 623 N.W.2d 577 ("[s]ection 6.84(2)'s strict construction requirement, applicable to statutes relating to the absentee ballot process, is consistent with the guarded attitude with which the legislature views that process.").

⁴ *See Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform*, p. 35–46 (Sept. 2005) (bipartisan Carter-Baker Commission's finding that absentee balloting has been a major source of specific types of fraud); *U.S. Dep't of Justice, Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), pp. 28–29 (absentee ballots across the nation are particularly susceptible to fraud and abuse because they are marked and cast outside the presence of election officials and the structured environment of a polling place).

A. Failure to Obtain an Application Prior to Voting In-Person Absentee

Pursuant to Wis. Stat. § 6.86(1)(a), an eligible voter must apply to vote by absentee ballot by submitting a “written application to the municipal clerk” by one of six expressly prescribed methods, including by mail, email or facsimile, and in person at the municipal clerk’s office. Wis. Stat. § 6.86(1)(a). In order to facilitate that process, Form EL-121 is provided to the voters. WEC, EL-121 Absentee Ballot Application (rev. 2020-07), <https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/EL-121%20Application%20for%20Absentee%20Ballot%20%28rev.%202020-06%29.pdf> (P. App. 24-25).

i. *In-Person Absentee Voting is NOT Exempt from the Application Requirement.*

In-person absentee balloting is authorized by Wis. Stat. § 6.86(1)(b), which requires as follows:

If application [for an absentee ballot] is made in person, the application shall be made no earlier than 14 days preceding the election and no later than the Sunday preceding the election. No application may be received on a legal holiday. A municipality shall specify the hours in the notice under s. 10.01 (2) (e). The municipal clerk or an election official shall witness the certificate for any in-person absentee ballot cast.

Wis. Stat. § 6.86(1)(b).

While statutes allow for the absentee process to occur in person, the Wisconsin Statutes expressly and unequivocally make clear that the elector must submit a written application before a ballot can be issued and that a municipal clerk is prohibited from issuing an absentee ballot to an elector unless that elector first submits a written application for the ballot:

[T]he municipal clerk ***shall not issue an absentee ballot unless the clerk receives a written application therefor*** from a qualified elector of the municipality. The clerk shall retain each absentee ballot application . . . ***if a qualified elector applies for an absentee ballot in person*** at the clerk's office, the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification. ***The***

clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application ...

Wis. Stat. § 6.86(1)(ar) (emphasis added).

Indeed, Form EL-121 expressly provides for its use when submitting a ballot during the in-person absentee voting period in two places: (1) a box to be checked by the clerk indicates it was completed for an “in-person voter,” and (2) section 5 of the application titled “I PREFER TO RECEIVE MY ABSENTEE BALLOT BY” includes a box to check for “VOTE IN CLERK’S OFFICE.” WEC, EL-121 Absentee Ballot Application (rev. 2020-07), <https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/EL-121%20Application%20for%20Absentee%20Ballot%20%28rev.%202020-06%29.pdf> (P. App. 24-25).

ii. The Legislature has Commanded Strict Compliance with the Application Requirement.

Wisconsin law requires strict compliance with absentee ballot procedures, including those governing the in-person absentee balloting process:

Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. **6.86**, 6.87 (3) to (7) and 9.01(1)(b) 2. and 4. **shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.**

Wis. Stat. § 6.84(2) (emphasis added); *accord Lee v. Paulson*, 2001 WI App 19 (The court excluded five absentee ballots from the certified election results because there was no corresponding written application. The removal of the five ballots changed the outcome of the election).

To ensure there is no doubt, the application requirement is found in Wis. Stat. § 6.86(1)(ar), which is among the sections expressly listed in Wis. Stat. § 6.84(2).

iii. The Municipal Clerks in Milwaukee and Dane Counties did NOT Require Electors to Submit Applications for In-Person Absentee Voting.

The record confirms that the clerks in Dane and Milwaukee Counties *did not* obtain an application prior to delivering a ballot to in-person absentee voters. *See e.g.*, Milwaukee Cty. Trans. 11/20/20 at 35:18-25; Milwaukee Cty. Trans. 11/24/20 at 15:16 - 16:14 (P. App. 33-35); Dane Cty. Trans. 11/22/20 at 58:19-21 (P. App. 54); Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12, Aff. Claire Woodall-Vogg dated 11/23/20 at ¶ 16 (P. App. 36-39). Absentee ballots totaling 108,947 were issued by municipalities within Milwaukee County and an additional 61,193 absentee ballots were issued by municipalities in Dane County during the “in-person absentee voting” period pursuant to Wis. Stat. § 6.86(1)(b) (the “In-Person Absentee Ballots”). Milwaukee Cty. Trans. 11/21/20 at 183:15-187:22 (P. App. 13-16); Dane Cty. Trans. 11/22/20 at 57:23-61:22 (P. App. 21-23); Dane Cty. Board Ex. 1. (P. App. 18).

None of the 170,140 In-Person Absentee Ballots issued in Milwaukee and Dane Counties during the in-person period under Wis. Stat. § 6.86(1)(b) had an associated written application. Instead, in both Dane and Milwaukee Counties, the Canvassing Boards during the Recount found that the Clerk’s receipt of form EL-122 (the “Envelope” in which the absentee ballot is placed by the elector), was sufficient to satisfy the statutory written application requirement. *See e.g.*, Milwaukee Cty. Trans. 11/20/20 at 34:13-20 (P. App. 41); Dane Cty. Trans. 11/22/20 at 58:19-21 (P. App. 42); Dane Cty. Board Ex. 1. (P. App. 18); Milwaukee Cty. Trans. 11/20/20 at 57:1 – 66:2 (P. App. 43-52); Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12; Aff. Claire Woodall-Vogg ¶ 16 (P. App. 36-39). Other municipalities, outside of Dane and Milwaukee County, did comply

with the statute by requiring a written application. Dane Cty. Trans. 11/28/20 at Trump Ex. 16, Aff. Lori Opitz ¶¶ 2-4 (P. App. 31-32).

These practices in Dane and Milwaukee County are plainly contrary to Wis. Stat. § 6.86(1)(a) (“[a]ny elector of a municipality who is registered to vote whenever required and who qualifies under §§ 6.20 and 6.85 as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods....”) and Wis. Stat. § 6.86(1)(ar) (“the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality.”)

This principal, that all absentee voters, without regard to whether the ballot is mailed or delivered in-person, are required to complete a separate written application is confirmed in § 6.86(1)(b). That statute notes that for the period of the in-person absentee voting, “the application shall be made.” Wis. Stat. § 6.86(1)(ar) leaves no doubt whatsoever that a written application is required to obtain an absentee ballot. “[T]he municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality” and the clerk is required to “retain each absentee ballot application.” Wis. Stat. § 6.86(1)(ar).⁵

In an attempt to explain their behavior, the Dane and Milwaukee County Clerks take the position that Form EL-122 (the certificate envelope into which an absentee elector places the ballot) constitutes the application described in the Statute. *See e.g.*, Milwaukee Cty. Trans. 11/20/20 at 34:13-20 (P. App. 41); Dane Cty. Trans. 11/22/20 at 58:19-21 (P. App. 42); Dane Cty. Board Ex. 1. (P. App. 18); Milwaukee Cty. Trans. 11/20/20 at 57:1 – 66:2 (P. App. 43-52); Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12; Aff. Claire Woodall-Vogg ¶ 16 (P. App. 36-

⁵ Form EL-121 can satisfy this requirement. (P. App. 24-25). It contains a specific box to be checked when it is submitted during the in person voting period. *Id.*

39). This is plainly wrong as it requires removing language from the Statute and requires one to ignore the structure imposed by the Statutes. It is even contradicted by WEC's own guidance.

Consider, for example, the statutory language expressly addressing in-person voting. It begins by noting that “[i]f the application is made in person, the application shall be made no earlier than fourteen days preceding the election and no later than the Sunday preceding the election.” Wis. Stat § 6.86(1)(b). The statute then describes, as a separate matter, that “[t]he municipal clerk or an election official shall witness the certificate for an in-person absentee ballot cast.” The “certificate” (i.e. ballot envelope) and the “application” are distinctly different documents treated differently in the Statute.

This reading of Wis. Stat. § 6.86 is confirmed even more emphatically if one considers the requirements related to the certificate envelope (EL-122) and the application. The municipal clerk is, by law, required to “retain each absentee ballot application.” Wis. Stat. § 6.86(1)(ar). Yet, the certificate envelopes are expressly not retained by the municipal clerk, but must, instead, be delivered to the County. Wis. Stat. § 7.52(4)(i) (“...the municipal clerk shall transmit the used envelopes to the county clerk”). WEC even provides a form for the delivery of EL-122 envelopes to the County, and sets out post-election procedures describing that same process. *See* WEC, Used Certificate Envelopes of Absentee Electors, https://elections.wi.gov/sites/elections.wi.gov/files/gab_forms/4/el_103_used_certificate_envelope_pdf_13716.pdf. WEC emphasizes the statutory requirement to forward the absentee ballot envelopes to the County in its explicit advice to municipal clerks on how to conclude election reporting. *See* WEC, Election Day Manual for Wisconsin Election Officials (Sept 2020), p. 140, <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Election%20Day%20Manual%20%282020-09%29.pdf>. One cannot square those two statutory provisions, or WEC's own forms and instructions, with the suggestions now made by the Dane and Milwaukee County Canvassing Boards. If the ballot envelopes are applications, then they must be kept

at the Clerk's Office, but the Statutes require that those ballot envelopes *must* be delivered to the County. However, if the application is a distinct, separate document (as the Statute clearly says it is), then the two statutory requirements for where the ballot envelopes and applications are kept (the county and municipality, respectively), as well as WEC's forms and instructions, are entirely consistent.

Interestingly, WEC's Recount Manual also confirms that the EL-122 is not the application required by the Statute. First, it, like the statutory language, recognizes that "the absentee ballot certificate envelopes" are a distinct document to be reviewed in order to determine the number of voters. WEC, Recount Manual November 2020,⁶ at pp. 7-8 <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Recount%20Manual%20Final%20%2811-2020%29%20highlight.pdf>. Acknowledging the absentee ballot certificate is a distinctly different document from the required application, the manual separately deals with the application in the immediately following section. There is no mention of them achieving the same purpose or being essentially the same thing—an application.

Moreover, in attempting to justify the situation where the "separate application" is missing, WEC makes no mention whatsoever of the Certificate Envelope (Form EL-122), but instead simply explains other reasons to ignore the absence of the required absentee ballot application. If, as the Canvassing Boards suggest, form EL-122 is the Application, then there would never be a need to look for a separate application, because, by law, every absentee ballot must be delivered in a sealed, ballot certificate envelope. Wis. Stat. § 6.87(4)(b)1.

Indeed, the actual application form, EL-121, contains a specific box to be checked for in person absentee voters. (P. App. 24-25). Again, there would be no need for that box on the form if, as is now suggested, the certificate envelope was the application. Necessarily, all voters will complete a certificate

⁶ A prior version of the Recount Manual, published in August 2018, contained identical information. WEC, Recount Manual August 2018, <https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf>.

envelope because there is no other legal way to submit an absentee ballot, whether they vote in person at the clerk's office or vote through the mail.

Certain practical aspects of the process also confirm the need for a separate application. The law expressly requires that “the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification. The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application . . .” Wis. Stat. § 6.86(1)(ar). If the application and the certificate are one document, there would be no point making the comparison.

Moreover, the linear nature of time makes clear the envelope cannot be the application. An application must be received *before* the ballot is provided. Recall the language of the Statute, “[T]he municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality.” *Id.* The envelope is not provided until the ballot has already been issued. If the EL-122 is the application, then it would need to be completed and returned to the clerk before the ballot is provided. But the EL-122 is not given to the clerk until after the elector has voted, the ballot is placed in the sealed certificate envelope and only then is the certificate envelope given to the clerk. The clerk has not received it in the time frame expressly required by the Statute: before the ballot is issued.

iv. Absentee Ballots Cast Without A Corresponding Application Must Be Excluded From the Final Vote Totals.

Pursuant to Wis. Stat. § 6.84(2), the requirements of § 6.86 are expressly mandatory. “Ballots cast in contravention of [§ 6.86] *may not be counted*” and “*may not be included in the certified result of any election.*” Wis. Stat. § 6.84(2) (emphasis added); *Accord Lee v. Paulson*, 2001 WI App 19, *supra*.

The Court of Appeals has already ruled that, based on the Statutes cited above, absentee ballots cast without an associated written application must be excluded. In *Lee v. Paulson (in re Ballot Recount)*, a local county supervisor's race during the November 2000 general election went to a recount. 2001 WI

App 19, ¶¶ 1-3. During the recount, the Polk County Board of Canvassers concluded that Walter Lee received 159 votes and that David Paulson received 161 votes, but during the recount the board found that five absentee ballots did not have the required application. *Id.* ¶ 2. Nevertheless, the Board of Canvassers decided to include the absentee ballots without applications. *Id.* ¶ 3.

On review of the Board of Canvassers' results, the Wisconsin Court of Appeals held that any and all absentee ballots issued without a written application cannot be counted pursuant to Wis. Stat. §§ 6.84(1)-(2) & 6.86(1)(ar) and since all of the defective absentee ballots were cast for Mr. Paulson five votes were deducted from his totals and Mr. Lee prevailed with 159 votes to Mr. Paulson's 156 votes. *Id.* ¶ 11.

This is not news to WEC. In a remarkably disingenuous section of its Recount Manual (discussed earlier in the context of the separate character of the application and certificate envelope), WEC suggests that the Board of Canvassers should ignore both the Statutes and *Lee v. Paulson*, and instead follow the informal opinion of WEC's staff attorney. *See* WEC, Recount Manual November 2020, at pp. 7-8, n. 5, <https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf> (stating that “[t]here should be a written application for each absentee ballot envelope except those issued in-person in the clerk’s office,” instructing canvassers to “not reject an absentee ballot if there is no separate written application,” and noting as contrary authority for these instructions both Wis. Stat. § 6.84(2) and *Lee v. Paulson, supra*). Of course, WEC avoids any responsibility for this patently incorrect advice by explaining that the Boards of Canvassers must make their own legal decisions. *Id.*

During the Recount, Petitioners identified 170,140 In-Person Absentee Ballots that were issued and cast without the required written application in Milwaukee County and Dane County.

Milwaukee Cty. Trans. 11/21/20 at 183:15-187:22 (P. App. 12-16); Dane Cty. Trans. 11/22/20 at 57:23-64:22 (P. App. 22-23); Dane Cty. Board Ex. 1 (P. App. 18). The Boards verified and agreed with those numbers. The Boards then held that those ballots satisfied the statutory requirement for an application because the EL 122 Envelope constitutes a sufficient application. Dane Cty. Board Ex. 1 (P. App. 18); Milwaukee Cty. Trans. 11/20/20 at 34:13-20, 57:1 – 66:2 (P. App. 41, 43-52); Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12, Aff. Claire Woodall-Vogg dated 11/23/20 at ¶ 16 (P. App. 36-39). Petitioners objected to counting any of those ballots and requested that they be excluded from the results. Milwaukee Cty. Trans. 11/22/20 at 4:20-24 (P. App. 17); Dane Cty. Trans. 11/20/20 at 15:9-18:14 (P. App. 20-21). The Boards overruled Appellants' objections and continued illegally counting such ballots as part of the Recount. Milwaukee Cty. Trans. 11/21/20 at 186:11 – 187:10 (P. App. 27-28); Dane Cty. Tran. 11/20/20 at 36:15 – 40:25 (P. App. 29-30).

Failing to grant the objection to absentee ballots cast without an application is a legal error by the Boards and should be reversed by this Court. As to the remedy, that is dealt with below.

B. Incomplete and Altered Absentee Envelopes

Absentee balloting must be witnessed, and the certification on the outside of the envelope provides a place where the witness must sign *and provide his or her address*. Wis. Stat. § 6.87(2). If the certification lacks the witness's address, it may not be counted: "*If a certificate is missing the address of a witness, the ballot may not be counted.*" Wis. Stat. § 6.87(6d) (emphasis added). Lest there be any doubt about whether this is directory or mandatory, this provision falls within the scope of provisions that Wis. Stat. § 6.84(2) declares mandatory. As recently as 2015, the Wisconsin Legislature reaffirmed the essential requirement that the ballot envelope certificate must be fully and accurately completed by the voter and the witness. 2015 Wis. Act 261, § 78 (creating Wis. Stat. § 6.87(6d)).

The Legislature provided one, and only one, legal method for remedying an improperly completed absentee ballot certification (such as a certification lacking the witness's address), and that is to return it to the elector:

If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot . . .

Wis. Stat. § 6.87(9).

Contrary to the law, both Dane and Milwaukee Counties held that both incomplete and altered absentee envelopes were allowed. Dane Cty. Trans. 11/20/20 at 60:1 - 65:14 (P. App. 62-63); Milwaukee Cty. Trans. 11/20/20 at 115:11 - 128:17 (P. App. 64-77). Milwaukee County counted all those ballot envelopes falling within the category of altered (red-ink) absentee ballots and entered that number into the record through a series of tabulations. (*See* P. App. 203-213 citing to all such tabulations). Dane County, in contrast, examined each such envelope and ruled accordingly. Dane Cty. Trans. 11/24/20 at 20:23-22:20, Ballot No. A7619 (P. App. 144-147); 11/25/20 at 43:18-44:21, Ballot No. 738A (P. App. 148-150); Dane Cty. Trans. at 11/25/20 at 83:1-84:22, Ballot No. 1002A (P. App. 140-141, 143); 11/28/20 at 61:1-25, Ballot No. 372 (P. App. 138-139); Ballot No. 571A (P. App. 151). Given the limitations in time, the Appellants Complaint only cites 2,238 envelopes in Dane County for which objections were overruled by the Board as illustrative. *Id.*; Dane Cty. Trans. 11/23/20 at 49:8-53:22, 11/24/20 at 78:25-79:18 (P. App. 56-57); Trump Ex. 13 (P. App. 152-162). Appellants make no claim here as to the balance of similar envelopes in Dane County solely to avoid the need to examine such a volume of evidence in the limited time permitted.

No municipal or county clerk is authorized to alter an elector's certificate envelope. Yet for the 2020 Election, clerks in municipalities throughout Milwaukee and Dane Counties altered absentee ballot certifications rather than follow the correct procedure under Wis. Stat. § 6.87(9).

Milwaukee used red ink to signify an address had been added or altered by the clerk's office. *See* Aff. Claire Woodall-Vogg dated 11/23/20 at ¶ 9 (P. App. 36-39); *see also* Youtube.com, Milwaukee Central Count Training Video (April 1, 2020), <https://www.youtube.com/watch?v=hbm-pPaYIqk> (last visited November 25, 2020) (City of Milwaukee training video indicating, from 10:40 to 11:15 of the video, that election officials may insert a missing witness address in "red ink," which is contrary to law). In other municipalities, the clerks initialed the certification next to the addresses they added.

The Appellants objected to the counting of ballots that were submitted in incomplete or altered envelopes. *See* Dane Cty. Trans. 11/20/20 at 48:25 - 49:8 (P. App. 58); Milwaukee Cty. Trans. 11/23/20 at 25:19 - 27:21 (P. App. 59-61). No one during the Recount argued that the ballots designated were not, in fact, either incomplete or altered. Having noted the existence of incomplete and altered envelopes, the Boards of both Counties none-the-less allowed them to be counted. Dane Cty. Trans. 11/20/20 at 60:1 - 65:14 (P. App. 62-63); Milwaukee Cty. Trans. 11/20/20 at 115:11 - 128:17 (P. App. 64-77). Each overruled the objections on legal grounds that such incomplete and altered absentee envelopes were legal. *Id.* Failing to grant the objection is a legal error by the Boards and should be reversed by this Court. As to the remedy, that is dealt with below.

C. COVID-19 and Unauthorized and Improper Attempts to Change Absentee Voting

The effect of the COVID-19 pandemic has been extraordinary. Businesses, courts, and government have tried to adapt, sometimes within Wisconsin's legal boundaries and sometimes beyond them. This was no different in our elections. Municipal clerks laudably adapted with

plexiglass shields, masks, and social distancing on election day. Of course, however laudable the intentions (and good people can differ on the real motives and intentions), the election laws must be followed. In two major substantial actions, Milwaukee and Dane Counties took steps which clearly went beyond their legal authority.

I. Abuse of Indefinitely Confined Status

Wisconsin statutory law expressly requires that all eligible electors must provide proof of identification in order to register to vote, and each time they vote. Wis. Stat. §§ 6.79(2)(a), (3), and 6.87(1). Photo identification is also required when requesting to vote by absentee ballot. Wis. Stat. §§ 6.86(1)(ac), (ar) and 6.87(1).

There are very limited exceptions to the requirement that an elector must provide photo identification with any application for an absentee ballot, including an exception if an elector certifies that he or she is “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period . . .” Wis. Stat. § 6.86(2)(a). In fact, in order to qualify for the exception, an elector must be “elderly, infirm or disabled **and** indefinitely confined.” *Frank v. Walker*, 17 F. Supp. 3d 837, 844 (E.D. Wis. Apr 29, 2014) (emphasis added), *rev’d on other grounds*, 768 F.3d 744 (7th Cir. 2014). An elector who meets the strict definition of “indefinitely confined” in Wis. Stat. § 6.86(2)(a) must sign a statement to that effect, and then “the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement . . . which contains the name and address of the elector and verifies that the name and address are correct.” Wis. Stat. § 6.87(4)(b)2.

For the November election, the number of electors claiming “indefinitely confined” status and thereby obtaining an absentee ballot without the otherwise required photo identification increased massively. In Milwaukee and Dane Counties alone, 46,498 absentee ballots were issued

and returned by indefinitely confined electors without identification. Dane Cty. Trans. 11/28/20 at 7:2-12:8 (Dane had 15,102 voters in this category and 8,907 claimed such status after March 25th); Milwaukee Cty. Trans 11/27/20 at 19:23-22:2 (Milwaukee County had 31,296 voters in this category and 19,488 claimed such status after March 25th).

As noted earlier, the number of those claiming to be indefinitely confined in Dane and Milwaukee Counties ballooned after the clerks of both counties issued public statements that all electors could claim this status based solely on the Governor's Safer at Home Order. This Wisconsin Supreme Court conclusively declared that such advice was incorrect. *See*, March 31, 2020 Order, *Jefferson v. Dane County*, No. 2020AP557-OA at 2 (P. App. 78-80) (explaining that the Dane County and Milwaukee County Clerks indicated that "all Dane [and Milwaukee] County voters could declare themselves to be 'indefinitely confined' under Wis. Stat. § 6.86(2)" because of the Safer at Home Order "thereby avoiding the legal requirement to present or upload a copy of the voter's proof of identification when requesting an absentee ballot" and concluding that such "advice was legally incorrect.").

As the Recount demonstrated, the damage was already done. People continued to apply for the status, continued not to provide identification and ultimately voted. As it happens, the clerks and the electors each had an obligation to act and each failed. Municipal clerks are expressly charged with the responsibility to review and expunge from the voter rolls those claiming to be Indefinitely Confined Voters when the Clerk has "reliable information that [the]... elector no longer qualifies for the service." Wis. Stat. § 6.86(2)(b). Moreover, electors who claimed they were Indefinitely Confined, but were not physically ill, infirm, elderly, or disabled were obligated to take steps to remove themselves from that status prior to the November 3, 2020 election. Wis. Stat. § 6.86(2)(a) ("If any elector is no longer indefinitely confined, the elector shall so notify the

municipal clerk.”) The Dane County Clerk acknowledged this obligation. Aff. Jordan Moskowitz (11/27/20) ¶8, Ex. 6 (P. App. 87-96). Unfortunately, no action was taken.

Indefinitely Confined Absentee Ballots issued without the required photo identification to electors that were not “elderly, infirm or disabled *and* indefinitely confined” were issued in violation of clear and unambiguous law and must be excluded from any certified results of the Election. Wis. Stat. § 6.86(2)(a); *Frank*, 17 F. Supp. 3d at 844. During the Recount, Petitioners identified with specificity Indefinitely Confined Absentee Ballots that were issued after the improper March 25, 2020 statements by the Dane County and Milwaukee County Clerks. *See* Milwaukee Cty. Trans. 11/27/20 at 19:23 - 22:3 (P. App. 81-84); Dane Cty. Trans. 11/28/20 at 7:2 - 12:6 (P. App. 85-86); Aff. Jordan Moskowitz dated 11/27/20 at ¶¶ 2-6, Ex. 1-4 (P. App. 87-96); Aff. Jordan Moskowitz dated 11/25/20 at ¶¶ 1-4 (P. App. 128-137). That identification was based on publicly available records provided to the Appellants by the Boards and there was no objection or other dispute about the accuracy of the number. *Id.* Petitioners isolated only those claiming the status after March 25 (the date of the offending Facebook post discussed by the Supreme Court in *Jefferson v. Dane County*, No. No. 2020AP557-OA) who had no identification on file and who did not vote in specific locations where their identity would have been noted. Appellants objected to counting any of these ballots and requested that they be excluded from the results. Dane Cty. Trans. 11/28/20 at 7:12 – 17:11 (P. App. 85); Milwaukee Cty. Trans. 11/27/20 at 19:23 - 22:22 (P. App. 81-84); Milwaukee Cty. Trans. 11/25/20 at Ex. 261, Aff. Jordan Moskowitz dated 11/25/20 (P. App. 128-137). The Boards overruled Petitioners’ objections and continued improperly counting those ballots as part of the Recount. *Id.*

The Canvassing Boards of both counties overruled the objections related to 28,395 Indefinitely Confined Persons who obtained that status after March 25, 2020 (the date of the improper advice by the

clerks to the public) and voted without any ID. The Boards held that as a matter of law the Clerks were not obligated to verify that individuals qualified indefinitely confined statuses. *Id.* Failing to grant the objection is a legal error by the Boards and should be reversed by this Court. As to the remedy, that is addressed in section II, *infra*.

II. Democracy in the Park

Wisconsin does not allow advance voting; instead, it has created a system of carefully tailored Statutes for absentee voting. Among the issues addressed in the Statutes are matters related to how a municipal clerk must act in advance of the election. So, for example, a municipal clerk must have only one place where ballots are received and if an alternate location is preferable, for in-person voting and the like, then the clerk must comply with very stringent rules described in Wis. Stat. § 6.855(1), including authorization from the governing body and creation of only one such alternate office. That law comports with prior decisions of the Supreme Court of Wisconsin, under a predecessor Statute, that excluded absentee ballots delivered to a location other than the appropriate municipal clerk's office. *Olson v. Lindberg*, 2 Wis. 2d 229, 236, 85 N.W.2d 775, 780 (1957)

Apparently to avoid numerous restrictions imposed by the Statutes, the City of Madison invented "Democracy in the Park." By this scheme the City placed poll workers in 206 locations on September 26 and October 3 (Dane Cty. Trans. 11/24/20 at 52:16 - 56:15 (P. App. 99-100); Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at ¶¶ 3-6, Ex. B-E (P. App. 101-113); Dane Cty. Trans. 11/24/20 at Ex. 2, Affidavit of Maribeth Witzel-Behl dated Nov. 23, 2020 (P. App. 122-134)), mimicked polling places by putting up signs identical to those for elections (Dane County Trans. 11/24/20 at 52:16 - 64:10 (P. App. 116-119); Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at ¶ 2, Ex. A (P. App. 101-113)), and then

acted in every way as if it were an election excepting only that they did not distribute ballots. Dane Cty. Trans. 11/24/20 at 52:16 - 64:10 (P. App. 116-119).

While the audacity of the scheme might be lauded by the Biden campaign—it was heavily promoted by them (Dane Cty. Trans. 11/24/20 at 57:11 - 58:16 (P. App. 114); Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at ¶ 2, Ex. A (P. App. 101-113)), it flagrantly violates a host of election laws. If, for example, these locations are “extensions” of the Clerk’s Offices, they are barred by prior rulings of the Supreme Court of Wisconsin. *Olson v. Lindberg*, 2 Wis. 2d 229, 236, 85 N.W.2d 775, 780 (1957) (excluding absentee ballots delivered to a location other than the appropriate municipal clerk’s office under a prior version of the statute).

These “Democracy in Park” locations were not legally established alternate absentee ballot sites because they were not established by the City of Madison Common Council; instead they were “created by, planned by, staffed by, and paid for by the City Clerk’s Office.” City of Madison, Statement of Madison City Clerk Maribeth Witzel Behl Regarding Democracy in the Park (Sept. 25, 2020), <https://www.cityofmadison.com/clerk/news/statement-of-madison-city-clerk-maribeth-witzel-behl-regarding-democracy-in-the-park>. See also Dane Cty. Trans. 11/24/20 at Ex. 2, Aff. Maribeth Witzel-Behl dated 11/23/20 at ¶ 5 (P. App. 122-124).

Alternate absentee ballot sites, however, may only be established by the “governing body of a municipality” and, if such a site is designated by the governing body of a municipality, then “no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.” Wis. Stat. § 6.855(1). There can be only one such site, but here there were 206, and the single site must be “as near as practicable” to the original office—something all 206 could not have been. *Id.*

Moreover, Wisconsin Statutes contemplate only limited ways in which an absentee ballot may be returned. It is either mailed or it is delivered in person to the clerk's office. Wis. Stat. § 6.87(4)(b). So, the dilemma for Madison was that these sites were either considered additional clerk's offices, in which case they were barred by Wis. Stat. § 6.855(1), or they were not clerk's offices, in which case they run afoul of the allowable methods for delivery of such ballots and run afoul of rules barring ballot delivery at places other than the clerk's office. Wis. Stat. § 6.87(4)(b); *Olsen*. Either way, the ballots received at "Democracy in the Park" violate the law and must not be counted.

The City of Madison, apparently recognizing the potential claim that might come after the election, commingled all the absentee ballots received at those events with other absentee ballots. However, the City did present undisputed facts that 17,271 ballots were received at those events. *See* Dane Cty. Trans. 11/24/20 at 52:16 - 56:15 (P. App. 99-100); Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at ¶¶ 3-6, Ex. B-E (P. App. 101-113); Dane Cty. Trans. 11/24/20 at Ex. 2, Affidavit of Maribeth Witzel-Behl dated Nov. 23, 2020 (P. App. 122-134). The Appellants objected to the counting of the ballots received during the Democracy in the Park event. Dane Cty. Trans. 11/24/20 at 52:3 - 56:15 (P. App. 99-100). The Board held, as a matter of law, that the event did not violate Wisconsin Election laws. Dane Cty. Trans. 11/24/20 at 72:21 - 73:16 (P. App. 120-121). Failing to grant the objection is a legal error by the Dane County Board of Canvassers and should be reversed by this Court. As to the remedy, that is dealt with below.

III. Relief for the Statutory Violations Must Include Declaratory Relief followed by a Drawdown of Votes.

A. Appellants request a Declaratory Judgment and Drawdown

The factual and legal conclusion that the Wisconsin Absentee voting Statutes were violated by the actions of Dane and Milwaukee clerks is wholly supported by a fair reading of Wisconsin Statutes and the facts. Having found the violation, this Court will need to determine the appropriate remedy.

At the outset, the Complaints ask that the Court enter an appropriate Declaratory Judgment with regard to the violations. That declaration is essential to establishing the basis for further action. Moreover, a declaration on the meaning of the Statutes involved will have enormous value not only to the Parties, but to the public as well. Without regard to the impact on this election, a holding by this Court on the meaning of the Statutes as applied to each of the four categories will prevent such abuses in the future. The Declaratory Judgment Act is an essential tool in matters of great public interest involving statutory interpretation. Cases of this type are costly and rare, and as such present an important vehicle for assisting public officials and private parties in their future actions.

The Appellants have asked, as well, that the Court enter the relief provided for within the Election Code. As noted earlier, violations of the provisions related to absentee voting require that the ballots “may not be counted” and “may not be included in the certified results of any election.” Wis. Stat. § 6.84(2). The Statute is clear and unequivocal. Moreover, the provisions of that Statute are, by law, “mandatory.” Wis. Stat. § 6.84(2). *See In re Chairman in Town of Worcester*, 29 Wis. 2d 674, 139 N.W.2d 557 (1966) (holding that absentee ballots without the name or initials of town clerk must be excluded under mandatory provision of predecessor statute); *Lee v. Paulson, supra* (absentee ballots issued without a corresponding written application must be excluded).

The process for withdrawing already cast ballots is described in the Statutes as a draw-down. Wis. Stat. 9.01(b)(4)(b)(e); (*Ard v. Bd. of Canvassers*, 2019 WI App 26, 387 Wis. 2d 686, 928

N.W.2d 814 (citing Wis. Stat. § 9.01(1)(b)). That is, having determined the number of ballot envelopes that are illegal, the voter roll for that municipality is then reduced by that total number. *Id.* This leads to an imbalance between ballots cast and number of eligible voters. *Id.* The ballots for that municipality are divided into absentee and non-absentee ballots, and as all the reductions would be from the absentee ballots, there is then a random drawdown of absentee ballots until the number of legal voters matches the number of ballots. *Id.* The tally then for the Office of President will be redetermined and those new results become the official tally to be certified by WEC and forwarded to the Governor. *See id.* That is the process required by Statute and requested by the Appellants.

It is also the remedy acknowledge by the Corporation Counsel for Milwaukee County:

"MS. DAUN: I think, Mr. Chairman, you can simply take a vote to include those as part of the record evidence here, all of them. Therefore, a total can be obtained at any time by rereview once the court jurisdiction determines that those are voters whose votes should not count."

(11/21/20 at 170: 4 - 15.)⁷

B. Anticipated Arguments of the Appellees--Laches

As the Appellants will not have an opportunity to file a written reply to arguments the Appellees may pose, we are providing the following comments addressing arguments the Appellees have previously made.

i. Laches

The Appellees have suggested that the Appellants were required to bring an action before the election took place to address the issues raised here. Of course, particularly in matters of public

⁷ It appears that several clerks (the clerk for the cities of Milwaukee and Wauwatosa in particular) violated the law by writing the voter number of all absentee voters in their wards on the ballots themselves and have opined that if this Court remands the case to for a drawdown that they would once again ignore the law and instead identify specific ballots that can be tied to specific voters for exclusion (R. 11/23/20 at 30:19 - 31:15), the Appellants request a draw down as that is the only legally available remedy. Wis. Stat. sec. 9.01(b)(4)(b)(e).

policy, that equitable defense does not apply to finding the violations and entering an appropriate Declaratory Judgment. (lengthy citation).

The equitable doctrine of laches has three elements, each of which must be proven by the Appellees. *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, 393 Wis. 2d 308, 946 N.W.2d 101 (unreasonable delay, lack of knowledge by other party, prejudice to other party). Cases allowing a laches defense in election law in Wisconsin are rare. There are a number of reasons for that paucity of authority. First, the violations discovered during the recount necessarily occurred during the election, not before. *Id.* at ¶17 (distinguishing substantive objections to the application of statutes, which may not even ripen until the applications occur, from belated challenges to their procedural enactment for purposes of laches) (citing *Schaeffer v. Anne Arundel Cty.*, 338 Md. 75, 656 A.2d 751, 753-55 (1995); *Stilp v. Hafer*, 553 Pa. 128, 718 A.2d 290, 293-94 (1998)). The recount Statute is absolutely clear that a recount and then an appeal to the courts is the only proper way to address these violations. Wis. Stat. § 9.01(11) (“[e]xclusive remedy. This section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process.”) A candidate must wait for an election to take place in order to challenge that election. Second, there is a statutory time period for bringing claims. The Petition for Recount and Appeal here were both brought during that time period. *Worcester*, 29 Wis. 2d 674, 676, 139 N.W.2d 557, 558 (1966).

The argument of laches is premised on a view by the other parties that if WEC guidance was incorrect, every candidate for office, if that candidate disagrees with the advice, must challenge it before the election. That is nonsense. WEC itself notes that its advice is just that-- “advice”. WEC, Recount Manual November 2020, at pp. 7-8, n. 5, available at

<https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf>.

The Wisconsin Supreme Court has made clear the legal effect of the manuals and memos: “[t]hey are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions. *SEIU v. VOS*, 2020 WI 67, ¶ 102. They simply “explain” statutes and rules or provide “guidance or advice” about how the executive branch is “likely to apply” a statute or rule. *Id.* They impose no obligations, set no standards, and bind no one. *Id.* Thus, the idea that the petitioners had a duty to dispute these manuals and guidance letters is simply ridiculous.

These are not Rules (with all the attendant notice and process). If it were a rule explicitly binding on municipal clerks, perhaps some action might have been contemplated by a political party or other group (none of whom are parties here). But, of course, WEC chooses not to make Rules and none of the objected to behaviors here arose from any Rule. Indeed, WEC seems purposely not to seek rulemaking, likely to avoid the very legal entanglement it now finds itself facing. WEC wants it both ways. It wants to explicitly say these are not rules and the Boards of Canvassers and municipal officials must make their own decisions based on their own reading of the Statute (see WEC, Recount Manual at pp. 33-34, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Recount%20Manual%20Final%20%2811-2020%29%20highlight.pdf> stating that “despite advice provided by [WEC] ultimately the Board of Canvassers “retains the authority and discretion to make decisions it deems appropriate”), while simultaneously arguing that municipal officials can rely on that advice when it suits the Boards of Canvassers whim.

To be clear WEC can, and does, change its advice.⁸ WEC, Recount Manual November 2020, at pp. 7-8, n. 5, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Recount%20Manual%20Final%20%2811-2020%29%20highlight.pdf>; see also Recount Manual August 2018, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf>. It can be changed, enhanced, revoked or ignored at any time as evidenced by the limitless number of advisories, letters, opinions, booklets etc. it generates constantly. See Elections Day Manual, (Sep. 2020); WEC forms EL-100-401 (300 different forms created by WEC); WEC Admin. Rules Chs 2–20 (forty-six administrative rules). And WEC, as noted throughout this Memorandum, does not feel duty bound to follow the law. So, to require a candidate, particularly one running in fifty separate jurisdictions, to take action against every bit of changing advice a Wisconsin agency gives is unreasonable in the extreme and certainly cannot bind that national candidate by a doctrine of laches. Application of laches would impose an impossible burden on these Appellants and all future candidates.

Of course, applying the doctrine of laches is particularly inappropriate in matters of public interest. *Carlson v. Oconto Cty. Bd. of Canvassers*, 2001 WI App 20, 240 Wis. 2d 438, 443-44, 623 N.W.2d 195, 197-98 (citing *State ex rel. Pelishek v. Washburn*, 223 Wis. 595, 600, 270 N.W. 541 (1936)) (the public policy of the election statutes is that substantial violations of the election law should operate to vacate an election). Prior to an election, a candidate or potential candidate, can reasonably believe that A) election officials will follow the law and B) the matter is not ripe

⁸ In fact at the meeting held by WEC only hours after the President filed his Recount Petition and paid the \$3 million dollar Recount fee, WEC changed the Recount Manual. In addition to several non-substantive changes made related to COVID protocols, WEC staff attempted to remove from the manual all of the language related to the Board of Canvassers duty to review the absentee ballot applications. Thankful those changes were not made due to a 3-3 tie vote among the Commissioners. In any event, the fact that WEC staff attempted to change the rules of the game, after the game had begun and with a specific focus on the President's primary argument, demonstrates exactly why Laches is a poor fit for this case. *Id.* available at <https://elections.wi.gov/node/7250>.

for adjudication until it actually occurs. Now, the Appellees argue the candidate cannot raise these matters after the election because he failed to raise them before. As with any other citizen, a candidate cannot be required to bring a claim he reasonably believes cannot be brought.

As to the specific claims asserted by Appellants, *laches* cannot be held to be a bar. Indeed, with regard to the clerks' failure to obtain written applications prior to issuing absentee ballots to in person absentee voters, there is no possible way a candidate in a statewide or national race would be able to determine whether or not each municipal clerk across the state was following the Statutes. The lack of applications and the clerks' actions were undiscoverable before the Recount. In fact, even during the Recount both Boards of Canvass refused to let the Appellants review the applications they did receive for non-in-person voting.

Likewise, with regard to the municipal clerks' decision to alter the ballot certifications, Appellants could not know if the clerks did this until they were allowed to see the certificates. The earliest this could have happened was on election day (assuming observers at the polls could actually see the ballots). And, the Appellants did make objections to altered certificate envelopes. Indeed, at the City of Milwaukee Central Count location, the election officials made an announcement that they were preemptively denying all objections based on alterations to the certificate envelopes made by the clerk. Appellants objected again during the Recount and are now appealing the boards of canvassers' denial of those objections.

And, as to the improper use of the Indefinitely Confined status, the legality of the advice given by the Dane and Milwaukee County clerks was already litigated and the Supreme Court of Wisconsin determined it was illegal. *See Jefferson v. Dane*, No. 2020AP557-OA, March 31, 2020 Order at 2. This Court need only deal with the remedy on this question.

With regard to the illegalities related to Democracy in the Park, the City of Madison Clerk was put on notice by the Republican Party of Wisconsin that these events were illegal. *See, e.g.* GOP warns Madison to drop plan to collect ballots in parks, Associated Press, September 25, 2020, available at <https://www.channel3000.com/gop-warns-madison-to-drop-plan-to-collect-ballots-in-parks/>. And, Appellants are timely pursuing a remedy for this illegal conduct in the only manner allowed by Wisconsin law. Laches does not apply to this Recount appeal. Application of laches would, in effect, require all candidates to take actions against ever changing non-binding advice in every election, in advance of the election, before the candidate knows if anyone actually followed the advice. Such a determination would fundamentally change our elections and would violate Due Process in the Wisconsin and U.S. Constitution by imposing a process and a cost on these candidates and all future candidates. Such a cost, as a prerequisite to running for office, is patently improper.

Application of laches to this case would also place an intolerable burden on the exercise of a First Amendment right -- the right of a citizen to run for public office, by seeking to persuade other citizens to cast their votes for him or her -- by forcing candidates, in the midst of an election, to continuously monitor ever-shifting election procedures, and guess at which might or might not impact the result, and which post-election challenges might or might not be deemed barred under the doctrine of *laches*. The cloud of confusion, uncertainty and ambiguity this regime would cast over all candidates in all elections would violate the void-for-vagueness doctrine, a well-established aspect of due process jurisprudence. *E.g., Center for Individual Freedom v. Madigan*, 697 F.3d 464, 478-79 (7th Cir. 2012).

CONCLUSION

Appellants respectfully request the Court overturn those findings and conclusions of the Dane and Milwaukee County Boards of Canvassers and enter a Declaratory Judgment that those acts described violate the Statutes of the State of Wisconsin. Further, Appellants request that the Court, pursuant to Statute, Order the drawdown procedures be applied as to the violations.

Respectfully submitted this 7th day of December, 2020

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Email: [REDACTED]@lcojlaw.com

SUBJECT: Filings on Trump
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Rick Esenberg <[REDACTED]@will-law.org>
DATE: 12/07/2020 12:40

Rick,
Thought you might enjoy the read.
Jim

-  [Appendix of Plaintiffs Appellants.pdf](#)
-  [Dane County Complaint.pdf](#)
-  [Memo in Support of Judgment on Nt of Appeal and...](#)
-  [Milwaukee County Complaint and exhibits.pdf](#)
-  [Motion for Judgment.pdf](#)
-  [Proposed Findings of Facts and Conclusions of L...](#)

SUBJECT: Filings
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Daniel Suhr <[REDACTED]@libertyjusticecenter.org>
DATE: 12/07/2020 12:43

Dan,
Thought you might find this helpful. I hope you will be able to join as Amicus along this new journey.
Hopefully Brian doesn't send us to the Appellate Court.
We expect an oral hearing on Thurs or Friday and the judge will rule from the bench.
Let me know if you have any question.
Jim

-  [Appendix of Plaintiffs Appellants.pdf](#)
-  [Dane County Complaint.pdf](#)
-  [Memo in Support of Judgment on Nt of Appeal and...](#)
-  [Milwaukee County Complaint and exhibits.pdf](#)
-  [Motion for Judgment.pdf](#)
-  [Proposed Findings of Facts and Conclusions of L...](#)

SUBJECT: Fwd: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>, Joe Olson <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>
DATE: 12/09/2020 11:20

Ken and All,

For reasons that may be obvious--we do not want this screwed up as that could doom our S. Crt. case--KEN-- would you be able to do this for the other States? Joe--or you?

Jim T.

----- Forwarded message -----

From: **Boris Epshteyn** <[REDACTED]@donaldtrump.com>
Date: Wed, Dec 9, 2020 at 11:17 AM
Subject: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf
To: Judge Troupis <[REDACTED]@gmail.com>, Christina Bobb <[REDACTED]@cgbstrategies.com>

Judge, hope all is well! Question per Mayor - do you think you could prepare a sample elector ballot for Wisconsin?

If the answer is yes, how would you feel about preparing same sample ballots for PA, Georgia, Michigan, AZ, Nevada and New Mexico?

If that's difficult, we can have counsels in those states do it.

Thank you!

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

--

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On Dec 7, 2020, at 8:52 PM, Judge Troupis <[REDACTED]@gmail.com> wrote:

Boris,

TROUPIS 009931

Here are two memo's I had prepared for me on appointing a second slate of electors in Wisconsin. There is no need for the legislators to act. The second slate just shows up at noon on Monday and votes and then transmits the results. It is up to Pence on Jan 6 to open them.

'Our strategy, which we believe is replicable in all 6 contested states, is for the electors to meet and vote so that an interim decision by a Court to certify Trump the winner can be executed on by the Court ordering the Governor to issue whatever is required to name the electors. The key nationally would be for all six states to do it so the election remains in doubt until January. But, if you let the 14th pass without Trump electors meeting and voting and transmitting, no Court can change the outcome. You must have electors meet and vote and transmit on the 14th.

Important: NOTE that Van Jones at CNN agrees with this because he intended to have the Democrats do exactly what we are talking about had they not been certified in PA. (There is a link to the article.) This is not just a Republican fantasy. Van Jones and I believe Larry Tribe at Harvard have both opined and come to the same conclusion.

Of course, before you get out a limb with this I would ask you make sure to have other attorneys or friendly professors review our work here and confirm that what we are planning to do is not without support.

If you take it further, you will want to have a discussion with, or have others review this, with Ken Chesebro on our team.

I hope Rudy is ok. Give him my best.

Jim

On Mon, Dec 7, 2020 at 7:24 PM Boris Epshteyn <[REDACTED]@donaldtrump.com> wrote:

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

--

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TROUPIS 009932

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<2020-11-18 Chesebro memo on real deadline.pdf>

<2020-12-06 Chesebro memo on Trump electors voting on Dec 14.pdf>

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FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>, Joe Olson <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>
DATE: 12/09/2020 11:40

Oh, absolutely!!!

Just have Rudy or someone tell the other states to send me a draft of either the next thing they plan to file, and where they want to insert a paragraph and footnote on timing, and I can adapt our material to suit!

Or, if they want to file some sort of notice just updating the court, that's fine too.

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Tribe is crowing about safe harbor. It'd be nice if Trump or at least Ellis would retweet this:
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From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Wednesday, December 9, 2020 12:20:15 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>; Joe Olson <[REDACTED]@michaelbest.com>; George Burnett <[REDACTED]@lcojlaw.com>
Subject: Fwd: WISCONSIN - Re: [EXTERNAL]Re: 2020-11-20 Chesebro memo on real deadline2.pdf

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Jim T.

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Cell: [REDACTED]

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Donald J. Trump for President, Inc.

Cell: [REDACTED]

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TO: Kenneth Chesebro <[REDACTED]@msn.com>
CC: Joe Olson <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>
DATE: 12/09/2020 11:48

Ken,
I think what they want is us to draft the ballot for them to vote with, the mailing instructions, words for the meeting, timing of meeting, where the meeting must take place etc. So that they each do it exactly right under the Federal law or state law if it is different.
Jim

On Wed, Dec 9, 2020 at 11:40 AM Kenneth Chesebro <[REDACTED]@msn.com> wrote:
Oh, absolutely!!!

Just have Rudy or someone tell the other states to send me a draft of either the next thing they plan to file, and where they want to insert a paragraph and footnote on timing, and I can adapt our material to suit!

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TROUPIS 009937

Thank you!

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

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TROUPIS 009938

Jim

On Mon, Dec 7, 2020 at 7:24 PM Boris Epshteyn <[REDACTED]@donaldtrump.com> wrote:

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

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<2020-11-18 Chesebro memo on real deadline.pdf>

<2020-12-06 Chesebro memo on Trump electors voting on Dec 14.pdf>

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2/28/24, 10:05 AM

SUBJECT: Opposition Papers

FROM: Judge Troupis <[REDACTED]@gmail.com>

TO: "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>

CC: George Burnett <[REDACTED]@lcojlaw.com>, Joe Olson <[REDACTED]@michaelbest.com>, Kenneth Chesebro <[REDACTED]@msn.com>

DATE: 12/09/2020 11:54

Kurt,

As soon as all the papers come in (and they are coming now) could you have your office upload them in a way that our entire team can simply sign-in and read or print? That will avoid us sending them around piecemeal.

Thanks

Jim

TROUPIS 009940

2/28/24, 10:05 AM

SUBJECT: RE: Opposition Papers

FROM: "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>

TO: Judge Troupis <[REDACTED]@gmail.com>

CC: George Burnett <[REDACTED]@lcojlaw.com>, Joe Olson <[REDACTED]@michaelbest.com>, Kenneth Chesebro <[REDACTED]@msn.com>

DATE: 12/09/2020 11:57

Yes, we can have someone send a sharefile link. I see that a few filings have trickled in already.

Kindest regards,

KURT A. GOEHRE

Partner/Attorney

Law Firm of Conway, Olejniczak & Jerry, S.C.

231 S. Adams Street | P.O. Box 23200

Green Bay, WI 54305

P: [REDACTED] F: [REDACTED]

E: [REDACTED]@lcojlaw.com | lcojlaw.com

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From: Judge Troupis <[REDACTED]@gmail.com>

Sent: Wednesday, December 9, 2020 11:55 AM

To: Kurt A. Goehre <[REDACTED]@lcojlaw.com>

Cc: George Burnett <[REDACTED]@lcojlaw.com>; Joe Olson <[REDACTED]@michaelbest.com>; Kenneth Chesebro <[REDACTED]@msn.com>

Subject: Opposition Papers

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Thanks

Jim

This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.

2/28/24, 10:06 AM

SUBJECT: Memo re Equal Protection and Discriminatory Intent

FROM: [REDACTED] <[REDACTED]@gmail.com>

TO: Judge Troupis <[REDACTED]@gmail.com>

CC: "[REDACTED]@outlook.com" <[REDACTED]@outlook.com>, [REDACTED] <[REDACTED]@swvalawfirm.com>, Beauty and the Bees <[REDACTED]@gmail.com>, "[REDACTED]@gmail.com" <[REDACTED]@gmail.com>, "Clinton W. Lancaster" <[REDACTED]@thelancasterlawfirm.com>, [REDACTED] <[REDACTED]@gmail.com>

DATE: 12/09/2020 12:00

ATTACHMENTS (20201209-120054-0002737): ["Memo re Equal Protection and Intent _ CKS _ v2.docx"](#)

TROUPIS 009944

Dear Judge Troupis and Madison Legal Team,

Attached, please find a memo re equal protection and discriminatory intent. At this time, I must turn to working on the Appendix, but can turn back to this later if there are follow-up questions.

Regards,

Cindy

TO: Judge Troupis and Legal Team
FROM: [REDACTED]
RE: Equal Protection and Discriminatory Intent in the Election Context
DATE: December 9, 2020

Issue Presented

Is discriminatory intent a necessary element of a Fourteenth Amendment Equal Protection Clause claim in the election context?

Short Answer

Yes, if the claim is based on racial discrimination. A plaintiff must prove discriminatory intent if an Equal Protection claim is based on racial discrimination. When laws are racially neutral but have a racially disproportionate impact, they violate the Equal Protection Clause only if there is proof of purposeful discrimination. The Supreme Court applies this principle to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination. Discriminatory intent may be ascertained from the totality of the circumstances, including the historical context and whether a law is so irregular on its face that it could rationally be viewed only as a pretext for establishing racial classifications.

No, if the claim is based on generalized unequal vote weighting. There is a smattering of Equal Protection cases addressing the unequal weighting of votes in which the Supreme Court has not considered discriminatory intent. These cases involve broader problems with unequal vote weighing outside of the racial discrimination context.

No, if alternatively brought under the Voting Rights Act. While claims brought under the Voting Rights Act are not constitutional claims, they provide similar voting and racial discrimination protections as found in the Fourteenth and Fifteenth Amendments and do not require a showing of discriminatory intent.

Equal Protection Clause

Express racial classifications. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., Amdt. 14, § 1. “Its central mandate is racial neutrality in governmental decision making.” *Loving v. Virginia*, 388 U.S. 1, 11 (1967). “A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.” *Shaw v. Reno*, 509 U.S. 630, 643-644 (1993). “No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute.” *Id.* at 642-643 (internal citations omitted).

Disproportionate impact. A law that is “neutral on its face and serving ends otherwise within the power of government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. *Id.*; see also *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-268 (1977) (“Official action will not be held unconstitutional solely because it results in a racially disproportionate impact.”). Yet, equal protection principles apply “to those rare statutes that, although race neutral, are, on their face, unexplainable on grounds other than race.” *Shaw*, U.S. at 643 (internal citations omitted). When discriminatory impact is found, “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” *Id.*

Discriminatory intent or purpose. Difficulties arise in ascertaining discriminatory intent because “[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the dominant or primary one.” *Id.* Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Id.*

The impact of the official action – whether it bears more heavily on one race than another, may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached. The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking [sic] body, minutes of its meetings, or reports.

Id. (internal citations omitted).

Election Context

Claims Based on Racial Discrimination. “[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment.” *Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980). “[T]his principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination.” *Id.* “[A]n illicit purpose must be proved before a constitutional violation can be found.” *Id.*

“Drawing on the ‘one person, one vote’ principle, [the Supreme Court has] recognized that ‘the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.’” *Shaw*, 509 U.S. at 640-641 (citing to *Allen v. State Bd. of Elections*, 393 U.S. 544, 569, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969)). “Where members of a racial minority group vote as a cohesive unit, practices such as multimember or atlarge [sic] electoral systems can reduce or nullify minority voters’

ability, as a group, to elect the candidate of their choice. Accordingly, the [Supreme] Court [has] held that such schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength. *Shaw*, 509 U.S. at 641.

In *Shaw v. Reno*, appellants challenged redistricting legislation on the basis that it was “so extremely irregular on its face that it rationally [could] be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.” *Id.* at 642. Holding for appellants, the Supreme Court explained that “a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.” *Id.* at 649.

General Claims Based on the Unequal Weighting of Votes. In *Bush v. Gore*, the Supreme Court explained that “[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one course of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.” *Bush v. Gore*, 531 U.S. 98, 103-106 (2000). “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” *Id.* “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Id.*

In *Bush v. Gore*, the Court’s decision turned on “whether the recount procedures the Florida Supreme Court [] adopted [were] consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.” *Id.* Noting that the Supreme Court had “ordered that the intent of the voter be discerned from such ballots” the Court found that “[t]he recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right.” *Id.* The Court explained that the “problem inheres in the absence of specific standards to ensure its equal application [and that] [t]he formulation of uniform rules to determine intent based on these recurring circumstances is practicable and . . . necessary.” *Id.* “[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.” *Id.* The Supreme Court held that Florida’s “standardless manual recounts” violated the Equal Protection Clause and that the recount procedures adopted by the Florida Supreme Court were “inconsistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.” *Id.* at 103-106. In its opinion, the Court did not consider whether the recount procedures were founded on a discriminatory intent or purpose.¹

Other cases have applied similar reasoning. In *Moore v. Ogilvie*, an Illinois law required that certain candidate nominating petitions be signed by at least 25,000 qualified voters of the state, of which 200 voters must be from at least 50 of the 102 counties within the state. *Moore v. Ogilvie*, 394 U.S. 814, 815 (1969). The Court held that the statute violated the Equal Protection Clause because it “applied a rigid, arbitrary formula to sparsely settled counties and populous counties alike, discriminated against

¹ While *Bush v. Gore* discusses “voter intent” in the context of the Florida recount process, it is separate and distinct from the “discriminatory intent” required in Equal Protection cases alleging racial discrimination.

residents of populous counties in favor of rural sections, and lacked the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.” *Id.* In *Gray v. Sanders*, the Court held that the Equal Protection Clause was violated by the use, in tabulating the votes in statewide elections, of a county unit system that resulted in disproportionate vote weighting. *Gray v. Sanders*, 372 U.A. 368, 381 (1963). Neither of these cases discussed discriminatory intent or purpose.

The Voting Rights Act

“Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color. The current version forbids any standard, practice, or procedure that results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. Both the Federal Government and individuals have sued to enforce Section 2.” *Shelby County v. Holder*, 570 U.S. 529, 536-537 (2013) (internal citations omitted).

Section 2 of the Voting Rights Act of 1965 reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [52 U.S.C. § 10303(f)(2)], as provided in subsection (b);²

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. §10301(a), (b).

Notably, Section (2)(a) of the Act focuses only on whether the action “results in a denial or abridgement” and does not turn on the intent or purpose of the action. The absence of an intent requirement is a significant difference between the Equal Protection Clause and the Voting Rights Act.

² The statutory language of 52 U.S.C. §10301(a) is somewhat similar to that of the Fifteenth Amendment: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S.C. Const. Amend. 15.

Analysis

In their Oppositions, Respondents cite to *Bush v. Gore* for the principle that “having once granted the right to vote on equal terms, the State may not, by later arbitrary and separate treatment, value one person’s vote over that of another” and argue that Petitioners’ requested relief violates this rule because voters in Dane and Milwaukee counties would be treated less favorably than voters in other counties. *See* Evers’ Opp. at p. 51-52 (citing to *Bush v. Gore*, 531 U.S. 98, 100 (2000)); *see also* WEC’s Opp. at 22-25; Intervenors’ Opp. at 75-77. Respondents contend that counties may not use varying standards to determine what constitutes a legal vote and that invalidating votes case in Dane and Milwaukee counties but not votes cast in the same manner elsewhere in the state would deny Wisconsin voters the equal protection of the law. *See* WEC’s Opp. at 22-23 (citing to *Bush v. Gore*, 531 U.S. at 107-110).

Based on these allegations, Respondents are not asserting racial discrimination. Instead, they are making a generalized grievance that about the unequal weighting of votes in light of the requested relief. Accordingly, Respondents will not be required to demonstrate discriminatory intent or purpose.

Petitioners may remind the Court that *Bush v. Gore* was a narrow, fact-specific decision that was, by its own language, not intended to be read broadly. Petitioners may distinguish the present case from *Bush*, explaining that there is nothing vague or arbitrary about Wisconsin’s recount procedures – rather, they are well-established, detailed, and fair. Moreover, the Wisconsin recount did not require vague determinations regarding voter intent or result in inconsistent rulings. To the contrary, the Boards of Commissioners made consistent rulings regarding the validity or invalidity of all challenged ballots. Importantly, Petitioners may also distinguish the present case on the basis that the Clerks in Dane and Milwaukee County did not follow the law, thereby devaluing the weight of all of the other votes cast in the State. And Respondents chose not to demand recounts in other counties, even though they had an opportunity to do so.

Arguing Petitioners’ position from language in *Bush*, a court’s failure to issue a remedy in this case will result in the unequal weighting of all legal votes in Wisconsin. The only way not to diminish the weight of legally case Wisconsin votes is to drawdown from the counties that did not follow the law. Alternative remedies may also be proposed, such as setting aside the election altogether and either sending the electoral decision to the legislature or conducting a new election.

Finally, note that Evers’ Opposition raised a defense under the Voting Rights Act. Citing to 52 U.S.C. § 10101(a)(2)(B), Respondents claimed that the requested relief would not only defy the Constitution, “but would also violate the federal statutory prohibition . . . against denying any registered voter the right to vote in an election based on an immaterial error or omission under state law.” Analyzing this issue is beyond the scope of this memo, but deserves further research into the specialized provisions of the Voting Rights Act.

SUBJECT: Memo on logistics for the electors voting on Dec. 14 in the 6 contested states

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: Judge Troupis <[REDACTED]@gmail.com>

CC: Austin Browning <[REDACTED]@gmail.com>, "Olson, Joseph L (13465)"

<[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>

DATE: 12/09/2020 21:40

ATTACHMENTS (20201209-214035-0001936): ["2020-12-09 Chesebro memo on Dec 14 requirements for electoral votes.pdf"](#)

Jim,

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Kenneth Chesebro
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Boston, MA 02210

[REDACTED]
[REDACTED]@msn.com

(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

MEMORANDUM

TO: James R. Troupis
FROM: Kenneth Chesebro
DATE: December 9, 2020
RE: **Statutory Requirements for December 14 Electoral Votes**

Here is a summary of the requirements under federal law, and under the law of the six States in controversy, concerning what is required for presidential electors to validly cast and transmit their votes. Obviously, there are party leaders and/or officials in each State who are familiar with the relevant details who would deal with the logistics, most of whom have handled such details in past elections. This memo merely supplies a general overview.

It appears that even though none of the Trump-Pence electors are currently certified as having been elected by the voters of their State, most of the electors (with the possible exception of the Nevada electors) will be able to take the essential steps needed to validly cast and transmit their votes, so that the votes might be eligible to be counted if later recognized (by a court, the state legislature, or Congress) as the valid ones that actually count in the presidential election. (On why this could work, see [here](#) and [here](#).) And, they can do so without any involvement by the governor or any other state official (except, in some States, where access to the Capitol Building is or might be needed, or where the Governor must approve a substitute elector or, in Nevada, where the Secretary of State is involved).

It is important that the Trump-Pence Campaign focus carefully on these details, as soon as possible, if the aim is to ensure that all 79 electoral votes are properly cast and transmitted – each electoral vote being potentially important if the election ultimately extends to, and perhaps past, January 6 in Congress. The National Archives has a very helpful checklist, [here](#).

I. FEDERAL LAW

The federal-law requirements for the December 14 electors' meeting are set out in 3 U.S.C. §§ 6-11 (copy [here](#)).

- Under federal law, the Trump-Pence electors must all meet, together, on December 14, “at such place in each State as the legislature of such State shall direct.” 3 U.S.C. § 7.

- In most States there is no requirement that they meet in public. It might be preferable for them to meet in private, if possible, to thwart the ability of protesters to disrupt the event. Witness, via [this video](#), what happened when the Trump-Pence electors met in public in Wisconsin in 2016, even though the Trump-Pence victory had not been contested. Even if held in private, perhaps print and even TV journalists would be invited to attend to cover the event.

- Preferably all electors who were on the ballot in the particular State would be in attendance. But if some are unwilling (due to intimidation) or unable to make it, at least four of the States permit the electors who do attend to fill the empty slots with alternates. However, it is vital that any party stalwarts who are on hand to fill in if necessary be constitutionally eligible to serve – i.e., per Art. II, § 1, cl. 2, not a federal official or federal employee (not even having reserve status in the military).

- The electors would then all vote for Trump for President, and Pence for Vice President, separately. 3 U.S.C. § 8.

- The electors would then prepare and sign six identical sets of papers – “certificates” – listing under separate headings their votes, indicating that each of them has voted for Trump for President, and Pence for Vice President. 3 U.S.C. § 9. (For examples, see [here](#) the 2016 certificate signed in Wisconsin by its ten electors; images of the certificates submitted in 2016 are archived [here](#)).

- The only thing ordinarily contemplated by § 9 that the Trump-Pence electors would not be able to do is include with their certificates the certificate of ascertainment that the governor is directed to give the winning electors pursuant to 3 U.S.C. § 6. But, as the Hawaii 1960 example shows (see [here](#) and [here](#)), this is hardly fatal; proof that the Trump-Pence electors are the validly appointed ones can be furnished to Congress before it meets on January 6.

- Next, the electors would place each certificate in a separate envelope, seal up the envelopes, and indicate on the outside of the envelopes that they contain the votes of the State for President and Vice President. 3 U.S.C. § 10.

- Finally, the electors would transmit the six envelopes containing identical originals of their votes as follows:

- 1 to the President of the Senate, by registered mail, on the same day (“forthwith”).

- 2 to the Secretary of State of the State, one to be held in reserve for the President of the Senate, and the other to be preserved as a public record.

- 2 to the National Archives, one to be held in reserve for the President of the Senate, and the other to be preserved as a public record, also by registered mail (“[o]n the day thereafter”).

- 1 to the federal district court where the electors meet.

II. STATE LAW

A. Arizona: 11 electors

The most straightforward State is Arizona, whose statutory provision regarding presidential elections lists no additional requirements beyond the federal-law requirements set out above. **Ariz. Rev. Stats. § 16-212** ([here](#)).

Assuming it is confirmed that there are no additional requirements (check carefully; perhaps there are regulations, for example, issued by the Secretary of State), the Trump-Pence electors presumably could meet and cast their votes anywhere in Arizona, anytime on December 14.

One concern: if one or more electors are absent from the meeting, **is there a procedure under Arizona law for filling vacancies?** The other five States make provision for that contingency. In the absence of any guidance, the electors present should simply vote to fill any vacancy.

B. Georgia: 16 electors

Georgia has two statutory provisions:

Ga. Code Ann. § 21-2-11 ([here](#)) requires that the electors “assemble at the seat of government of this state at 12:00 Noon” on December 14. But what does “seat of government” mean? See [here](#). At minimum, they must meet somewhere in Atlanta – must they meet in the Capitol Building?

Ga. Code Ann. § 21-2-12 ([here](#)) supplies a mechanism for replacing one or more of the 16 electors if someone dies or fails to attend. In that event, the electors in attendance “shall proceed to choose by voice vote a person of the same political party . . . to fill the vacancy”

However, there’s a wrinkle. Unlike in other States, where that choice is automatically effective, in Georgia a choice must be ratified: “immediately after such choice the name of the person so chosen shall be transmitted by the presiding officer of the college to the Governor, who shall immediately cause notice of his or her election in writing to be given to such person.”

Could the Governor, in the current situation, refuse to ratify the choice, on the ground that this slate of electors is not the one the voters elected on Nov. 3 (according to the official canvass)? Given this statutory provision, **it seems imperative that every effort be made to secure the participation of all 16 electors, and to avoid making a substitution if at all possible.**

C. Michigan: 16 electors

The relevant provisions of Michigan law are **Mich. Comp. Laws §§ 168.41 & 168.47** ([here](#)).

Michigan is much more specific about the location in which electors must meet, which could be a bit awkward.

Under § 168.47, the electors “shall convene in the senate chamber at the capitol of the state at 2 p.m., eastern standard time” However, there is no requirement that they convene on the senate floor where, presumably, the Biden-Harris electors will convene. Presumably they could convene in the senate gallery.

Replacement of any absent elector is much easier than in Georgia: the electors who show up “shall proceed to fill such vacancy by ballot, by a plurality of votes.”

However, the qualifications for such replacement are more stringent than the federal requirements: under § 168.41, a Michigan elector must have been a U.S. citizen for at least 10 years, and a resident of Michigan for at least a year prior to Nov. 3.

D. Nevada: 6 electors

Nevada is an extremely problematic State, because it requires the meeting of the electors to be overseen by the Secretary of State, who is only supposed to permit electoral votes for the winner of the popular vote in Nevada. **Nev. Rev. Stats. §§ 298.065, 298.075** (see [here](#)).

These provisions are designed to thwart the “faithless elector.” They make no sense when applied to this situation, in which we are trying to have an alternate slate vote, in hopes that its legitimacy will be validated before January 6. Therefore, perhaps arguably the Nevada electors could simply meet and cast their votes, without the involvement of the Secretary of State. After all if, as in the Hawaii example in 1960, an alternate slate can meet and vote without the Governor’s certificate in hand, and the votes can later be deemed valid, then why should it matter that the alternate slate in Arizona, when voting on December 14, did not have the Secretary of State overseeing their voting?

It bears notice that in any scenario in which Trump and Pence might have a possibility of winning Nevada’s electoral votes, the failure to have the Secretary of State oversee the vote would hardly seem like a significant hurdle. If there were a vote in Congress to take Nevada away from Biden and Harris, presumably along with it would come a vote to overlook this procedural detail.

E. Pennsylvania: 20 electors

The statutory provisions in Pennsylvania parallel those in Georgia.

25 Pa. Stats. § 3192 ([here](#)) states that the electors “shall assemble at the seat of government of this Commonwealth, at 12 o'clock noon of” December 14. Again, does “seat of government” mean somewhere in Harrisburg, or does it instead mean the Capitol Building, specifically?

25 Pa. Stats. § 3194 ([here](#)) supplies a mechanism for replacing one or more of the 20 electors if someone dies or fails to attend. In that event, the electors in attendance “shall proceed to choose viva voce a person of the same political party . . . to fill the vacancy”

However, just as in Georgia, there is a wrinkle: the choice must be ratified: “immediately after such choice the name of the person so chosen shall be transmitted by the presiding officer of the college to the Governor, who shall forthwith cause notice in writing to be given to such person of his election” Given this statutory provision, **it seems imperative that every effort be made to secure the participation of all 20 electors, and to avoid making a substitution if at all possible.**

F. Wisconsin: 10 electors

Under Wisconsin law, the electors “shall meet at the state capitol,” which presumably means the Capitol Building (“state capitol” being a term more specific than “seat of government”), “at 12:00 noon.” Wis. Stat. § 7.75(1) ([here](#)).

Any absent elector may readily be replaced. *Id.* (“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.”).

* * *

In conclusion, it appears that voting by an alternate slate of electors is unproblematic in Arizona and Wisconsin; slightly problematic in Michigan (requiring access to the senate chamber); somewhat dicey in Georgia and Pennsylvania in the event that one or more electors don't attend (require gubernatorial ratification of alternates); and very problematic in Nevada (given the role accorded to the Secretary of State).

K.C.

2/28/24, 10:10 AM

SUBJECT: Re: Memo on logistics for the electors voting on Dec. 14 in the 6 contested states
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>
CC: Austin Browning <[REDACTED]@gmail.com>, "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>, George Burnett <[REDACTED]@lcojlaw.com>
DATE: 12/09/2020 22:04

Excellent.
Jim

Sent from my iPhone

On Dec 9, 2020, at 9:40 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

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Austin having found PDFs of the 2016 certificates, which supply helpful guidance, what we need now are accurate lists of the Trump-Pence electors in all six States.

With that information, I can draft papers, similar to those we now have for Wisconsin, ready to be signed in the other 5 States (subject to careful review by key officials in those States).

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(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

<2020-12-09 Chesebro memo on Dec 14 requirements for electoral votes.pdf>

TROUPIS 009958

SUBJECT: Re: elector certificate
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>
CC: [REDACTED]@yahoo.com
DATE: 12/10/2020 13:54

So do they list all the names after "10" in each category and then sign below?

Sent from my iPhone

On Dec 10, 2020, at 1:16 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Hi, Jim,

I've done a redraft of the Wisconsin certificate, cutting out some verbiage that's no necessary and is not found in the 2016 certificates of the other 5 contested states, and which also borrows some "best practices" language from the other certificates.

Obviously it's up to the Wisconsin electors what language to use, but I think this draft works better. I plan to adapt it for the other states.

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Wisconsin Certificate of Vote - National Archives

united states of america . state of wisconsin . certificate of vote cast . for . president and vice
president of the united states . by . presidential electors of wisconsin

www.archives.gov

Ken

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Thursday, December 10, 2020 1:33 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Re: elector certificate

I am doing a rewrite, to make it simpler and also incorporate best practices from other States.

Should have it done by 1 p.m.

None of the certificates from the 6 states submitted in 2016 was notarized -- I would leave that off.

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Thursday, December 10, 2020 1:29 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Fwd: elector certificate

Please review.
Jim

Sent from my iPhone

Begin forwarded message:

From: Brian Schimming <[REDACTED]@yahoo.com>
Date: December 10, 2020 at 12:15:08 PM CST
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Fw: elector certificate

For review from Jefferson

B

[Sent from Yahoo Mail for iPhone](#)

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On Thursday, December 10, 2020, 11:40 AM, Mark Jefferson <[REDACTED]@wisgop.org> wrote:

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Sent: Thursday, December 10, 2020 11:28 AM
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Cc: Alec Zimmerman <[REDACTED]@wisgop.org>
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Hey guys,

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Pence), WI Secretary of State, National Archives, Records Administration, and the Chief Judge of the Wisconsin Western District Court (Peterson).

Once again, I left out the language referring to the canvass certificate furnished by WEC (which we obviously won't have). And in place of WEC seals that we also won't have, I put a spot for a notary stamp. For reference, I've attached pictures of the documents we had in 2016 (elector certificate, WEC statement of canvass, and certificate of ascertainment from the Governor).

Let me know if you have any questions.

Chaz

<Electors Ballot 15.jpg>

<Electors Ballot 17.jpg>

<Electors Ballot 16.jpg>

<Dec 10 -- DRAFT OF WI ELECTORS CERTIFICATE -- Chesebro edits.docx>

SUBJECT: Re: elector certificate
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
CC: "[REDACTED]@yahoo.com" <[REDACTED]@yahoo.com>
DATE: 12/10/2020 13:58
ATTACHMENTS (20201210-135826-0001088): ["2016 WI electoral votes.pdf"](#)

Some states have certificates where the electors list all their names under President, and then also under Vice President, but it's clearly not required.

It's typical to just say (as this does) that the electors voted distinctly, by separate ballot, and record the totals -- and then have all the electors sign on the 2nd page, attesting that it's true.

Attached is the 2016 WI certificate which did exactly that.

It would be nice to get some of those official-looking gold seals!

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Thursday, December 10, 2020 2:54 PM
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Cc: [REDACTED]@yahoo.com <[REDACTED]@yahoo.com>
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<Dec 10 -- DRAFT OF WI ELECTORS CERTIFICATE -- Chesebro edits.docx>

UNITED STATES OF AMERICA

STATE OF WISCONSIN

CERTIFICATE OF VOTE CAST

FOR

PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

BY

PRESIDENTIAL ELECTORS OF WISCONSIN

WE, THE UNDERSIGNED, ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES OF AMERICA, being duly elected, qualified and acting Presidential Electors of the State of Wisconsin, pursuant to the attached certificate of the Chairperson of the Wisconsin Elections Commission, certified by Michael Haas, Interim Administrator of the Wisconsin Elections Commission and exemplified by Governor Scott Walker and Secretary of State Douglas La Follette, respectively; having met and convened at the State Capitol, in the City of Madison, in the State of Wisconsin, at 12:00 noon on December 19, 2016, pursuant to Section 7, Title 3 of the United States Code, and Section 7.75 of the Wisconsin Statutes, for the purpose of casting our votes for President and Vice President of the United States, and the transmitting of the results of our determination, in accordance with Sections 9 and 11, Title 3 of the United States Code, DO HEREBY CERTIFY:

That all of such Presidential Electors, so elected and so certified to this meeting of the Electoral College answered present and were present in person.

WE FURTHER CERTIFY that the following distinct lists contain a correct abstract of the votes cast for the election of President and Vice President of the United States, respectively:

FOR PRESIDENT

<u>Names of Persons Voted For</u>	<u>Number of Votes</u>
DONALD J. TRUMP of the State of New York	Ten (10)

FOR VICE PRESIDENT

<u>Names of Persons Voted For</u>	<u>Number of Votes</u>
MICHAEL R. PENCE of the State of Indiana	Ten (10)



IN TESTIMONY WHEREOF, We have hereunto set our hands. Done at the Capitol, in the City of Madison, in the State of Wisconsin, on the First Monday after the Second Wednesday in December, being the 19th day of December, 2016.

J. Bradford Courtney

Brad Courtney, Chairperson

Kathleen Kiernan

Kathy Kiernan, Secretary

Kim Travis

Kim Travis

Kim Babler

Kim Babler

Brian Westrate

Brian Westrate

Dan Feyen

Dan Feyen

Kevin Hermening

Kevin Hermening

Bill Berglund

Bill Berglund

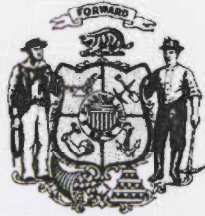
Steve King

Steve King

Mary Buestrin

Mary Buestrin

STATE OF WISCONSIN



WISCONSIN ELECTIONS COMMISSION
ELECTORAL COLLEGE OF WISCONSIN

CERTIFICATE OF FILLING VACANCY

Upon the call of the roll, a vacancy became known due to the absence of Elector

Jim Miller

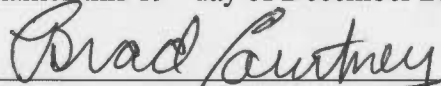
Representing the Seventh Congressional District of Wisconsin

Thereupon, by nomination duly made and seconded,

Kevin Hermening

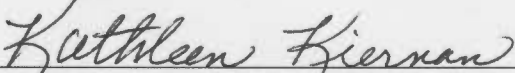
was elected by the Electors present, as an Elector of President and Vice President of the United States of America for the State of Wisconsin to fill the vacancy in the manner provided by law. This Elector participated in the proceedings as set forth in record of the Electoral College.

IN WITNESS WHEREOF the undersigned
Chairperson and Secretary of the Electoral
College of Wisconsin hereunto subscribe their
names this 19th day of December 2016.

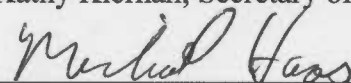


Brad Courtney, Chairperson of the College

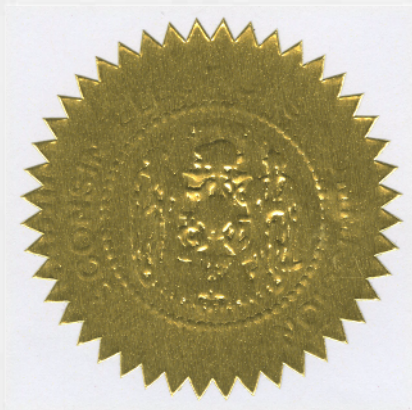
ATTEST:



Kathy Kiernan, Secretary of the College



Michael Haas, Interim Administrator
Wisconsin Elections Commission



SUBJECT: Re: elector certificate
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
CC: "[REDACTED]@yahoo.com" <[REDACTED]@yahoo.com>
DATE: 12/10/2020 14:03

For example, Georgia is an example of a relatively unusual state that lists under President and Vice President:
<https://www.archives.gov/files/electoral-college/2016/vote-georgia.pdf>

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Thursday, December 10, 2020 2:58 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Cc: [REDACTED]@yahoo.com <[REDACTED]@yahoo.com>
Subject: Re: elector certificate

Some states have certificates where the electors list all their names under President, and then also under Vice President, but it's clearly not required.

It's typical to just say (as this does) that the electors voted distinctly, by separate ballot, and record the totals -- and then have all the electors sign on the 2nd page, attesting that it's true.

Attached is the 2016 WI certificate which did exactly that.

It would be nice to get some of those official-looking gold seals!

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Thursday, December 10, 2020 2:54 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: [REDACTED]@yahoo.com <[REDACTED]@yahoo.com>
Subject: Re: elector certificate

So do they list all the names after "10" in each category and then sign below?

Sent from my iPhone

On Dec 10, 2020, at 1:16 PM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Hi, Jim,

I've done a redraft of the Wisconsin certificate, cutting out some verbiage that's no necessary and is not found in the 2016 certificates of the other 5 contested states, and which also borrows some "best practices" language from the other certificates.

Obviously it's up to the Wisconsin electors what language to use, but I think this draft works better. I plan to adapt it for the other states.

Also, I've prepared a form that can be used to elect an alternate (use the form multiple times if there are multiple vacancies to use).

I prepared that vacancy form from the one used in Wisconsin in 2016, available here:

<https://www.archives.gov/files/electoral-college/2016/vote-wisconsin.pdf>

Wisconsin Certificate of Vote - National Archives

united states of america . state of wisconsin . certificate of vote cast . for . president and vice president of the united states . by . presidential electors of wisconsin

www.archives.gov

Ken

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Thursday, December 10, 2020 1:33 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Re: elector certificate

I am doing a rewrite, to make it simpler and also incorporate best practices from other States.

Should have it done by 1 p.m.

None of the certificates from the 6 states submitted in 2016 was notarized -- I would leave that off.

Ken

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Thursday, December 10, 2020 1:29 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Fwd: elector certificate

Please review.

Jim

Sent from my iPhone

Begin forwarded message:

From: Brian Schimming <[REDACTED]@yahoo.com>
Date: December 10, 2020 at 12:15:08 PM CST
To: Judge Troupis <[REDACTED]@gmail.com>
Subject: Fw: elector certificate

For review from Jefferson

B

[Sent from Yahoo Mail for iPhone](#)

Begin forwarded message:

On Thursday, December 10, 2020, 11:40 AM, Mark Jefferson <mjefferson@wisgop.org> wrote:

Here is what we will have them sign. Please get to Judge Troupis or whomever needs it. Thanks,
mj

From: Charles Nichols <[REDACTED]@wisgop.org>
Sent: Thursday, December 10, 2020 11:28 AM
To: Mark Jefferson <[REDACTED]@wisgop.org>; Andrew Hitt <[REDACTED]@outlook.com>
Cc: Alec Zimmerman <[REDACTED]@wisgop.org>
Subject: elector certificate

Hey guys,

Attached is the updated elector certificate for Monday. Everyone will need to sign 6 copies. A copy will be sent to the President of the Senate (VP Pence), WI Secretary of State, National Archives, Records Administration, and the Chief Judge of the Wisconsin Western District Court (Peterson).

Once again, I left out the language referring to the canvass certificate furnished by WEC (which we obviously won't have). And in place of WEC seals that we also won't have, I put a spot for a notary stamp. For reference, I've attached pictures of the documents we had in 2016 (elector certificate, WEC statement of canvass, and certificate of ascertainment from the Governor).

Let me know if you have any questions.
Chaz

<Electors Ballot 15.jpg>

<Electors Ballot 17.jpg>

<Electors Ballot 16.jpg>

<Dec 10 -- DRAFT OF WI ELECTORS CERTIFICATE -- Chesebro edits.docx>

2/28/24, 10:16 AM

SUBJECT: Re: Federal Action

FROM: "William Bock, III" <[REDACTED]@kgrlaw.com>

TO: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>

CC: "William Bock, III" <[REDACTED]@kgrlaw.com>, Judge Troupis <[REDACTED]@gmail.com>, Kenneth Chesebro <[REDACTED]@msn.com>, "[REDACTED]" <[REDACTED]@kgrlaw.com>, [REDACTED] <[REDACTED]@kgrlaw.com>

DATE: 12/10/2020 14:19

ATTACHMENTS (20201210-141958-0003854): ["image001.png"](#), ["image002.jpg"](#), ["image003.png"](#), ["0_image001.png"](#)

Guys, We found our witness. Still going. Thanks. Go get em tomorrow!

Bill Bock

On Dec 5, 2020, at 1:35 PM, Olson, Joseph L (13465) <[REDACTED]@michaelbest.com> wrote:

I will see if I can track them down.

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com



From: William Bock, III <[REDACTED]@kgrlaw.com>
Sent: Saturday, December 5, 2020 12:15 PM
To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>; [REDACTED] <[REDACTED]@kgrlaw.com>; [REDACTED] <[REDACTED]@kgrlaw.com>
Subject: RE: Federal Action

Joe, Jim,

Thank you both very much and sorry for the delayed response. Joe, I read your response earlier and it gave me peace of mind. Thanks for that!

We also caught a break (hopefully) when Judge Pepper didn't take it as a related case, so we are in front of Judge Ludwig.

I wondered if you might be able to assist with one other thing –

We have a hearing in our case on Thursday and **our witness list is due tomorrow at noon**. We are trying to locate **Lori Merner** and **Dan Miller** who were Republican watchers at the Milwaukee Central Count location where absentee ballots were counted on election evening. We need to speak with them today if possible but do not have contact information for them.

They were mentioned in the following article from the Empower Wisconsin publication:

<https://empowerwisconsin.org/eyewitness-to-milwaukee-election-fraud/>

Would you be able to reach out to anyone in your network who might help us track down these individuals?

Thanks for any help you can provide!

Bill

William Bock, III | Partner



111 Monument Circle Suite 900
Indianapolis, IN 46204-5125

Phone: [REDACTED]

Fax: [REDACTED]

Mobile: [REDACTED]

[REDACTED] [@kgrlaw.com](mailto:[REDACTED]@kgrlaw.com) www.kgrlaw.com

Follow us on [Twitter](#) and [LinkedIn](#) and visit our [Blog](#)



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From: Olson, Joseph L (13465) [[mailto:\[REDACTED\]@michaelbest.com](mailto:[REDACTED]@michaelbest.com)]

Sent: Thursday, December 3, 2020 5:11 PM

To: Judge Troupis; William Bock, III

Cc: Kenneth Chesebro; James Knauer; Kevin Koons

Subject: RE: Federal Action

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Also, I noted you drew Judge Pepper. She is a terrible judge. I would suggest you file the consent to magistrate. It will not delay things and you will have a better chance

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Partner

T [REDACTED] | michaelbest.com



From: Judge Troupis <[\[REDACTED\]@gmail.com](mailto:[REDACTED]@gmail.com)>

Sent: Thursday, December 3, 2020 4:01 PM

To: William Bock, III <[\[REDACTED\]@kgrlaw.com](mailto:[REDACTED]@kgrlaw.com)>; Olson, Joseph L (13465)

<[\[REDACTED\]@michaelbest.com](mailto:[REDACTED]@michaelbest.com)>

Cc: Kenneth Chesebro <[\[REDACTED\]@msn.com](mailto:[REDACTED]@msn.com)>; [REDACTED]

<[REDACTED]@kgrlaw.com>; [REDACTED] <[REDACTED]@kgrlaw.com>

Subject: Re: Federal Action

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I am buried here. Joe Olson can probably answer your questions so I have copied him.

We are filing our appeal right now

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Sent from my iPhone

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One other minor detail –

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Thanks!

Bill

William Bock, III | Partner

[<image001.jpg>](#)

111 Monument Circle Suite 900
Indianapolis, IN 46204-5125

Phone: [REDACTED]

Fax: [REDACTED]

Mobile: [REDACTED]

[REDACTED]@kgrlaw.com www.kgrlaw.com

Follow us on [Twitter](#) and [LinkedIn](#) and visit our [Blog](#)

[<image002.png>](#)

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From: Kenneth Chesebro [[mailto: \[REDACTED\]@msn.com](mailto: [REDACTED]@msn.com)]

Sent: Thursday, December 3, 2020 12:49 PM

To: William Bock, III

Cc: Judge Troupis

Subject: Re: Federal Action

Hello Bill,

I read your complaint in draft a few days ago -- Jim was kind enough to pass it along -- and really admire what you've pulled together, especially on such short notice.

The Wisconsin state-court action is very, very strong, but I see your federal-court action as extremely helpful, particularly in strengthening the chance that the U.S. Supreme Court might end up hearing the Kelly cert. petition out of Pennsylvania, and perhaps similar cert. petitions involving other states.

My priority is to help Jim and his team with the state-court effort, but Jim is fine with my assisting with your case if time permits.

It could help the progress of both cases if our teams coordinate their efforts, and I'd be happy to play a role in that effort, at minimum.

I volunteered to help on Jim's case pro bono, and am open to doing the same on the federal-court case if you'd like my help, particularly on Seventh Circuit papers (I have extensive experience in handling federal appeals, particularly on cases involving constitutional law and federal jurisdiction).

Don't hesitate to call or text me at [REDACTED], day or night.

Ken

Kenneth Chesebro
25 Northern Avenue, # 1509
Boston, MA 02210
[REDACTED]
[REDACTED]@msn.com
(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Thursday, December 3, 2020 12:30 PM
To: William Bock, III <[REDACTED]@kgrlaw.com>
Cc: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Federal Action

Bill,
As I mentioned, we had been thinking through a federal action of the type you have filed. Ken Chesebro, copied on this email, is our resident expert on Federal/State interplay and the Electors. So, you should stay in touch with him and to the extent he can he will provide you his thoughts. His email is above, and his phone is [REDACTED]

Jim T
<2020-12-2 (1) Complaint.pdf>

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CC: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>, Judge Troupis <[REDACTED]@gmail.com>, Kenneth Chesebro <[REDACTED]@msn.com>, "[REDACTED]" <[REDACTED]@kgrlaw.com>, [REDACTED] <[REDACTED]@kgrlaw.com>

DATE: 12/10/2020 14:21

ATTACHMENTS (20201210-142102-0003853): ["image001.png"](#) , ["image002.jpg"](#) , ["image003.png"](#) , ["0_image001.png"](#)

PS - check the stipulation filed today on Pacer and see if it helps you.

Bill Bock

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[<image001.jpg>](#)

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Phone: [REDACTED]

Fax: [REDACTED]

Mobile: [REDACTED]

[\[REDACTED\]@kgrlaw.com](#) www.kgrlaw.com
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[<image002.png>](#)

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Kenneth Chesebro
25 Northern Avenue, # 1509
Boston, MA 02210

[Redacted]
[Redacted]@msn.com

(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

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Jim T

<2020-12-2 (1) Complaint.pdf>

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SUBJECT: Re: Statement on electors mtg / Draft
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Brian Schimming <[REDACTED]@yahoo.com>
CC: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/10/2020 15:55

This is nicely phrased!

Excellent idea to link to the Jones & Lessig essay, showing that quite recently the Democrats endorsed parallel electors' meetings as a reasonable thing to do (not just Kennedy in 1960).

I have fixed the link to CNN, and tweaked the language a bit.

Proposed Jim Troupis Statement on Electors Meeting

"As the legal proceedings arising from the November 3 presidential election continue to work their way through the Wisconsin court system, I have advised the Republican Party of Wisconsin to convene a separate Republican electors' meeting and have the Trump-Pence electors cast their votes at the Wisconsin State Capitol on December 14.

Of course, there is precedent for such a meeting. Democrat electors pledged to John F. Kennedy convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, the state's electoral votes were ultimately awarded to President Kennedy, even though he did not win the state until 11 days after his electors cast their votes.

The legitimacy and good sense of two sets of electors meeting on December 14 to cast competing votes for President and Vice President, with the conflict to be later sorted out by the courts and Congress, was pointed out by prominent Democrat activists Larry Lessig and Van Jones in an essay published last month [on CNN.com](https://www.cnn.com).

Given that the results in Wisconsin are still in doubt, with legal arguments that have yet to be decided, just as the Democrat electors met in Hawaii in 1960 while awaiting a final resolution of that State's vote, so too the Republican electors should meet this year on December 14 as we await a final resolution in Wisconsin."

From: Brian Schimming <[REDACTED]@yahoo.com>
Sent: Thursday, December 10, 2020 3:47 PM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Statement on electors mtg / Draft

Ken - Brian Schimming here. State party wants Jim to put this statement out before the electors meeting here on Monday. Jim wanted you to get a look: said whatever went out would have to wait until after we filed appeal to WIS Supreme Court

Let me know, thanks

B

Proposed Jim Troupis Statement on Electors Meeting

“As the legal proceedings continue to work their way through the Wisconsin court system, I have advised the Republican Party of Wisconsin to convene a separate Republican electors meeting and vote at the Wisconsin State Capitol on December 14.

Of course, there is precedent for such a meeting. Democrats convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, the state’s electoral votes were ultimately awarded to President Kennedy. In fact, just last month, when Republicans appeared to have a lead in Pennsylvania, Larry Lessig and Van Jones published an essay on [CNN.com](https://www.cnn.com) calling on Democrats to possibly convene their electors in that state if the results were still in doubt. Given this, and the legal arguments that have yet to be decided, the GOP electors should also meet on Monday while we await a final resolution in Wisconsin.”

[Sent from Yahoo Mail for iPhone](#)

SUBJECT: Re: Statement on electors mtg / Draft
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Brian Schimming <[REDACTED]@yahoo.com>
CC: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/10/2020 15:59
ATTACHMENTS (20201210-155953-0001281): ["WI -- Dec 10 draft of cover memo enclosed with certificates.docx"](#)

I've done a cover memo that would be enclosed with the certificates, in internal envelopes that would be sealed and labeled prominently on the front:

**"VOTES OF THE STATE OF WISCONSIN
FOR PRESIDENT AND VICE PRESIDENT
OF THE UNITED STATES."**

Then, the external envelopes would be addressed with the addresses I've listed in the memo.

Pretty simple!

Note: the items I've listed as sent by Registered Mail need to be sent by REGISTERED (not certified) mail. The Bush team almost screwed up on this in 2000!

Ken

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Thursday, December 10, 2020 4:55 PM
To: Brian Schimming <[REDACTED]@yahoo.com>
Cc: Judge Troupis <[REDACTED]@gmail.com>
Subject: Re: Statement on electors mtg / Draft

This is nicely phrased!

Excellent idea to link to the Jones & Lessig essay, showing that quite recently the Democrats endorsed parallel electors' meetings as a reasonable thing to do (not just Kennedy in 1960).

I have fixed the link to CNN, and tweaked the language a bit.

Proposed Jim Troupis Statement on Electors Meeting

"As the legal proceedings arising from the November 3 presidential election continue to work their way through the Wisconsin court system, I have advised the Republican Party of Wisconsin to convene a separate Republican electors' meeting and have the Trump-Pence electors cast their votes at the Wisconsin State Capitol on December 14.

Of course, there is precedent for such a meeting. Democrat electors pledged to John F. Kennedy convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, the state's electoral votes were ultimately awarded to President Kennedy, even though he did not win the state until 11 days after his electors cast their votes.

The legitimacy and good sense of two sets of electors meeting on December 14 to cast competing votes for President and Vice President, with the conflict to be later sorted out by the courts and Congress, was pointed out by prominent Democrat activists Larry Lessig and Van Jones in an essay published last month [on CNN.com](#).

Given that the results in Wisconsin are still in doubt, with legal arguments that have yet to be decided, just as the Democrat electors met in Hawaii in 1960 while awaiting a final resolution of that State's vote, so too the Republican electors should meet this year on December 14 as we await a final resolution in Wisconsin."

From: Brian Schimming <[REDACTED]@yahoo.com>

Sent: Thursday, December 10, 2020 3:47 PM

To: Kenneth Chesebro <[REDACTED]@msn.com>

Subject: Statement on electors mtg / Draft

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Let me know, thanks

B

Proposed Jim Troupis Statement on Electors Meeting

"As the legal proceedings continue to work their way through the Wisconsin court system, I have advised the Republican Party of Wisconsin to convene a separate Republican electors meeting and vote at the Wisconsin State Capitol on December 14.

Of course, there is precedent for such a meeting. Democrats convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, the state's electoral votes were ultimately awarded to President Kennedy. In fact, just last month, when Republicans appeared to have a lead in Pennsylvania, Larry Lessig and Van Jones published an essay on [CNN.com](#) calling on Democrats to possibly convene their electors in that state if the results were still in doubt. Given this, and the legal arguments that have yet to be decided, the GOP electors should also meet on Monday while we await a final resolution in Wisconsin."

[Sent from Yahoo Mail for iPhone](#)

[space for optional business letterhead]

MEMORANDUM

TO: President of the Senate (By Registered Mail)
United States Senate
Washington, D.C. 20510

Archivist of the United States (By Registered Mail)
700 Pennsylvania Avenue, NW
Washington, DC 20408

Secretary of State (By Certified Mail)
State of Wisconsin
P.O. Box 7848
Madison, WI 53707

Chief Judge, U.S. District Court (By Certified Mail)
Western District of Wisconsin
120 N. Henry Street
Madison, WI 53703

FROM: _____, Chairperson, Electoral College of Wisconsin

DATE: December 14, 2020

RE: Wisconsin's Electoral Votes for President and Vice President

Pursuant to 3 U.S.C. § 11, enclosed please find duplicate originals of Wisconsin's electoral votes for President and Vice President, as follows: two (2) duplicate originals for the President of the Senate and the Archivist, and one (1) duplicate original for the Secretary of State and Chief Judge.

[sign; no need for separate signature line]

2/28/24, 10:19 AM

SUBJECT: Draft of press release I'll be supplying other states
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
CC: Austin Browning <[REDACTED]@gmail.com>, Brian Schimming <[REDACTED]@yahoo.com>
DATE: 12/11/2020 12:01
ATTACHMENTS (20201211-120114-0001030): "[Draft press release for state Republican party.docx](#)"

Jim,

Here is my current copy of a draft press release I'm suggesting for the other states -- unless you would prefer other states not so closely copy what you're doing.

Some of my wording changes might be an improvement over the version I sent earlier. So whoever is messaging might want to look at this version.

Ken

Kenneth Chesebro
25 Northern Avenue, # 1509
Boston, MA 02210

[REDACTED]
[REDACTED]@msn.com

(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

<https://www.linkedin.com/in/ken-chesebro>

TROUPIS 009992

Draft language for state Republican Party re Dec. 14 casting of Electoral votes

As the legal proceedings arising from the November 3 presidential election continue to work their way through our nation's judicial system, we have asked the _____ [NAME OF STATE] Republicans who pledged to vote for President Trump and Vice President Pence in the Electoral College to convene in _____ [CAPITOL CITY] on December 14, to cast their ballots and send them to Congress, where the Electoral votes are to be opened and counted beginning on January 6.

Of course, there is precedent for our Republican Electors meeting on December 14, even as the Democrat Electors for _____ [NAME OF STATE] also meet.

Democrat Electors pledged to John F. Kennedy convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, Hawaii's electoral votes were awarded to President Kennedy, even though he did not win the state until 11 days after his Electors cast their votes.

The legitimacy and good sense of two sets of Electors meeting on December 14 to cast competing votes for President and Vice President, with the conflict to be later sorted out by the courts and Congress, was pointed out by prominent Democrat lawyers, Van Jones and Larry Lessig, in an essay published last month [on CNN.com](#).

Given that the results in _____ [NAME OF STATE] are still in doubt, with legal arguments that have yet to be decided, just as the Democrat Electors met in Hawaii in 1960 while awaiting a final resolution of that State's vote, so too the Republican Electors should meet this year on December 14 as we await a final resolution of _____'s ___ Electoral votes.

2/28/24, 10:29 AM

SUBJECT: Testimony Draft--JRT

FROM: Judge Troupis <[REDACTED]@gmail.com>

TO: [REDACTED]@gmail.com

DATE: 12/13/2020 12:56

ATTACHMENTS (20201213-125610-0003889): ["Testimony_DRAFT 12-13.docx"](#)

TROUPIS 009994

Testimony

Draft 12/13/20 For discussion purpose only

James R. Troupis

Senator Johnson and members of the Committee, thank you for this opportunity to present testimony regarding the November 3, 2020 Election in Wisconsin. Wisconsin has specific laws related both to elections and to recounts that have been tested both in Court and in the legislative process.

Given the narrow margins between candidates at every level in Wisconsin in recent years, recounts are not uncommon in our State. In 2011 I represented Mr. Justice David Prosser in a tense Statewide recount, and in 2016 there was a recount, as well, of the Presidential race. There have been literally dozens of recounts of Assembly and Senate races over the past twenty years in Wisconsin. As a practical matter this means there are experienced counsel and experienced boards of canvassers who can conduct a recount with transparency and civility. The laws of Wisconsin provide a unique opportunity for this Committee because, in part, all the materials related to the election are, by law, on open display.

Candidly, I do not believe, the facts about the manipulation of the absentee voting process in Wisconsin are disputed. Nor do I believe there is any dispute about the laws that were violated during the period prior to November 3 election.

While others may differ on whether those violations were justified, the fact those actions were contrary to the explicit laws of Wisconsin seems obvious.

To begin, it is important to understand that Wisconsin treats absentee voting as a “privilege”, not a right. Our legislature explicitly wrote in the law that because absentee voting occurs without the normal election-day protections, it was far more likely to result in, in the laws words: “fraud or abuse”; “overzealous solicitation of absent electors who may prefer not to participate in an election”, and “undue influence on an absent elector to vote for or against a candidate.” Wisconsin statutes are explicit and the enforcement of them: “shall be . . . mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.”

The absentee voting laws were violated in at least four separate ways, calling into question no fewer than 220,000 votes in Wisconsin. Again, given Wisconsin’s transparent process and the full recount at which more than 2500 volunteers participated, we were able to identify virtually all of those 220,000 voters by name, address and ward. This is not speculation. Except as to one small

group of votes, the canvassing boards and the Biden campaign agree we have, in fact, named each and every person involved. This is not speculation.

The largest category of improperly cast ballots, 170,140, are what we refer to as In-person Absentee Voters. Our statutes explicitly require that every absentee voter complete an application before they may receive a ballot. This application process, distinct from the actual casting of the ballot, is essential to assure a chain of custody, which in turn provides a critical assurance that there is not fraud, abuse or undue influence, from registration through the actual casting of a vote. What we now know is that the chain of custody was broken and the law was violated in Dane County and Milwaukee County where, contrary to the law, the clerks allowed individuals to vote without an application. To be specific, so there is no doubt, the law states expressly, “[T]he municipal clerk ***shall not issue an absentee ballot unless the clerk receives a written application therefor*** from a qualified elector of the municipality.” No separate written application as required by law was ever received for those ballots.

In Wisconsin, absentee balloting must be witnessed, and the certification on the outside of the envelope containing the ballot provides a place where the witness must sign and provide his or her address and the clerk initials the envelope to verify identification was received. If the certification lacks the

witness's address, it cannot be counted. As the statute states, "*If a certificate is missing the address of a witness, the ballot may not be counted.*" This provision is mandatory and by law must be strictly construed. Despite that explicit directive, the clerks in Dane and Milwaukee counties actually altered these legally binding documents after they arrived in their offices. Addresses were added. In addition, those certified documents require a clerk's initials or they can not be counted. More than 2000 had no initials and thus there is no to know they were properly received and identification was presented.

Given the pandemic, municipal clerks laudably incorporated safety protocols into election day voting, including plexiglass barriers, social distancing, enforcement of mask mandates and the like. However, in absentee voting those clerks, unfortunately, went far beyond what the law allows. For absentee voters in Dane and Milwaukee Counties the county clerks told voters they could vote without Identification (an obvious requirement for all voters) so long as they claimed to be indefinitely confined due to covid under a statute meant for nursing homes, assisted living facilities and homebound disabled persons. 28,395 persons claimed that status after the clerks posted their notices. By law, the clerks are required to take action to remove those persons who for whom they had "reliable information that [the] . . . elector no longer qualifies for the service." No action

was taken, and those persons, without any identification whatsoever, were allowed to cast votes.

It is important to recognize, unlike other states, Wisconsin does not allow advance voting. Instead, any vote cast prior to November 3 was an absentee vote, subject to the mandatory strict regulation of the statutes. Rather than follow the law, the City of Madison conducted advance voting on September 26 and October 3 at 206 separate locations in Madison. Ballots were received, witnesses were provided for envelopes, signage advertised the locations as if it were election day. The law expressly prohibits any clerk from having more than one clerk's offices and here Madison created 206. Then, in a rather obvious attempt to avoid later scrutiny, the City took those ballots and mixed them in with all the other absentee ballots otherwise legally cast so that it would be nearly impossible to identify all the illegal votes. Still, even without the names, there is no dispute that 17,271 votes were received through these improper and illegal events as the city actually counted them before they intermingled them with legally cast absentee votes.

All in all, more than 3 million of Wisconsin's citizens cast their votes legally and without taint. As I have detailed, more than 220,000 votes were received that were not legally cast. The law presumes those votes were fraudulent or are the result of undue influence and the law mandates explicitly that they not be

counted. The 3 million legal voters who cast their ballots ought not have their votes diluted and cancelled out by votes which, by law, are not to be counted.

#####

2/28/24, 10:32 AM

SUBJECT: Re: Testimony Draft--JRT
FROM: Ron Johnson <[REDACTED]@gmail.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/13/2020 14:23

Would you mind if we suggested a few edits ?

Sent from my iPad

> On Dec 13, 2020, at 12:56 PM, Judge Troupis <[REDACTED]@gmail.com> wrote:
>
>
>
> <Testimony DRAFT 12-13.docx>

2/28/24, 10:32 AM

SUBJECT: Re: Testimony Draft--JRT
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Ron Johnson <[REDACTED]@gmail.com>
DATE: 12/13/2020 14:30

Please do.

Sent from my iPhone

> On Dec 13, 2020, at 2:23 PM, Ron Johnson <[REDACTED]@gmail.com> wrote:

>

> Would you mind if we suggested a few edits ?

>

> Sent from my iPad

>

>> On Dec 13, 2020, at 12:56 PM, Judge Troupis <[REDACTED]@gmail.com> wrote:

>>

>>

>>

>> <Testimony DRAFT 12-13.docx>

2/28/24, 10:35 AM

SUBJECT: Fwd: Supreme Court decision
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Brian Schimming <[REDACTED]@yahoo.com>
CC: George Burnett <[REDACTED]@lcojlaw.com>
DATE: 12/13/2020 15:11

FYI

Sent from my iPhone

Begin forwarded message:

From: Ivan Pentchoukov <[REDACTED]@epochtimes.nyc>
Date: December 13, 2020 at 3:10:17 PM CST
To: [REDACTED]@lcojlaw.com, [REDACTED]@gmail.com
Subject: Supreme Court decision

Dear Mr. Troupis and Mr. Burnett,

I'm a reporter keeping track of the Wisconsin Supreme Court recount appeal. I understand the court may rule on the case soon. Would you be so kind as to notify me when the decision is made? You will likely learn about this before the public docket is updated.

Thank you and best wishes,
Ivan

--

Ivan Pentchoukov
The Epoch Times
229 West 28th Street
New York, NY 10001
[REDACTED]

TROUPIS 0010003

2/28/24, 10:36 AM

SUBJECT: Re: Fwd: Supreme Court decision
FROM: Brian Schimming <[REDACTED]@yahoo.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
CC: George Burnett <[REDACTED]@lcojlaw.com>
DATE: 12/13/2020 15:22

Confirmed

B

[Sent from Yahoo Mail for iPhone](#)

On Sunday, December 13, 2020, 3:11 PM, Judge Troupis <[REDACTED]@gmail.com> wrote:

FYI

Sent from my iPhone

Begin forwarded message:

From: Ivan Pentchoukov <[REDACTED]@epochtimes.nyc>
Date: December 13, 2020 at 3:10:17 PM CST
To: [REDACTED]@lcojlaw.com, [REDACTED]@gmail.com
Subject: Supreme Court decision

Dear Mr. Troupis and Mr. Burnett,

I'm a reporter keeping track of the Wisconsin Supreme Court recount appeal. I understand the court may rule on the case soon. Would you be so kind as to notify me when the decision is made? You will likely learn about this before the public docket is updated.

Thank you and best wishes,
Ivan

--

Ivan Pentchoukov
The Epoch Times
229 West 28th Street
New York, NY 10001
[REDACTED]

TROUPIS 0010004

SUBJECT: Rough Draft 1-1-1
FROM: Brian Schimming <[REDACTED]@gmail.com>
TO: Jim Troupis <[REDACTED]@hotmail.com>, Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/13/2020 20:40

STATEMENT BY JAMES TROUPIS, LEAD COUNSEL
WISCONSIN TRUMP CAMPAIGN

We are disappointed in the Wisconsin Supreme Court's decision - as should all people who are concerned about transparency and only legal votes being counted in an election.

Regrettably, the Court ruled that current state law really means something completely different than it plainly says. This ruling effectively says that anyone can early vote, without proper identification, weeks before the election, even in shadow ballot-harvesting operations and not have to follow any commonly accepted rules of absentee voting.

It's also a penalty to the millions of our fellow Wisconsinites who followed the rules. Three million people who voted by the rules will have their votes diluted by 200,000 who did not.

This court decision. should be also a message to the legislature: the current specific, statutory language must be rewritten - so unelected bureaucrats and courts cannot twist state law to it's will.

We will review our options and have further comment shortly.

SUBJECT: Draft 1-1-1 /. On the SPLIT DECISION”

FROM: Brian Schimming <[REDACTED]@gmail.com>

TO: Jim Troupis <[REDACTED]@hotmail.com>, Judge Troupis <[REDACTED]@gmail.com>

DATE: 12/13/2020 21:07

STATEMENT FROM JAMES TROUPIS, LEAD COUNSEL
WISCONSIN TRUMP CAMPAIGN

“We are pleased the Wisconsin Supreme Court largely concurred with our position that serious infractions of current state law occurred in the November, 2020 election. It is why we brought the suit in the first place.

The facts of the case make it clear: plain-letter language in state law, as well as the specific experience of the 2020 election process show considerable reason to question the final result in Wisconsin.

The Court made the separate decision not to effect a (correction) to the infractions by the often used “draw-down” of the thousands of illegal votes cast. That was their decision to make, they were uncomfortable with the commonly accepted remedy available to them.

We are in internal discussions about potential next steps and will announce them in a timely manner.”

SUBJECT: Re: Draft 1-1-1 / . On the SPLIT DECISION”
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Brian Schimming <[REDACTED]@gmail.com>
DATE: 12/13/2020 21:12

I would say "Court agreed with our conclusion that serious...."
add after place "for the President."

On Sun, Dec 13, 2020 at 9:07 PM Brian Schimming <[REDACTED]@gmail.com> wrote:

STATEMENT FROM JAMES TROUPIS, LEAD COUNSEL
WISCONSIN TRUMP CAMPAIGN

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SUBJECT: Re: Draft 1-1-1 /. On the SPLIT DECISION”
FROM: Brian Schimming <[REDACTED]@gmail.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/13/2020 21:21

Yep, good change

On Sun, Dec 13, 2020 at 9:12 PM Judge Troupis <[REDACTED]@gmail.com> wrote:

I would say "Court agreed with our conclusion that serious...."
add after place "for the President."

On Sun, Dec 13, 2020 at 9:07 PM Brian Schimming <[REDACTED]@gmail.com> wrote:

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WISCONSIN TRUMP CAMPAIGN

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The Court made the separate decision not to effect a (correction) to the infractions by the often used “draw-down” of the thousands of illegal votes cast. That was their decision to make, they were uncomfortable with the commonly accepted remedy available to them.

We are in internal discussions about potential next steps and will announce them in a timely manner.”

SUBJECT: SPLIT DECISION. / DRAFT 2-2-2

FROM: Brian Schimming <[REDACTED]s@gmail.com>

TO: Jim Troupis <[REDACTED]@hotmail.com>, Judge Troupis <[REDACTED]@gmail.com>

DATE: 12/13/2020 21:27

STATEMENT FROM JAMES TROUPIS, LEAD COUNSEL
WISCONSIN TRUMP CAMPAIGN

“We are pleased the Wisconsin Supreme Court agreed with our conclusion that serious infractions of current state law occurred in the November, 2020 election. It is why we brought the suit in the first place for the President.

The facts of the case make it clear: plain-letter language in state law, as well as the specific experience of the 2020 election process show considerable reason to question the final result in Wisconsin.

The Court made the separate decision not to effect a (correction) to the infractions by the often used “draw-down” of the thousands of illegal votes cast. That was their decision to make, they were uncomfortable with the commonly accepted remedy available to them.

We are in internal discussions about potential next steps and will announce them in a timely manner.”

2/28/24, 10:39 AM

SUBJECT: Press release for after electoral vote

FROM: Kenneth Chesebro <[REDACTED]@msn.com>

TO: Judge Troupis <[REDACTED]@gmail.com>

CC: Brian Schimming <[REDACTED]@yahoo.com>

DATE: 12/14/2020 00:54

ATTACHMENTS (20201214-005442-0000099): ["Draft press release for state Republican parties for after electors vote.docx"](#)

Hi, I sent the following to the national people coordinating this -- updated version of what I cribbed from you!

Ken

TROUPIS 0010010

Draft language for state Republican parties

re Dec. 14 casting of Electoral votes

(ONLY RELEASE A STATEMENT AFTER THE ELECTORS VOTE)

As the legal proceedings arising from the November 3 presidential election continue to work their way through our nation's judicial system, we requested that the _____ [state] Republicans who pledged to vote for President Trump and Vice President Pence in the Electoral College, which was required to cast its votes on December 14, cast their ballots and send them to Congress, where the Electoral votes are to be opened and counted beginning on January 6.

They did so as a precautionary measure, to ensure that if, as a result of a later court order or other proceeding prescribed by law, they are ultimately recognized as being the duly elected and qualified Electors, the State's electoral votes will be properly counted in Congress.

Of course, there is precedent for our Republican Electors meeting on December 14, even as the Democrat Electors for _____ [state] also met.

Democrat Electors pledged to John F. Kennedy convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, Hawaii's electoral votes were awarded to President Kennedy, even though he did not win the state until 11 days after his Electors cast their votes.

The legitimacy and good sense of two sets of Electors meeting on December 14 to cast competing votes for President and Vice President, with the conflict to be later sorted out by the courts and Congress, was pointed out by prominent Democrat lawyers, Van Jones and Larry Lessig, in an essay published last month [on CNN.com](#).

To the extent that the final results in our state remain in doubt, just as the Democrat Electors met in Hawaii in 1960 while awaiting a final resolution of that State's vote, so too the Republican Electors met this year on December 14 as we await a final resolution of the ____ [number] electoral votes of _____ [state].

2/28/24, 10:40 AM

SUBJECT: RE: Jefferson

FROM: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>

TO: "Kurt A. Goehre" <[REDACTED]@lcojlaw.com>, George Burnett <[REDACTED]@lcojlaw.com>, Judge Troupis <[REDACTED]@gmail.com>, Kenneth Chesebro <[REDACTED]@msn.com>, Stewart Karge <[REDACTED]@gmail.com>, Joe Voiland <[REDACTED]@yahoo.com>

DATE: 12/14/2020 10:24

ATTACHMENTS (20201214-102413-0001329): ["image001.png"](#)

Well, they got this one right – although they managed to avoid saying anything about the elector's and/or the clerk's duty to take themselves off the list ...

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com



From: Kurt A. Goehre <[REDACTED]@lcojlaw.com>
Sent: Monday, December 14, 2020 10:07 AM
To: George Burnett <[REDACTED]@lcojlaw.com>; Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>
Subject: RE: Jefferson

<https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=315283>

Kindest regards,

KURT A. GOEHRE
Partner/Attorney
Law Firm of Conway, Olejniczak & Jerry, S.C.
231 S. Adams Street | P.O. Box 23200
Green Bay, WI 54305
P: [REDACTED] F: [REDACTED]
E: [REDACTED]@lcojlaw.com | lcojlaw.com

2015 - 2020 BEST OF THE BAY WINNER | BEST LAW FIRM

IMPORTANT CONFIDENTIAL NOTICE

The contents of this message, along with any attachments, are confidential and are subject to the attorney-client and/or attorney work-product privileges. Please destroy this message immediately and notify the sender that you received this message in error. No permission is given for persons other than the intended recipient(s) to read or disclose the contents of this message.

-----Original Message-----

From: George Burnett <[REDACTED]@lcojlaw.com>
Sent: Monday, December 14, 2020 10:04 AM
To: Joseph L Olson <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; Kurt A. Goehre <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>
Subject: Jefferson

Court just released decision in this case

Sent from my iPhone

Email Disclaimer

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SUBJECT: Re: Jefferson
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>
DATE: 12/14/2020 10:24
ATTACHMENTS (20201214-102452-0001328): "[image001.png](#)"

yes

On Mon, Dec 14, 2020 at 10:24 AM Olson, Joseph L (13465) <[REDACTED]@michaelbest.com> wrote:

Well, the got this one right – although they managed to avoid saying anything about the elector’s and/or the clerk’s duty to take themselves off the list ...

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com



From: Kurt A. Goehre <[REDACTED]@lcojlaw.com>
Sent: Monday, December 14, 2020 10:07 AM
To: George Burnett <[REDACTED]@lcojlaw.com>; Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge <[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>
Subject: RE: Jefferson

<https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=315283>

Kindest regards,

KURT A. GOEHRE

Partner/Attorney

Law Firm of Conway, Olejniczak & Jerry, S.C.

231 S. Adams Street | P.O. Box 23200

Green Bay, WI 54305

P: [REDACTED] F: [REDACTED]
E: [REDACTED]@lcojlaw.com | lcojlaw.com

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TROUPIS 0010016

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-----Original Message-----

From: George Burnett <[REDACTED]@lcojlaw.com>

Sent: Monday, December 14, 2020 10:04 AM

To: Joseph L Olson <[REDACTED]@michaelbest.com>; Judge Troupis <[REDACTED]@gmail.com>; Kurt A.

Goehre <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>; Stewart Karge

<[REDACTED]@gmail.com>; Joe Voiland <[REDACTED]@yahoo.com>

Subject: Jefferson

Court just released decision in this case

Sent from my iPhone

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SUBJECT: Fwd: [EXTERNAL]Redrafted press release language for after electors vote
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
CC: Brian Schimming <[REDACTED]@yahoo.com>
DATE: 12/14/2020 10:28

FYI — no press comments

Get [Outlook for iOS](#)

From: Mike Roman <[REDACTED]@donaldtrump.com>
Sent: Monday, December 14, 2020 10:20:29 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>; Boris Epshteyn <[REDACTED]@donaldtrump.com>
Cc: Joshua Findlay <[REDACTED]@donaldtrump.com>
Subject: Re: [EXTERNAL]Redrafted press release language for after electors vote

DJT staff in state were instructed not to do any media advisory or post-event press release. Any inquiries will be forwarded to HQ Press. No one is authorized to comment or provide background.

MR

From: Kenneth Chesebro <[REDACTED]@msn.com>
Sent: Monday, December 14, 2020 10:51
To: Boris Epshteyn
Cc: Mike Roman; Joshua Findlay
Subject: Re: [EXTERNAL]Redrafted press release language for after electors vote

Exactly

Get [Outlook for iOS](#)

From: Boris Epshteyn <[REDACTED]@donaldtrump.com>
Sent: Monday, December 14, 2020 9:49:12 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Mike Roman <[REDACTED]@donaldtrump.com>; Joshua Findlay <[REDACTED]@donaldtrump.com>
Subject: Re: [EXTERNAL]Redrafted press release language for after electors vote

Thanks! Let's let the process work itself through, get done and then we can take it from there on Comms.

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

--

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On Dec 14, 2020, at 10:46 AM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Idea of a press release originated from Troupis in Wi — he did a draft last wed only for Wi, which he had planned to release once the trial court ruled against us.

Idea was to alert Wisconsin Supreme Court that it did not have to rush the case.

In case other states wanted to do it, I adapted the language for each state and included it on the packets.

On sat, RG decided there should be no advance notice (the PA electors were nervous about publicity) and I passed that on to Josh and the regional staffers.

So yesterday I offered this latest draft as a replacement, unilaterally — there has been no higher level decision to do anything. Simply trying to avoid anyone using the old draft, which has outdated wording (uses future tense).

Probably RG and comms will want to consider just one statement going out on this, nationally. Like a tweeted statement by Ellis, and follow up on-camera explanation by RG, and or follow up tweet by the President? Much wiser heads on that sort of thing than me!

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From: Boris Epshteyn <[REDACTED]@donaldtrump.com>
Sent: Monday, December 14, 2020 8:24:03 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Mike Roman <[REDACTED]@donaldtrump.com>; Joshua Findlay <[REDACTED]@donaldtrump.com>
Subject: Re: [EXTERNAL]Redrafted press release language for after electors vote

Thank you. What's the reasoning to do a press release?

Either way, nothing should go out until after 4pm ET.

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

--

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On Dec 14, 2020, at 2:02 AM, Kenneth Chesebro <[REDACTED]@msn.com> wrote:

Adapted from earlier draft -- attached.

<Draft press release for state Republican parties for after electors vote.docx>

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SUBJECT: Re: Fwd: [EXTERNAL]Redrafted press release language for after electors vote
FROM: Brian Schimming <[REDACTED]@yahoo.com>
TO: Kenneth Chesebro <[REDACTED]@msn.com>, Judge Troupis <[REDACTED]@gmail.com>
DATE: 12/14/2020 10:46

Confirmed

Brian

[Sent from Yahoo Mail for iPhone](#)

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Get [Outlook for iOS](#)

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Sent: Monday, December 14, 2020 10:20:29 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>; Boris Epshteyn <[REDACTED]@donaldtrump.com>
Cc: Joshua Findlay <[REDACTED]@donaldtrump.com>
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Sent: Monday, December 14, 2020 9:49:12 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Mike Roman <[REDACTED]@donaldtrump.com>; Joshua Findlay <[REDACTED]@donaldtrump.com>
Subject: Re: [EXTERNAL]Redrafted press release language for after electors vote

Thanks! Let's let the process work itself through, get done and then we can take it from there on Comms.

Best,

TROUPIS 0010021

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

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From: Boris Epshteyn <[REDACTED]@donaldtrump.com>
Sent: Monday, December 14, 2020 8:24:03 AM
To: Kenneth Chesebro <[REDACTED]@msn.com>
Cc: Mike Roman <[REDACTED]@donaldtrump.com>; Joshua Findlay <[REDACTED]@donaldtrump.com>
Subject: Re: [EXTERNAL]Redrafted press release language for after electors vote

Thank you. What's the reasoning to do a press release?

TROUPIS 0010022

Either way, nothing should go out until after 4pm ET.

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

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<[REDACTED]@msn.com> wrote:

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<Draft press release for state Republican parties for after electors
vote.docx>

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2/28/24, 10:45 AM

SUBJECT: Do not bring things
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Joe Voiland <[REDACTED]@yahoo.com>
DATE: 12/15/2020 21:02

Joe,
Reince has asked me to ask you not to bring things to sign or give to the President. It is not that sort of gathering.
As Reince arranged this we should do as he asks.
Thanks.
Jim

Sent from my iPhone

SUBJECT: PA lawsuit - Wisconsin parallel
FROM: Boris Epshteyn <[REDACTED]@donaldtrump.com>
TO: Bruce Marks <[REDACTED]@mslegal.com>, Jim Troupis <[REDACTED]@gmail.com>
DATE: 12/21/2020 16:43
ATTACHMENTS (20201221-164347-0000895): ["text.htm"](#)

Dear Judge Troupis,

Please meet Bruce Marks, our attorney in PA who spearheaded the SCOTUS filing yesterday.

Bruce - Judge Troupis is our leading attorney in Wisconsin.

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

--

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SUBJECT: Fwd: PA lawsuit - Wisconsin parallel
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Joe Olson <[REDACTED]@michaelbest.com>
CC: George Burnett <[REDACTED]@lcojlaw.com>, Kenneth Chesebro <[REDACTED]@msn.com>
DATE: 12/21/2020 18:48
ATTACHMENTS (20201221-184858-0000890): ["Trump v Boockvar Petition.pdf"](#)

Joe,
See below.
I have called Reince and Justin to see what's really going on. Reince heard the President may want to talk. I briefed George within the last 45 minutes.
Ken Chesebro and I also spoke and I told him if we file anything he will need to write it.
Today was the first day I was able to buy even one present for Karen, aaargh.
Jim

Sent from my iPhone

Begin forwarded message:

From: Judge Troupis <[REDACTED]@gmail.com>
Date: December 21, 2020 at 6:38:41 PM CST
To: George Burnett <[REDACTED]@lcojlaw.com>
Subject: Fwd: PA lawsuit - Wisconsin parallel

Here it is
Jim

Sent from my iPhone

Begin forwarded message:

From: Bruce Marks <[REDACTED]@mslegal.com>
Date: December 21, 2020 at 5:01:10 PM CST
To: Boris Epshteyn <[REDACTED]@donaldtrump.com>, Jim Troupis <[REDACTED]@gmail.com>
Cc: "Eastman, John" <[REDACTED]@chapman.edu>
Subject: RE: PA lawsuit - Wisconsin parallel

Judge, can you call me? The Campaign wants us to work together with professor eastman to file an Article II cert petition from Wisconsin to scotus, thanks. [REDACTED]

From: Boris Epshteyn <[REDACTED]@donaldtrump.com>
Sent: Monday, December 21, 2020 5:44 PM
To: Bruce Marks <[REDACTED]@mslegal.com>; Jim Troupis <[REDACTED]@gmail.com>
Subject: PA lawsuit - Wisconsin parallel

Dear Judge Troupis,

Please meet Bruce Marks, our attorney in PA who spearheaded the SCOTUS filing yesterday.

Bruce - Judge Troupis is our leading attorney in Wisconsin.

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

--

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No. 20-

IN THE
Supreme Court of the United States

DONALD J. TRUMP FOR PRESIDENT, INC.,

Petitioner,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH
OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

BRUCE S. MARKS, ESQ.
MARKS & SOKOLOV, LLC
1835 Market Street, Suite 1717
Philadelphia, PA 19103
[REDACTED]

JOHN C. EASTMAN, ESQ.
Counsel of Record
174 West Lincoln Avenue, Suite 620
Anaheim, CA 92805
[REDACTED]

@gmail.com

Counsel for Petitioners

300748



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TROUPIS 0010031

QUESTIONS PRESENTED

Article II of the Constitution provides that “Each State shall appoint [electors for President and Vice President] *in such Manner as the Legislature thereof may direct.*” U.S. Const. art. II, § 1, cl. 2 (emphasis added). That power is “plenary,” and the statutory provisions enacted by the legislature in the furtherance of that constitutionally-assigned duty may not be ignored by state election officials or changed by state courts. *Bush v. Gore (“Bush II”)*, 531 U.S. 98, 104-05 (2000).

Yet, during the 2020 presidential election, that is what the Pennsylvania Supreme Court did in four cases – three at issue in this Petition, and one already before the Court. Statutory requirements were eliminated regarding signature verification, the right of campaigns to challenge invalid mail ballots, mandates that mail voters fill in, date, and sign mail ballot declarations, and even the right of campaigns to observe the mail ballot canvassing process in a meaningful way.

Collectively, these three decisions resulted in counting approximately 2.6 million mail ballots in violation of the law as enacted by the Pennsylvania Legislature. According to public reports, without these protections, the resulting disqualification rate of invalid ballots was anemic—meaning over 110,000 invalid ballots were illegally counted—more than enough to have affected the outcome of the election, where the margin between the two principal candidates for President currently stands at 80,558. The questions presented are therefore:

1. Whether the Pennsylvania Supreme Court’s alteration or suspension of state

election law through its three decisions before and after the November 2020 general election usurped the Pennsylvania Legislature’s plenary authority to “direct [the] Manner” for appointing electors for President and Vice-President, in violation of Article II, Section 1, Clause 2 of the U.S. Constitution?

2. Whether the Pennsylvania Supreme Court’s three decisions usurping the Pennsylvania Legislature’s plenary authority to “direct [the] Manner” for appointing presidential electors, by changing the law, including eviscerating protections against mail ballot fraud, violated the Due Process Clause of the Constitution, and whether Pennsylvania applying the new rules promulgated by the Court during the election in only select counties where mail ballots heavily favored one candidate over the other violated the Equal Protection Clause of the Constitution?
3. Whether this Court has the power to provide a meaningful remedy to Petitioner in advance of the January 6, 2021 Joint Session of Congress, at which electoral votes will be opened and counted, or before the January 20, 2021 inauguration date specified by the Constitution?

PARTIES TO THE PROCEEDINGS

- I. **Pennsylvania Supreme Court: *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, Nos. 31 EAP 2020, 32 EAP 2020, 33 EAP 2020, 34 EAP 2020, 35 EAP 2020, 29 WAP 2020 (November 23, 2020), reported at 2020 Pa. LEXIS 5989, 2020 WL 6875017**

Petitioner: Donald J. Trump for President, Inc., Appellant

Respondents:

Elizabeth J. Elkin, Philadelphia County Board of Elections; Democratic National Committee; Philadelphia County Board of Elections; Omar Sabir; Al Schmidt; Lisa Deely; Bureau of Commissions, Elections and Legislation; DNC Services Corp./ Democratic National Committee; Democratic Party; and James Brewster, Appellees.

- II. **Pennsylvania Supreme Court: *In re Canvassing Observation*, No. 30 EAP 2020 (November 17, 2020), reported at 2020 Pa. LEXIS 5879, 2020 WL 6737895**

Petitioner: Donald J. Trump for President, Inc., Appellee

Respondents:

Philadelphia County Board of Elections, Appellant
Pennsylvania Democratic Party, Appellee

- III. **Pennsylvania Supreme Court: *In re November 3, 2020 Gen. Election*, No. 149 MM 2020 (October 23, 2020), reported at 240 A.3d 591**

Petitioner: Donald J. Trump for President, Inc., Appellee

Respondents:

National Republican Congressional Committee, Appellee
Republican National Committee, Appellee
Republican Party of Pennsylvania, Appellee

Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania, Petitioner

Bucks County Board of Elections, Chester County Board of Elections, Montgomery

County Board of Elections, Philadelphia County Board of Elections, Luzerne County Board of Elections, Clearfield County Board of Elections, Northampton County Board of Elections, Crawford County Board of Elections, Lehigh County Board of Elections, Armstrong County Board of Elections, Bradford County Board of Elections, Clarion County Board of Elections, Tioga County Board of Elections, Clarion County Board of Elections, Susquehanna County Board of Elections, Greene County Board of Elections, Delaware County Board of Elections, Lancaster County Board of Elections, Cumberland County Board of Elections, Allegheny County Board of Elections, Franklin County Board of Elections, Perry County Board of Elections, Sullivan County Board of Elections, Wyoming County Board of Elections, Adams County Board of Elections, Westmoreland County Board of Elections, Warren County Board of Elections, Potter County Board of Elections, Lackawanna County Board of Elections, Centre County Board of Elections, Columbia County Board of Elections, Blair County Board of Elections, Bedford County Board of Elections, Dauphin County Board of Elections, Fayette County Board of Elections, Huntingdon County Board of Elections, Indiana County Board of Elections, Lawrence County Board of Elections, Lebanon County Board of Elections, Montour County Board of Elections, Northumberland County Board of Elections, Venango County Board of Elections, York County Board of Elections, Armstrong County Board of Elections, Berks County Board of Elections, Elk County Board of Elections, Butler County Board of Elections, Respondents

Pennsylvania State Democratic Party, Dwight Evans, Respondent Pennsylvania Alliance for Retired Americans, Respondent League of Women Voters of Pennsylvania, NAACP Pennsylvania State Conference, Common Cause Pennsylvania, Respondents.

RULE 29.6 STATEMENT

Petitioner, Donald J. Trump for President, Inc., is the official campaign committee for Donald J. Trump, President of the United States and candidate for re-election to the office of President. Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED CASES

- A. *In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, Nos. 31 EAP 2020, 32 EAP 2020, 33 EAP 2020, 34 EAP 2020, 35 EAP 2020, 29 WAP 2020, Supreme Court of Pennsylvania. Judgment entered November 23, 2020.
1. *In re: 2,349 Ballots in the 2020 General Election*, No. 1162 CD 2020, Commonwealth Court of Pennsylvania. Judgment entered November 19, 2020.
 - a. *Zicarelli v. Allegheny County Board of Elections*, No. GD 20-011654, Court of Common Pleas of Allegheny County. Judgment entered November 18, 2020.
 2. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 1136 CD 2020, Commonwealth Court of Pennsylvania. Judgment not entered: on November 18, 2020 the Supreme Court of Pennsylvania exercised extraordinary jurisdiction over the case.
 - a. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100878, Court of Common Pleas of Philadelphia. Judgment entered November 13, 2020.
 3. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 1137 CD 2020, Commonwealth Court of Pennsylvania. Judgment not entered: on November 18, 2020 the Supreme Court of Pennsylvania exercised extraordinary jurisdiction over the case.

- a. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100877, Court of Common Pleas of Philadelphia. Judgment entered November 13, 2020.
 4. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 1138 CD 2020, Commonwealth Court of Pennsylvania. Judgment not entered: on November 18, 2020 the Supreme Court of Pennsylvania exercised extraordinary jurisdiction over the case.
 - a. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100876, Court of Common Pleas of Philadelphia. Judgment entered November 13, 2020.
 5. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 1139 CD 2020, Commonwealth Court of Pennsylvania. Judgment not entered: on November 18, 2020 the Supreme Court of Pennsylvania exercised extraordinary jurisdiction over the case.
 - a. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100875, Court of Common Pleas of Philadelphia. Judgment entered November 13, 2020.
 6. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 1140 CD 2020, Commonwealth Court of Pennsylvania. Judgment not entered: on November 18, 2020 the Supreme Court of Pennsylvania exercised extraordinary jurisdiction over the case.
 - a. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100874, Court of Common Pleas of Philadelphia. Judgment entered November 13, 2020.
- B. *In re: Canvassing Observation*, No. 30 EAP 2020, Supreme Court of Pennsylvania. Judgment entered November 17, 2020.
1. *In re: Canvassing Observation*, No. 1094 CD 2020, Commonwealth Court of Pennsylvania. Judgment entered November 5, 2020.
 - a. *In re: Canvassing Observation, Appeal of Donald J. Trump for President, Inc.*, No. 201107003, Court of Common Pleas of Philadelphia. Judgment Entered November 4, 2020.

C. *In re: November 3, 2020 General Election*, No. 149 MM 2020, Supreme Court of Pennsylvania. Judgment entered October 23, 2020.

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Petitioner Donald J. Trump for President, Inc., respectfully petitions for a writ of certiorari to review the judgments of the Pennsylvania Supreme Court.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania in *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, Nos. 31 EAP 2020, 32 EAP 2020, 33 EAP 2020, 34 EAP 2020, 35 EAP 2020, 29 WAP 2020, dated November 23, 2020, is reported at 2020 Pa. LEXIS 5989, 2020 WL 6875017, and reprinted in Petitioner's Appendix ("Pet. App.") A.

The opinion of the Supreme Court of Pennsylvania in *In re Canvassing Observation*, No. 30 EAP 2020, dated November 17, 2020, is reported at 2020 Pa. LEXIS 5879, 2020 WL 6737895, and reprinted in Pet. App. B.

The opinion of the Supreme Court of Pennsylvania in *In re November 3, 2020 Gen. Election*, No. 149 MM 2020, dated October 23, 2020, is reported at 240 A.3d 591, and reprinted in Pet. App. C.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Pennsylvania in *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election* was entered on November 23, 2020 (Pet. App. A).

The decision of the Supreme Court of Pennsylvania in *In re Canvassing Observation* was entered on November 17, 2020 (Pet. App. B).

The decision of the Supreme Court of Pennsylvania in *In re November 3, 2020*

Gen. Election was entered on October 23, 2020 (Pet. App. C).

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). All three decisions are final judgments by the highest court of the Commonwealth of Pennsylvania and, as demonstrated *infra*, Petitioner raised the federal questions presented in this case in the Court below, either expressly or by challenging the alteration of election statutes enacted by the Pennsylvania legislature in the exercise of its power to determine the “manner” of choosing presidential electors, which “presents a federal constitutional question.” *Bush II*, 531 U.S. at 113.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, Section 1, Clause 2 of the United States Constitution provides: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”

The Fourteenth Amendment of the Constitution, Section 1 provides, in relevant part: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The relevant provisions of the United States Code and Title 25 of the Pennsylvania Statutes and Consolidated Pennsylvania Statutes, as set forth in the attached Appendix (Pet. App. K), are:

1. 3 USC § 2

2. 3 USC § 5
3. 3 USC § 15
4. 28 U.S.C. § 1257(a)
5. PA. Const. Art VII §14
6. 25 P.S. § 2650
7. 25 P.S. § 3146.1
8. 25 P.S. § 3146.2
9. 25 P.S. § 3146.6
10. 25 P.S. § 3146.8
11. 25 P.S. § 3150.11
12. 25 P.S. § 3150.16

STATEMENT OF THE CASE

In key jurisdictions across the country, state and local election officials and courts altered or ignored state election laws,¹ in violation of the federal Constitution’s Article II assignment to State Legislatures of the plenary authority over the “manner” of choosing electors, including in a related case from Pennsylvania currently before the Court. *See, e.g., Republican Party v. Boockvar*, 208 L.Ed.2d 266, 267, 2020 U.S. LEXIS 5188, 2020 WL 6304626 (2020) (Statement of Alito, J., joined by Thomas and Gorsuch, JJ.) (“[T]he constitutionality of the [Pennsylvania] Supreme Court’s

¹ *See State of Tex. v. Commonwealth of Pa., et. al*, No. 22O155 (S.Ct., filed Dec. 8, 2020), in which the State of Texas identified numerous provisions of state law that were altered or ignored in four key states—the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin. This Court denied Texas’s Motion for Leave to File an Original Action for lack of standing. *Id.* (Dec. 11, 2020). The standing of Petitioner is not in question in this case.

decision [in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. Sep. 17, 2020)] ... has national importance, and there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution.”)² This case presents in stark relief several of the violations that occurred in Pennsylvania. Together, those violations alone affected more ballots than the current margin of difference between the two principal candidates for President in Pennsylvania.

I. Mail Voting and the Importance of Anti-Fraud Provisions³

After the presidential election controversy in Florida in 2000, a bipartisan commission, headed by former Democrat President Jimmy Carter and former Republican Secretary of State James Baker, found that mail ballots are “the largest source of potential voter fraud.” BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (hereinafter, “Carter-Baker Report”).⁴ Pennsylvania’s Legislature, which has the “plenary” power

² A summary of disputes arising out of six key swing states was recently published by Peter Navarro, Director of the Office of Trade and Manufacturing Policy, in his personal capacity. See “The Immaculate Deception: Six Key Dimensions of Election Irregularities” (Dec. 17, 2020), available at: https://www.scribd.com/document/488534556/The-Immaculate-Deception-12-15-20-1#from_embed.

³ In Pennsylvania, voters return mail ballots in envelopes which contain a declaration for signing, addressing, and dating on the back. The ballot itself is contained in an inner “secrecy” envelope. If the mail ballot is approved during canvassing beginning on Election Day, the outside envelope is opened. If the ballot is not contained in a sealed inner envelope, *i.e.* a “naked” ballot, or the inner envelope has markings indicating the identity of the voter, it is rejected. Otherwise, the inner envelope is mixed with other inner envelopes which are then opened and counted. This procedure protects the secrecy of the vote. See 25 P.S. §§ 3146.6(a), 3146.8, 3150.16(a). At the same time, if the mail ballots cannot be challenged until after the outside envelope is opened, and inner envelope mixed, opened, and counted, a post-election challenge cannot match the mail ballot with its vote.

⁴ At: <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf>.

under Article II of the U.S. Constitution to determine the manner for choosing Pennsylvania’s presidential electors, *see* Art. II, § 1, cl. 2; *McPherson v. Blecker*, 146 U.S. at 25; *Bush II*, 531 U.S. at 98, as well as the Pennsylvania Constitution itself, has long limited mail voting. Until this year, only voters who could establish cause were eligible to apply for mail (absentee) ballots, Pa. Const. Art. 7, § 14; 25 P.S. § 3146.1,⁵ and they were subject to strict signature verification and voter identification requirements, as well as requirements that political parties and candidates be able to observe the entire process for validation and canvassing of absentee ballots and, where necessary, challenge their validity. *See, e.g.*, 25 P.S. §§ 3146.2 (2012), 3146.2b (2012), 3146.8 (2012); *see also In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1234 (Pa. 2004) (“so-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed – particularly where ... they are designed to reduce fraud.”).⁶

In October 2019, the Legislature decided to allow no-excuse mail balloting by any eligible voter in the state,⁷ 25 P.S. § 3150.11(b), but it retained the strict

⁵ Pennsylvania’s Election Code now permits voters to vote absentee as “[q]ualified absentee electors” (25 P.S. § 3146.1), or by mail as “[q]ualified mail-in electors” (*id.* § 3150.11).

⁶ The Pennsylvania Legislature’s concerns about election fraud are well founded based on a history of misconduct in Philadelphia, both in mail voting and voting at the polls. *See, e.g., Marks v. Stinson*, 1994 U.S. Dist. LEXIS 5273 (E.D. Pa. April 26, 1994) (certifying state Senate candidate as the winner and removing his opponent from office based on massive absentee ballot and other election fraud by Democratic candidate and election officials which changed the result of the election); indictment of Michael (Ozzie) Myers, U.S. Department of Justice Press Release dated July 23, 2020, “Former Congressman Charged with Ballot Stuffing, Bribery, and Obstruction,” available at: <https://www.justice.gov/opa/pr/former-congressman-charged-ballot-stuffing-bribery-and-obstruction>.

⁷ Whether the Legislature had the authority to allow no-excuse mail ballots under the State

signature verification, voter identification, and observation and challenge requirements. *See, e.g.*, Sections 1302.2, 1306, 1308, “Act 77,” 2019 Pa. Legis. Serv. Act 2019-77 2019 Pa. ALS 77; 2019 Pa. Laws 77; 2019 Pa. SB 421 (approved Oct. 31, 2019). Those requirements were in place, and complied with, in the delayed June 2020 primary election.⁸ But each of them was dispensed with for the general election, not by the Legislature (as required by Article II), but by state and local elections officials, either unilaterally or in conjunction with the state’s elected Supreme Court.

II. Pennsylvania Election Officials and Courts Weakened or Entirely Disregarded Key Anti-Fraud Provisions of Pennsylvania Election Law

A. November 3, 2020 Gen. Election Ratified the Secretary of the Commonwealth’s Dispensing with Statutory Signature Verification Requirements for Mail Ballots, and *Sua Sponte* Eliminated the Statutory Right to Challenge Them During Canvassing on Election Day

In early August 2020, the League of Women Voters filed suit against the Secretary of the Commonwealth, Kathy Boockvar, alleging that in implementing the signature verification requirements contained in state law, the Secretary had failed to develop a plan for providing notice and an opportunity to cure for mail voters whose

Constitution is the subject of another case pending before this Court. *See Kelly v. Commonwealth of Penn.* (No. 20-810).

⁸ In the June 2020 primary election, where there were no significantly contested races, and thus, no mail ballots challenged on election day, signature defects alone resulted in “over 26,500 absentee and mail-in ballots [being] rejected in Pennsylvania,” or “1.8% of the total absentee and mail-in ballots cast statewide.” Complaint (Docket No. 1), ¶¶ 2, 54, *League of Women Voters v. Boockvar*, No. 2:20-cv-03850-PBT (E.D. Pa. Aug. 7, 2020) (*citing* Caitlin Huey-Burns & Adam Brewster, “Why some mail-in ballots are rejected and how to make sure your vote counts,” CBS News (Aug. 4, 2020), <https://www.cbsnews.com/news/why-mail-in-ballot-rejected-voting-counts/>).

ballots were disqualified because the signature did not match the registration signature on file, which the League contended violated federal constitutional guarantees of due process and equal protection. *See* Complaint (Docket No. 1), ¶¶ 60-68, 78-82, *League of Women Voters v. Boockvar*, No. 2:20-cv-03850-PBT (E.D. Pa. Aug. 7, 2020). The League did not contend that Pennsylvania state law did not allow for signature verification. Instead of responding to the notice and cure allegations, however, Secretary Boockvar took it upon herself to inform county registrars that state law did not require, and did not even permit, mail ballots to be rejected when the signature did not match the registration signature on file.⁹ The League then voluntarily dismissed its suit. *Id.* (Docket Nos. 39, 40).

Apparently recognizing that her actions contravened the long-standing recognition and practice that state law allowed signature verification of mail ballots during canvassing beginning on Election Day, the Secretary then asked the Pennsylvania Supreme Court to ratify her decision to dispense with the signature verification requirements, via an extraordinary petition for “King’s Bench jurisdiction.” The partisan-elected Supreme Court obliged, holding on October 23, 2020—just 11 days before the November 3, 2020 general election—that signature verification was not permitted under 25 P.S. §3146.8(g)(3) despite its language that

⁹ *See* Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, 9/11/2020 (“Boockvar 9/11/20 Guidance”), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20MailIn%20Ballot%20Return%20Envelopes.pdf>; Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures, 9/28/2020 (“Boockvar 9/28/20 Guidance”), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedures.pdf>.

the signature on the declarations on the outside envelopes of mail ballots be “sufficient.” The leaders in the Pennsylvania Legislature—both House and Senate—vehemently disagreed, *see* Legislators’ Br., fn. 16, *infra*. But the Court denied their motion to intervene and only allowed them to submit amicus briefs.

Although the Secretary had not even alleged in her petition for “King’s Bench jurisdiction” that statutory provisions allowing for the challenge of non-conforming absentee ballots were somehow void, the Pennsylvania Supreme Court nonetheless declared *sua sponte* that those provisions were also of no effect. Pet. App. C, at 29 fn. 25 (*citing* 25 P.S. §§ 3146.8(f), (g)(5)). This, despite the Court’s acknowledgement that state law continued to provide for challenges to the mail ballots themselves during canvassing by posting a \$10 per ballot bond, and referenced procedures for resolving such challenges, *including* mail-in ballots which had only been authorized in 2019:

(f) Any person challenging an application for an absentee ballot, *an absentee ballot*, an application for a mail-in ballot *or a mail-in ballot for any of the reasons provided in this act* shall deposit the sum of ten dollars (\$10.00) in cash with the county board, which sum shall only be refunded if the challenge is sustained or if the challenge is withdrawn within five (5) days after the primary or election. If the challenge is dismissed by any lawful order then the deposit shall be forfeited. The county board shall deposit all deposit money in the general fund of the county.

25 P.S. §§ 3146.8(f) (emphasis added). Instead of recognizing that these statutory provisions undermined its odd interpretation of § 3146.8(g)(3), which plainly allows consideration of the authenticity of signatures on mail ballots, the Court dispensed with the unambiguous language in the statutes as “overlooked remnants of a prior, now eliminated, process.” Pet. App. C, at 29 n. 24. As a result, mail ballots are

opened, mixed, and counted beginning on Election Day without any right to challenge the authenticity of the signatures.

Petitioner raised these issues of federal constitutional law in the court below. Petitioner argued that Secretary Boockvar’s alteration of statutory requirements adopted by the Legislature for use in federal elections “creates a federal constitutional question under the Elections and Electors Clauses.” Petitioner and Republican Intervenors’ Supp. Br., p. 4 (*citing* Ans. at 23-24). It also argued that adopting the Secretary’s position would “fail to consider ‘the extent to which the [Pennsylvania] Constitution could, consistent with [the Elections Clause], ‘circumscribe the legislative power.’” *Id.* at 17 (*quoting* *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 77 (2000) (“*Bush I*) (per curiam)). As it fully set out in its answer to the Secretary’s Petition:

[T]he U.S. Constitution also places crucial and inviolate prohibitions on judicial rewriting of the Election Code. The Elections Clause directs that “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed by the Legislature thereof,” subject to directives of Congress. U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Likewise, the Electors Clause directs that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,” electors for President and Vice President. U.S. CONST. art. II, § 1, cl. 2.

The Electors Clause in particular “convey[s] the broadest power of determination” and “leaves it to the legislature exclusively to define the method” of appointment of electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). “Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.” *Bush v. Gore*, 531 U.S. at 112–13 (Rehnquist, J., concurring). “A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question,” including when such departure is carried out by the state judiciary. *Id.* at 113. “[W]ith respect to a Presidential election,” state

courts must be “mindful of the legislature’s role under Article II in choosing the manner of appointing electors.” *Id.* at 114. For this reason as well, the Court may not deviate from Act 77’s plain text or rewrite the Election Code.

Ans. at 23-24.

Petitioner also argued that the Secretary’s novel construction of state election law, which would invalidate in-person votes due to signature mismatch but not mail votes, “would raise significant constitutional issues” under the Equal Protection and Due Process Clauses. *Id.* at 13 (*citing Bush II*, 531 U.S. at 104-05 (per curiam); *see also* Ans. at 3, 30 (elaborating on the Due Process and Equal Protection violations that would occur if the Secretary’s construction were adopted).

B. *Canvassing Observation* Eviscerated the Campaigns’ Statutory Right to Meaningfully Observe Canvassing of Mail Ballots

Building on its holding that state law did not permit signature verification or permit challenges of mail ballots during the canvassing process beginning on Election Day, the Pennsylvania Supreme Court held in the second case at issue that the requirements of state law mandating that campaign representatives be allowed “to be present” and “to remain in the room” during the canvassing process – 25 P.S. §§ 3146.8(b), 3146.8(g)(1.1) – did not actually require “meaningful” observation. *Canvassing Observation*, Pet. App. B, at 17-19. Overruling the Commonwealth Court, the Supreme Court held that mere presence at one end of a “room” as large as the Philadelphia Convention Center was sufficient, even when that resulted in the statutorily-authorized observers being as far as 100 feet away from some of the canvassing tables. Petitioner challenged the interpretation of these statutory

provisions before the Pennsylvania Supreme Court. *See Canvassing Observation*, Initial Brief of Appellee Donald J. Trump for President, Inc., filed Nov. 13, 2020, at 18-20. Petitioner’s challenge to the interpretation of these state laws constitutes a federal question when presidential elections are at issue. *See Bush II*, 531 U.S. at 113 (“A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question”) (Rehnquist, C.J., concurring); *see also Case of Electoral Coll.*, 8 F. Cas. 427, 432–33 (C.C.D.S.C. 1876) (“When the legislature of a state, in obedience to [Article II, § 1], has by law directed the manner of appointment of the electors, that law has its authority solely from the Constitution of the United States. It is a law passed in pursuance of the Constitution.”).

C. *Canvass of Absentee and Mail-In Ballots Eviscerated the Requirement that Mail Voters “Fill Out” the Declaration, Which Has Long Included the Voter’s Current Address and Date*

Concluding its trifecta of altering existing requirements for casting mail ballots, the Pennsylvania Supreme Court then determined that the statutory requirement that mail voters “*shall* then fill out, date, and sign” the declaration on the outer envelope, 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added), was not mandatory. *Canvass of Absentee and Mail-In Ballots* (Pet. App. A), at 19-20, 34. Although the declaration had long included a place for mail voters to date, sign, and confirm their address—an important requirement to ensure continued eligibility to vote—the Court held that the phrase, “fill out,” was ambiguous and therefore could

not apply to the address requirement.¹⁰ *Id.*, at 14-25.¹¹ Similarly, the Court held that the requirement that mail voters “*shall ... date*” the declaration was not mandatory because, in the Court’s view, it served no purpose. The notion that absentee ballots dated *before* they were even sent to the voter would provide evidence that the ballot had been fraudulently cast apparently escaped the Court’s attention. In addition, given the Pennsylvania Supreme Court’s decision in *November 3, 2020 Gen. Election* extending the date by which mail ballots may be received to 5 p.m. on the Friday following the election, the date requirement ensures that the ballot was not filled out after Election Day.

Ironically, in the guidance issued on September 11, 2020, Secretary Boockvar recognized and directed that “the county board of elections *shall* examine the Voter’s Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, *i.e., the voter’s name and address*, with information

¹⁰ Under Pennsylvania law, a voter may vote in an election after moving by completing a form. *See, e.g.,* 25 P.C.S. §§ 1323, 1328, 1901, 1902; *see also Public Interest Legal Found. v. Boockvar*, No. 1:20-cv-1905, 2020 U.S. Dist. LEXIS 193577, at *3 n.2 (M.D. Pa. Oct. 20, 2020) (when voters fail to confirm their continued residence and are deemed inactive, they “can still vote on Election Day, but they must sign an affirmation that they still live at the address currently on file with the board of elections.”). The address requirement allows election officials to determine whether the voter still resides at the address to which the mail ballot is issued. In addition, requiring the person filling out the ballot to hand-write the address is an impediment to fraud.

¹¹ The Court also dispensed with the “address” requirement by noting it had been added to the Declaration by the Secretary pursuant to authority delegated from the Legislature, not by the Legislature itself. *Canvass of Absentee & Mail-In Ballots* (Pet. App. A), at 23-27 (*citing In re Nov. 3, 2020 Gen. Election*, (Pet. App. C), at 27; 25 P.S. §§ 3146.6(a)(3), 3150.16(a.1)). It had been a part of the absentee ballot declaration for a very long time, however, so the post-election change to this long-standing election requirement is itself problematic, quite apart from any Article II violation. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

contained in” the above-referenced voter files. Boockvar 9/11/20 Guidance, at 3. Then, a few weeks later, she issued an additional guidance, specifically directing that “A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted.” Boockvar 9/28/20 Guidance, at 5. Because most Pennsylvania counties completed their canvassing of mail ballots in accord with the statutory requirements, as confirmed by Secretary Boockvar’s guidances, the Pennsylvania Supreme Court’s *post-election* alteration of those statutory requirements, which affected two large (and heavily Democrat) counties still canvassing their mail ballots, namely, Philadelphia and Allegheny, was therefore not just an Article II violation, but an Equal Protection violation as well.¹²

In its brief on appeal in the Commonwealth Court of Appeals, Petitioner challenged the erroneous interpretation given by the Philadelphia County Board of Elections and the Court of Common Pleas to Pennsylvania’s statutory requirement that a mail voter “fill out, date, and sign” the Declaration. *See Canvass of Absentee & Mail-In Ballots*, Petitioner’s Brief of Nov. 18, 2020 (Case No. 1136 C.D. 2020), at 26-32. Petitioner also argued in that brief that the courts “cannot ignore the clear mandates of the election code.” *Id.* at 32 (the Article II issue). It argued at length

¹² Two other Democrat-controlled counties – Bucks and Montgomery – also “did not follow” Secretary Boockvar’s guidance and counted mail ballots that were not filled out in full. *See Canvass of Absentee & Mail-in Ballots* (Pet. App. A), at 33, n.6 (citing *In re Canvass of Absentee and/or Mail-in Ballots of Nov. 3, 2020 Gen. Election, Petition of Donald J. Trump for President, Inc.*, No. 2020-05786-35 (Bucks Cty. Ct. Com. Pl. Nov. 19, 2020)); *Donald J. Trump for President, Inc. v. Montgomery Cnty. Bd. of Elections*, No. 2020-18680 (Nov. 13, 2020)).

that treating the “shall” in the statutory “fill out, date and sign” provision as directory rather than mandatory “raises serious equal protection concerns.” *Id.* at 29-30. That brief was then brought forward to the Pennsylvania Supreme Court when that Court accepted review. *See* Order of Nov. 18, 2020 (Case No. 93 EM 2020). In addition to the Equal Protection issue raised in the brief, Petitioner’s challenge to the erroneous interpretation of these state laws constitutes a federal question when presidential elections are at issue. *See Bush II*, 531 U.S. at 113 (“A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.”) (Rehnquist, C.J., concurring); *see also Case of Electoral Coll.*, 8 F. Cas. 427, 432–33 (C.C.D.S.C. 1876) (“When the legislature of a state, in obedience to [Article II, § 1], has by law directed the manner of appointment of the electors, that law has its authority solely from the constitution of the United States. It is a law passed in pursuance of the Constitution.”).

D. Other Article II Violations

Petitioners do not mean to suggest that these were the only actions taken in Pennsylvania which violated Article II. In addition to the three Pennsylvania Supreme Court cases at issue, as well as the *Boockvar* case already pending before this Court, other Pennsylvania courts have changed the rules of the 2020 presidential, contrary to the dictates of the Legislature. By way of example, the Pennsylvania Commonwealth Court conceded that Pennsylvania’s “directive [to securely seal the ballot secrecy envelope] is mandatory such that an elector’s noncompliance results in a ballot that is not valid is supported by the statutory

language and [the Pennsylvania Supreme Court’s decision in] *Boockvar*,” but chose to “give prospective application” to a “strict interpretation” of the law Election Code due to the “tremendous challenges presented by the massive expansion of mail-in voting” for the 2020 election. *In re Canvass of Absentee and/or Mail-in Ballots of Nov. 3 General Election*, No. 1191 C.D. 2020 (Commw. Ct. Nov. 25, 2020), at 13-14. Unlike the multiple cases where it granted extraordinary review to Secretary Boockvar, the Pennsylvania Supreme Court denied Petitioner’s application for review in this case. *See* Order of December 8, 2020 (Case No. 676 MAL 2020).

III. The 2020 Pennsylvania Election Results

According to the 2020 election returns, President Trump received 2,731,230 votes on election day, 595,538 votes by mail ballots and 50,874 votes by provisional ballot, for a total of **3,377,642** votes. Former Vice President Biden received 1,409,341 votes on election day, 1,995,691 votes by mail ballot and 53,168 votes by provisional ballot, for a total of **3,458,200** votes. The difference is **80,558** votes.¹³

In the 2018 General Election, when election officials were permitted to review, and candidates and parties were permitted to challenge absentee ballots, an average of 4.5% of the ballots were disallowed across Pennsylvania, with an even higher percentage, generally between 4.3 and 8.0 percent, in larger Democrat controlled counties (such as Montgomery and Philadelphia).¹⁴ In contrast, in the 2020 general

¹³ *See* <https://www.electionreturns.pa.gov/#>. The total votes listed on that site do not precisely match the sum of the three vote categories.

¹⁴ *See* <https://dig.abclocal.go.com/ccg/interactives/mail-ballots-rejected-map/index.html>.

election with over 2.6 million persons voting by mail – almost all for the first time – when neither election officials or candidates were permitted to review or contest the signatures, address, and date during the canvassing of mail ballots for the first time in Pennsylvania’s history, less than 0.28% percent were disqualified according to public sources, 1/16th the rate from the 2018 election.¹⁵ That disparity alone involves more ballots than the current margin of votes between the two candidates.

REASONS FOR GRANTING THE WRIT

I. By Eviscerating Election Law Enacted By the Pennsylvania Legislature Pursuant to Authority Derived from Article II of the Federal Constitution, the Pennsylvania Supreme Court Has Decided an Important Federal Question in a Way that Conflicts with Decisions of this Court

This Court has long held that Article II of the Constitution gives to the *Legislatures* of the States the exclusive power to determine the manner of choosing presidential electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). That power is “plenary.” *Bush II*, 531 U.S. at 104; *McPherson*, 146 U.S. at 25.

During the early part of our nation’s history (and, in one instance, all the way up through the election of 1860), most state legislatures simply chose electors themselves. *See McPherson*, 146 U.S. at 29-32. Florida’s Legislature assigned itself the power of choosing electors in 1868, and Colorado’s Constitution did the same in 1876 upon that State’s admission to statehood. *Id.* at 33. Although all 50 state legislatures have now chosen popular vote as the “manner” of choosing electors, *see*

¹⁵ See https://ballotpedia.org/Election_results,_2020:_Analysis_of_rejected_ballots.

Bush II, 531 U.S. at 104 (“History has now favored the voter”), that popular vote must be conducted “as the legislature has prescribed.” *Id.*

State legislatures do not act “solely under the authority given [them] by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.” *Bush I*, 531 U.S. at 76. The function of state legislature in carrying out a federal function derived from the U.S. Constitution “transcends any limitations sought to be imposed by the people of a State.” *Leser v. Garnett*, 258 U.S. 130, 137 (1922). “The appointment of ... electors is ... placed absolutely and wholly with the legislatures of the several States.” *McPherson*, 146 U.S. at 34-35; *see also Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

A. The Three Decisions Violated Article II By Changing the Law During the Election.

The exercise of the fundamental right to vote for presidential electors in the 2020 general election in Pennsylvania did not occur “as the legislature ha[d] prescribed.” As described above, non-legislative officials, oftentimes at the instigation of partisan third parties, ignored or significantly altered and thereby violated state election law, including, most troublingly, laws enacted to minimize the risk of fraud in mail voting and thereby protect the integrity of the election process. The decisions of the Pennsylvania Supreme Court, an elected body, also raised serious concerns whether these were partisan attempts to assist the Democratic candidate whose campaign strategy of utilizing mail ballots was well publicized, in comparison to President’s Trump’s well-known strategy to encourage in-person voting.

First, November 3, 2020 Gen. Election (Pet. App. C) changed the law to prohibit signature verification on mail-ballot declarations and eliminated the statutory right for parties and campaigns to challenge mail ballots during canvassing beginning on Election Day.

Second, Canvassing Observation (Pet. App. B) eliminated the campaigns' statutory right to meaningfully observe canvassing of mail ballots beginning on Election Day.

Third, Canvass of Absentee & Mail-In Ballots (Pet. App. A) eliminated or modified statutory requirements for signing, addressing, and dating mail ballot declarations.

In sum, the three Pennsylvania Supreme Court decisions at issue are contrary to established precedent of this Court. Moreover, the enormity of potential election consequences necessitates this Court granting the petition for writ of certiorari.

B. This Court Should Independently Examine Pennsylvania's Election Laws, Which The Pennsylvania Supreme Court Erroneously and Dramatically Changed During the Presidential Election

Pennsylvania is apparently of the view that the manner for choosing electors established by the state legislature is conditional, subject to alteration by “interpretation” by election officials in the executive branch or by the judiciary. The Secretary erroneously noted in her Application that “[t]he U.S. Constitution assigns to the states primary responsibility for determining the manner of selecting Presidential electors ... and [the Pennsylvania Supreme Court] is the ultimate

expositor of state law.” *November 3, 2020 Gen. Election*, Secretary’s Application for Invocation of King’s Bench filed Oct. 4, 2020, at 14.

Contrary to the Secretary’s claim, the Constitution does not assign the power to “the states,” of course, but rather to the “Legislature” of the State. U.S. Const. Art. II, § 1, cl. 2. And because an election law enacted for the choosing of presidential electors “has its sole authority from the constitution of the United States,” *Case of Electoral Coll.*, 8 F. Cas. at 432, neither is it true that the state’s Supreme Court is the ultimate expositor of that law. By relying on the erroneous interpretations of state law in the judgments at issue here, Pennsylvania thus advanced the position that non-legislative officials—executive (both statewide and local) and judicial—had the authority to alter the state’s election law, and conceded that they had in fact done so. That, too, is contrary to this Court’s precedents.

To be sure, “[a]s a general rule, this Court defers to a state court’s interpretation of a state statute.” *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) (“*Bush I*”); see also *Bush v. Gore [Bush II]*, 531 U.S. at 113 (Rehnquist, C.J., concurring). “In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law.” *Bush II*, *supra*, at 112. “But in the case of a law enacted by a state legislature applicable ... to the election of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.” *Bush I*, 531 U.S. at 76. As Chief Justice Rehnquist noted, selecting the manner of choosing presidential

electors is an “exceptional cas[e] in which the Constitution imposes a duty or confers a power on a particular branch of a State’s government,” namely, the *Legislature* of the State. *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring). In such a case, “the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.” *Id.*

Thus, “[i]n order to determine whether a state court has infringed upon the legislature’s authority, [this Court] necessarily must examine the law of the State as it existed prior to the action of the court.” *Id.* at 114. This is therefore one of the “areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.” *Id.* (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975), *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Bowie v. City of Columbia*, 378 U.S. 347 (1964)).

Each decision at issue in this petition involved a substantial departure from prior caselaw and the mandates of unambiguous statutes adopted by the *Legislature* of the State. *November 3, 2020 Gen. Election* eviscerated statutory language that county election boards “*shall* examine the declaration on the [outer] envelope of each [mail] ballot ... and *shall* compare the information thereon”—which includes the voter’s signature—to the relevant mail voter files in order to determine whether the declaration is “sufficient.” 25 P.S. § 3146.8(g)(3) (emphasis added). It also eliminated the statutory right provided by 25 P.S. § 3146.8(f) for campaigns to challenge mail ballots beginning on Election Day. *Canvassing Observation* inexplicably held that statutory requirements allowing campaign representatives and watchers to the

“present” and “to remain in the room” during the canvassing process, 25 P.S. §§ 3146.8(b), 3146.8(g)(1.1), in order to be able to verify that the process was being conducted according to law did not actually require “meaningful” observation. And *Canvass of Absentee and Mail-In Ballots* strangely held that “shall” means “may” and eliminated long-standing requirements that mail ballots be signed with addresses and dates. Two of the three decisions were subject to cogent dissents. The leaders of both the Pennsylvania House of Representatives and the Senate, vehemently disagreed with the Pennsylvania Supreme Court’s “interpretation” of state law.¹⁶

Because these statutes were enacted by the Legislature for use in *federal* elections, review by this Court to ensure a proper interpretation of the law would “not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*.” *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring). “To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate [the Court’s] responsibility to enforce the

¹⁶ See, e.g., *November 3, 2020 Gen. Election*, Brief of proposed-Intervenors, Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader, filed Oct. 7, 2020, at 3-6 (Secretary Boockvar “seeks to disrupt Pennsylvania’s clear and unambiguously crafted procedures for determining and challenging the validity of an absentee or mail-in ballot and/or application” and “asks th[e] Court to rewrite existing law ...”); *Canvassing Observation*, Brief of proposed-Intervenor Appellees Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and House Majority Leader Kerry Benninghoff, filed Nov. 13, 2020, at 4, 8-10 (“The General Assembly plainly did not craft detailed watcher and candidate access provisions only for those representatives to be shuttled so far away from the operations of the canvassing process that they have no meaningful opportunity to observe the process” as “[s]uch an absurd result would be in clear violation of the Election Code and the Pennsylvania Rules of Statutory Construction.”).

explicit requirements of Article II.” *Id.* at 115. This Court should therefore grant the writ in order to fulfill its responsibility to enforce Article II.

II. This Court Should Re-Affirm That Federal Courts Have The Power To Remedy Violations of Article II.

This Court adjudicates cases arising under the Constitution and laws of the United States, of course. It does not decide elections. That is the role of voters who cast lawful ballots. But the Constitution does contain rules that are obligatory on all agents of government—including those who conduct elections. Under Article II, the “manner” set out by the Legislature via the statutes it has adopted are part of those constitutional rules.

It is therefore well within this Court’s authority to re-affirm by declaratory and injunctive relief that only the state legislature has the power to adopt a statutory scheme for choosing presidential electors; that alterations to that scheme by non-legislative officials in the state are both illegal and unconstitutional; and that election results affected in a way greater than the margin between candidates cannot be validly certified. At that point, a couple of avenues for resolution present themselves.

First, applying long-standing burden-shifting doctrine, state election officials or federal district courts could recertify the existing results if, and only if, they can establish the validity of a sufficient number of the mail ballots to sustain the existing certification. *See, e.g., Warf v. Bd. of Elections*, 619 F.3d 553, 561-62 (6th Cir. 2010) (“once the contestant has made a showing of irregularity, ... contestee must then come forward with evidence of substantial compliance with balloting procedures”); *Wilkes-*

Barre Election Appeals, 1967 Pa. Dist. & Cnty. Dec. LEXIS 9, *16 (Pa.Com.Pl. Luz. Cnty. Dec. 27, 1967) (concluding that where “challenger has presented a prima facie case to substantiate his challenge [to absentee ballot,] ... the burden of proof shifted to the voter to establish her position.”).

Second, alternatively, the matter can be remanded to allow the State Legislature to consider whether the violations of its state law yielded a significant enough number of illegally-cast votes to have altered the results of the election. If they did, the Legislature has it within its power under Article II to certify the slate of electors that obtained the majority of *lawfully* cast ballots and submit that certification to the President of the Senate prior to January 6, 2021, the date set by statute for the meeting of the Joint Session of Congress to count electoral votes. *See McPherson*, 146 U.S. at 25 (“Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, *there is no doubt of the right of the legislature to resume the power at any time*, for it can neither be taken away nor abdicated”) (emphasis added, quoting with approval Senate Rep. 1st Sess. 43d Cong. No. 395). This power is also recognized by federal law, which provides that “[w]hensoever 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.

Only by pursuing such a course will the public’s faith in the election process be restored, and only then will voters on either side of the intensely partisan divide be

able to find solace in a result that was obtained after a fair electoral fight, where every *legal* vote was counted but where those votes were not diluted or negated by the casting and counting of *illegal* votes.

III. The Pennsylvania Court Decisions Create a Mail Ballot Statutory Scheme That Is So Porous That It Gave Rise To Due Process and Equal Protection Violations That Should Be Reviewed by this Court.

A. Due Process Was Violated By The Three Pennsylvania Supreme Court Decisions

When election practices reach “the point of patent and fundamental unfairness,” the integrity of the election itself violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). *See also Roe v. Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995) (“retroactive change in the election that [would] effectively ‘stuff the ballot box,’ implicat[es] fundamental fairness”). Further, a “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Matthews v. Eldridge*, 424 U.S. 319, 333 (1975) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). *See also Lachance v. Erickson*, 522 U.S. 262, 266 (1998) (“The core of due process is the right to notice and a meaningful opportunity to be heard.”). The absence of meaningful safeguards in an election violates the Due Process Clause.

Specifically, the three Pennsylvania Supreme Court decisions taken together (a) prohibit signature verification by the boards of elections, (b) remove the requirement that voters address and date mail ballots, and (c) deny candidates the statutory rights to challenge whether signatures on mail ballots are genuine,

meaningfully observe the canvassing by which mail are processed, and enforce the requirements that mail ballot declarations are properly signed, addressed, and dated before they are opened, mixed, and counted. In short, the three decisions eliminated all “meaningful safeguards” designed to protect against fraud in the mail ballot process. Once the mail ballots are opened, mixed, and counted, no post-election challenge can match a defective ballot to its vote. The toothpaste is forever out of the tube. Changing longstanding rules in the middle and after a presidential election violates due process.

B. The Equal Protection Clause Was Violated By Different Voting Standards Being Used In Different Counties

The Equal Protection Clause of the United States Constitution prohibits the use of different standards in the treatment and tabulation of ballots within a state. “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush II*, 531 U.S. at 104-05 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). “It must be remembered that ‘the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’” *Bush II*, 531 U.S. at 105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

As set forth above, state and local officials and the judiciary applied different voting standards in different counties in Pennsylvania in the general election of November 3, 2020 in violation of the Equal Protection Clause. Specifically, while many counties (controlled by Republicans and supportive of President Trump)

enforced the standards promulgated by Secretary Boockvar before the election and carefully reviewed mail ballot declarations, key Democratic counties – Philadelphia and Allegheny – at issue in *Canvassing of Absentee and Mail-in Ballots* did not. This resulted in mail ballot voters being treated differently depending on the county in which they resided, and mail ballots for President Trump and his opponent being treated differently depending on the counties in which they were canvassed, violating Equal Protection in two ways. See *Marks v. Stinson, supra.* (election officials favoring one candidate over the other violated equal protection.)

IV. The Court’s Intercession Is Necessary To Uphold The Rule of Law And To Put the Country at Ease, To The Extent Possible in these Tumultuous Times

“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Even the appearance of fraud in a close election is poisonous to democratic principles: “Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); see also *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008) (States have an interest in preventing voter fraud and ensuring voter confidence). Few things contribute more to the appearance of fraud than partisan election officials altering statutory requirements designed to protect against fraud. Equally concerning is the appearance that Pennsylvania’s elected Supreme Court may have engaged in partisan decision-making designed to favor the Democratic presidential candidate over the Republican.

Our country is deeply divided in ways that it arguably has not been seen since the election of 1860. There is a high level of distrust between the opposing sides, compounded by the fact that, in the election just held, election officials in key swing states, for apparently partisan advantage, failed to conduct their state elections in compliance with state election law. Indeed, a poll taken shortly after the election by the reputable Rasmussen polling firm indicated that 47% of all Americans (including 75% of Republicans and 30% of Democrats), believed that it was “likely” or “very likely” the election was stolen from the current incumbent President.

The fact that nearly half of the country believes the election was stolen should come as no surprise. President Trump prevailed on nearly every historical indicator of success in presidential elections. For example, he won both Florida and Ohio; only one candidate in history—Republican or Democrat—has ever lost the election after winning both States. And he won these traditional swing states by large margins—Ohio by 8 percentage points and 475,660 votes; Florida by 3.4 percentage points and 371,686 votes. He won 18 of the country’s 19 so-called “bellwether” counties—counties whose vote, historically, almost always goes for the candidate who wins the election. Initial analysis indicates that he won 26 percent of non-white voters, the highest percentage for any Republican candidate since 1960. A large percentage of the American people know or at least strongly believe that something is deeply amiss.

When election officials conduct elections in a manner that violates state election law and thereby contravenes the Constitution of the United States, grave harm is done not just to the candidates on the ballot but to the citizenry’s faith in the

election process itself. Partisan judicial decisions add to this harm. Compliance with state election law is no mere procedural requirement. For without compliance with the rule of law, elections are subject to the very real prospect that fraud could occur in the election. Altering or suspending state laws designed to minimize the risk of fraud in the casting of mail ballots, as occurred in this case, only exacerbates that concern.

The decision by Pennsylvania election officials, ratified by the Pennsylvania Supreme Court, to prevent meaningful access by election observers, is equally troubling, not only domestically, but internationally as well. Indeed, meaningful access by observers is one of the factors relied on by both the United Nations¹⁷ and our own State Department¹⁸ in determining whether foreign elections are conducted in a free and fair manner. By failing to follow the rule of law, Pennsylvania’s election officials and its Supreme Court put our nation’s belief in elected self-government at risk, and undercut our credibility on the world stage.

¹⁷ The United Nations Declaration of Principles for International Election Observation (endorsed by, among others, the Organization of American States, of which the United States is a member) acknowledges the importance of “political contestants” being “allowed to monitor all processes related to elections and observe procedures, including among other things the functioning of electronic and other electoral technologies inside polling stations, counting centers and other electoral facilities, as well as the transport of ballots and other sensitive materials.” DECLARATION OF PRINCIPLES FOR INTERNATIONAL ELECTION OBSERVATION, Principal 14, p. 5 (Oct. 27, 2005). Available at: https://www.ndi.org/sites/default/files/1923_declaration_102705_0.pdf.

¹⁸ The United States State Department has also found that “prohibition of local independent observers at polling stations” is one of the factors demonstrating that elections are “not free and fair.” Michael Pompeo, “Press Statement: Presidential Elections in Belarus” (Aug. 10, 2020). Available at: <https://www.state.gov/presidential-elections-in-belarus/>.

Our constitutional republic has endured for nearly two and a half centuries based on the consent of the governed. That consent is grounded in the confidence of our people in the legitimacy of our institutions of government. But that legitimacy can only be sustained if the elections through which the sovereign people determine the direction of their government are free and fair. Fortunately, the Framers of our Constitution built a remedy for such concerns into the system, namely, an independent federal judiciary, free of the passions of politics, which can review dispassionately even intense controversies such as those swirling around this election. It is therefore the most solemn duty of this Court to objectively review the facts and legal issues presented by the Petitioner in this historic case, render judgment upon the unconstitutional actions that occurred in Pennsylvania, and restore the confidence of all Americans that the rule of law will be upheld today and that our elections in the future will be secure.

V. The Issues Addressed by this Petition Are Not Moot

Respondents may contend that these cases are moot because Pennsylvania's certified electors already met on December 14, 2020, cast their votes for President, and transmitted those votes to the President of the Senate, as specified by federal law. *See* 3 U.S.C. §§ 7, 11. But in Pennsylvania (as well as in six other states), two different slates of electors met, cast votes, and transmitted those votes to the President of the Senate. *See* Ivan Pentchoukov, "Electors in 7 States Cast Dueling

Votes for Trump,” *The Epoch Times* (Dec. 15, 2020).¹⁹

Though rare, such a thing has happened twice before in our nation’s history when election challenges such as this were still underway on the date Congress had designated for electors to meet and vote. In 1960, Hawaii’s Governor had certified Vice President Richard Nixon as the winner of that state’s electors. Those electors met on the designated day and cast their votes. But because challenges to the results of the election were still pending, the electors pledged to Senator John Kennedy also met and cast their votes. When it was subsequently determined that Senator Kennedy had won the election, those electoral votes were the ones counted during the joint session of Congress in January 1961.²⁰

The election of 1876 likewise yielded multiple slates of electors from several states, namely, Florida, Louisiana, Oregon, and South Carolina. The legal challenges that swirled around that election dispute were only deemed moot once a commission established by Congress determined that Rutherford B. Hayes had prevailed, and then only after he was inaugurated on March 4, 1877.²¹ This case will therefore not be moot at least until January 20, 2021—the day the Constitution now sets as inauguration day.

¹⁹ Available at: https://www.theepochtimes.com/mkt_app/electors-in-7-states-cast-dueling-votes-for-trump_3620059.html.

²⁰ Jack M. Balkin, *BUSH V. GORE AND THE BOUNDARY BETWEEN LAW AND POLITICS*, 110 *Yale L.J.* 1407, 1421 n. 55 (2001).

²¹ See generally, William H. Rehnquist, *Centennial Crisis: The Disputed Election of 1786* (Vintage 2005).

None of the other election dates, such as the so-called December 8, 2020 “safe harbor” date established by 3 U.S.C. § 5 or even the January 6, 2021 date for the joint session of Congress established by 3 U.S.C. § 15, are constitutionally required.²² Indeed, if this Court vacated a State’s appointment of presidential electors has having been illegally certified because of illegal and unconstitutional conduct by election officials, those electoral votes would not be counted in the joint session of Congress on January 6, 2021.

Even the swearing in of the next President on January 20, 2021, will not moot this case because review could outlast the selection of the next President under “the ‘capable of repetition, yet evading review’ doctrine,” which applies “in the context of election cases ... when there are ‘as applied’ challenges as well as in the more typical case involving only facial attacks.” *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (internal quotations omitted); accord *Norman v. Reed*, 502 U.S. 279, 287-88 (1992). The legal issues presented by this petition, namely, whether the alteration of state election laws by non-legislative officials in the states is unconstitutional, will likely recur in future elections—including in the presidential election in 2024, in which Petitioner is constitutionally eligible to run. Mootness is therefore not, and

²² Specifically, nothing in Pennsylvania law suggests that the Legislature had adopted a scheme designed to comport with 3 U.S.C. § 5 “safe harbor” provision. Section 3456 provides no deadline for concluding an election contest challenging a presidential election. 25 P.S. § 3456. Section 3159 provides no deadline for the Secretary of the Commonwealth to “certify and file” election returns. 25 P.S. § 3159. Further, Section 3166, which governs “Presidential electors,” provides no deadline for the Secretary to “receiv[e] and comput[e] the returns of the election of presidential electors,” and “lay them before the Governor.” 25 P.S. § 3166.

will not become, an issue.

CONCLUSION

In October 2019, the Legislature of the Commonwealth of Pennsylvania allowed for no-excuse mail voting for every eligible voter in the state, but it kept in place long-standing validation and observer requirements to protect against fraud in the casting and canvassing of mail ballots, which are “the largest source of potential voter fraud.” Carter-Baker Report, *supra*. Pennsylvania election officials, in conjunction with the Pennsylvania Supreme Court, altered or dispensed with those significant “meaningful safeguards” in the recent General Election. Because that election included the choice of presidential electors, the alterations to statutory requirements contravened Article II, Section 1 of the Constitution, which assesses plenary power to the *Legislature* to determine the manner of choosing electors.

The effect of these illegal and unconstitutional changes to state election law affected enough ballots to alter the results of the election. Certiorari is warranted so that this Court can reaffirm its prior Article II holdings that only the *Legislature* of a state can alter election laws utilized in the choice of presidential electors, and to provide redress for the breaches of that constitutional requirement that occurred in these cases.

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APPENDIX A

[J-118A-2020, J-118B-2020, J-118C-2020, J-118D-2020, J-118E-2020 and J-118F-2020]
IN THE SUPREME COURT OF PENNSYLVANIA

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: CANVASS OF ABSENTEE AND : No. 31 EAP 2020
MAIL-IN BALLOTS OF NOVEMBER 3, :
2020 GENERAL ELECTION :
: :
: SUBMITTED: November 18, 2020
APPEAL OF: DONALD J. TRUMP FOR :
PRESIDENT, INC. :

IN RE: CANVASS OF ABSENTEE AND : No. 32 EAP 2020
MAIL-IN BALLOTS OF NOVEMBER 3, :
2020 GENERAL ELECTION :
: :
: SUBMITTED: November 18, 2020
APPEAL OF: DONALD J. TRUMP FOR :
PRESIDENT, INC. :

IN RE: CANVASS OF ABSENTEE AND : No. 33 EAP 2020
MAIL-IN BALLOTS OF NOVEMBER 3, :
2020 GENERAL ELECTION :
: :
: SUBMITTED: November 18, 2020
APPEAL OF: DONALD J. TRUMP FOR :
PRESIDENT, INC. :

IN RE: CANVASS OF ABSENTEE AND : No. 34 EAP 2020
MAIL-IN BALLOTS OF NOVEMBER 3, :
2020 GENERAL ELECTION :
: :
: SUBMITTED: November 18, 2020
APPEAL OF: DONALD J. TRUMP FOR :
PRESIDENT, INC. :

IN RE: CANVASS OF ABSENTEE AND : No. 35 EAP 2020
MAIL-IN BALLOTS OF NOVEMBER 3, :
2020 GENERAL ELECTION :
: :
: SUBMITTED: November 18, 2020
:

APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC. :

IN RE: 2,349 BALLOTS IN THE 2020 GENERAL ELECTION : No. 29 WAP 2020

APPEAL OF: ALLEGHENY COUNTY BOARD OF ELECTIONS : Appeal from the Order of the Commonwealth Court entered November 19, 2020 at No. 1162 CD 2020, reversing the Order of the Court of Common Pleas of Allegheny County entered November 18, 2020 at No. GD 20-011654 and remanding

: SUBMITTED: November 20, 2020

Justice Donohue announces the judgment of the Court, joined by Justices Baer, Todd and Wecht, and files an opinion joined by Justices Baer and Todd

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

JUSTICE DONOHUE

DECIDED: November 23, 2020

These appeals present the question of whether the Election Code requires a county board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot’s outer envelope but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged. Pursuant to our longstanding jurisprudence, central to the disposition of these appeals is whether the information is made mandatory by the Election Code or whether the inclusion of the information is directory, i.e., a directive from the Legislature that should be followed but the failure to provide the information does not result in invalidation of the ballot.

We are guided by well-established interpretive principles including that where the language of a statute is unambiguous, the language shall be controlling. 1 Pa.C.S. §

1921(b). In the case of ambiguity, we look to ascertain the legislative intent, and in election cases, we adhere to the overarching principle that the Election Code should be liberally construed so as to not deprive, inter alia, electors of their right to elect a candidate of their choice. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020). Stated more fully:

Election laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.

Appeal of James, 105 A.2d 64, 65-66 (Pa. 1954).

Guided by these principles and for the reasons discussed at length in this opinion, we conclude that the Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged.

* * *

In connection with five of these consolidated appeals, Petitioner Donald J. Trump for President, Inc. (the "Campaign") challenges the decision of the Philadelphia County Board of Elections (the "Philadelphia Board") to count 8,329 absentee and mail-in ballots. The Campaign does not contest that these ballots were all timely received by the Philadelphia Board prior to 8:00 p.m. on November 3, 2020 (election day); that they were cast and signed by qualified electors; and that there is no evidence of fraud associated

with their casting. The Campaign instead contends that these votes should not be counted because the voters who submitted them failed to handwrite their name, street address or the date (or some combination of the three) on the ballot-return outer envelope. The Philadelphia County Court of Common Pleas, per the Honorable James Crumlish, upheld the Philadelphia Board's decision to count the ballots, ruling that the Election Code does not mandate the disqualification of ballots for a failure to include the challenged information, stressing that the inclusion or exclusion of this information does not prevent or promote fraud. The Campaign pursued an appeal to the Commonwealth Court. This Court granted the Philadelphia Board's application to exercise our extraordinary jurisdiction, 42 Pa. C.S. § 726, over these cases then pending in the Commonwealth Court.

At or around the same time that the matters were being litigated in Philadelphia, across the state in Allegheny County, Nicole Zicarelli, a candidate for the Pennsylvania Senate in the 45th Senatorial District (Allegheny-Westmoreland counties) challenged the November 10, 2020 decision of the Allegheny County Board of Elections (the "Allegheny County Board") to canvass 2,349 mail-in ballots that contained a signed – but undated – declaration. Again, all of the outer envelopes were signed, they are conceded to be timely and there are no allegations of fraud or illegality. On November 18, 2020, the Court of Common Pleas of Allegheny County, per the Honorable Joseph James, upheld the decision of the Allegheny County Board to count the ballots. *Zicarelli v. Allegheny County Board of Elections*, No. GD-20-011654 (Allegheny Cty. Ct. Com. Pl.). Zicarelli filed an appeal to the Commonwealth Court and an application in this Court requesting that we exercise extraordinary jurisdiction over her appeal. During the pendency of the

request to this Court, on November 19, 2020, a three-judge panel of the Commonwealth Court, with one judge dissenting, reversed the common pleas court decision.

On November 20, 2020, the Allegheny County Board filed an emergency petition for allowance of appeal, which we granted, limited to whether the ballots contained in undated outer envelopes should be invalidated. We stayed the order of the Commonwealth Court pending the outcome of this appeal and consolidated it with the Philadelphia Board cases.

In these appeals, we are called upon to interpret several provisions of the Election Code. We set them forth at the outset since they guide the resolution of these appeals.

Section 3146.6(a) provides as follows with respect to absentee ballots:

(a) Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added).

Section 3150.16(a) sets forth the procedure for the submission of a mail-in ballot:

(a) General rule.--At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible

pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3150.16(a) (emphasis added).

Sections 3146.4 and 3150.14(b) delegate to the Secretary of the Commonwealth the responsibility to prescribe the form of the elector's declaration on the outer envelope used to mail the absentee and mail-in ballots:

§ 3146.4. Envelopes for official absentee ballots

The county boards of election shall provide two additional envelopes for each official absentee ballot of such size and shape as shall be prescribed by the Secretary of the Commonwealth, in order to permit the placing of one within the other and both within the mailing envelope. On the smaller of the two envelopes to be enclosed in the mailing envelope shall be printed, stamped or endorsed the words "Official Election Ballot," and nothing else. **On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector, and the name and address of the county board of election of the proper county.** The larger envelope shall also contain information indicating the local election district of the absentee voter. **Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors qualifications, together with a statement that such elector has not already voted in such primary or election.** The mailing envelope addressed to the elector shall contain the two envelopes, the official absentee ballot, lists of candidates, when authorized by section 1303 subsection (b) of this act, the uniform instructions in form and substance as

prescribed by the Secretary of the Commonwealth and nothing else.

25 P.S. § 3146.4 (emphasis added).

§ 3150.14. Envelopes for official mail-in ballots

* * *

(b) Form of declaration and envelope.--**The form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain, among other things, a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election.**

25 P.S. § 3150.14(b) (emphasis added).

The pre-canvassing or canvassing of absentee and mail-in ballots proceed in accordance with the dictates of 25 P.S. § 3146.8(g)(3), as follows:

§ 3146.8. Canvassing of official absentee ballots and mail-in ballots

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), **the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote,** the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3) (emphasis added).

Pursuant to the authority granted in § 3150.14(b), the Secretary of the Commonwealth developed the following declaration used in connection with the 2020 General Election:

I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.

[BAR CODE]

Voter, sign or mark here/Votante firme o margue aqui

X _____

Date of signing (MM/DD/YYYY)/Fechade firme (MM/DD/YYYY)

Voter, print name/Votante, nombre en letra de impreta

Voter, address (street)/Votante, dirreccion (calle)

[LABEL – Voters' name and address]

In addition, the Secretary issued guidance to the county boards of elections with respect to the examination of ballot return envelopes. First, on September 11, 2020, she issued the following guidance:

3. EXAMINATION OF DECLARATION ON BALLOT RETURN ENVELOPES:

The county board of elections is responsible for approving ballots to be counted during pre-canvassing.

To promote consistency across the 67 counties, the county boards of elections should follow the following steps when processing returned absentee and mail-in ballots.

After setting aside ballots of elector's who died prior to the opening of the polls, the county board of elections shall examine the Voter's Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the "Registered Absentee and Mail-in Voters File, the absentee voter's list and/or the Military Veterans' and Emergency Civilians Absentee Voters File."

If the Voter's Declaration on the return envelope is blank, that ballot return envelope must be set aside and not counted. If the board determines that a ballot should not be counted, the final ballot disposition should be noted in SURE. The ballot return status (Resp Type) should be noted using the appropriate drop-down selection.

If the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code.

Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, 9/11/2020, at 3. On September 28, 2020, the Secretary offered additional guidance on the treatment of ballot return envelopes:

With regard to the outer ballot-return envelope:

A ballot-return envelope with a declaration that is filled out, dated, and signed by an elector who was approved to receive an absentee or mail-in ballot is sufficient and counties should continue to pre-canvass and canvass these ballots.

A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted. Ballot-return envelopes must be opened in such a manner as not to destroy the declarations executed thereon.

All ballot-return envelopes containing executed declarations must be retained for a period of two years in accordance with the Election Code.

* * *

Pre-canvass and Canvass Procedures

At the pre-canvass or canvass, as the case may be, the county board of elections should:

- Segregate the unopened ballots of voters whose applications were challenged by the challenge deadline (5:00 PM on the Friday before the election).
 - These ballots must be placed in a secure, sealed container until the board of elections holds a formal hearing on the challenged ballots.
 - Ballot applications can only be challenged on the basis that the applicant is not qualified to vote.
- Set aside the ballot of any voter who was deceased before election day.
- Set aside any ballots without a filled out, dated and signed declaration envelope.
- Set aside any ballots without the secrecy envelope and any ballots in a secrecy envelope that include text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference.

The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

No challenges may be made to mail-in or absentee ballot applications after 5:00 pm on the Friday before the election.

No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.

NOTE: For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*.

Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures, 9/28/2020, at 5, 8-9.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the General Assembly's passage of Act 77 of 2019, voters in Pennsylvania may cast their ballots in elections by absentee or no-excuse mail-in ballots. To do so, they must submit applications to county boards of elections, and in connection therewith must provide the address at which they are registered to vote. They must also sign a declaration affirming, among other things, that they are "eligible to vote by mail-in [or absentee] ballot at the forthcoming primary or election," and that "all of the information" supplied in the mail-in or absentee ballot application is "true and correct." 25 P.S. §§ 3150.12, 3146.2. Upon receipt of the application, the county board of elections must confirm the elector's qualifications and verify that the elector's address on the application matches the elector's registration. Upon the county board of elections' approval of the application, the elector is provided with a ballot, an inner "secrecy envelope" into which the ballot is to be placed, and an outer envelope into which the secrecy envelope is to be placed and returned to the board. The outer envelope has pre-printed on it (1) a voter's declaration, (2) a label containing the voter's name and address, and (3) a unique nine-digit bar code that links the outer envelope to the voter's registration file contained in the Statewide Uniform Registry of Electors ("SURE") system. After receiving the outer envelope, the board of elections stamps the date of receipt on it and then scans the unique nine-digit bar code, which links the voter's ballot to his or her registration file.

The pre-canvassing or canvassing of absentee and mail-in ballots then proceeds in accordance with the dictates of 25 P.S. § 3146.8(g)(3):

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3).

Pursuant to this section, on November 9, 2020, the Philadelphia Board met to determine whether ballots separated into nine categories were "sufficient" to be pre-canvassed or canvassed. It concluded that four categories were not sufficient to be pre-canvassed or canvassed: (1) 472 ballots where the outer envelope lacked a signature and any other handwritten information; (2) 225 ballots where the outer envelope was not signed by the voter; (3) 112 ballots where the individual who completed the declaration appeared to be different from the individual who had been assigned the ballot; and (4) 4,027 ballots that were not submitted in a secrecy envelope.

In contrast, the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed the ballots in five categories: (1) 1,211 ballots that lacked a handwritten date, address, and printed name on the back of the outer envelope (but were signed); (2) 1,259 ballots that lacked only a handwritten date on the back of the outer envelope (but were signed and contained a handwritten name and address); (3) 533 ballots that lack only a

handwritten name on the back of the outer envelope (but were signed and dated and contained a handwritten address); (4) 860 ballots that lack only a handwritten address on the back of the outer envelope (but were signed and dated and contained a handwritten name); (5) 4,466 ballots that lack only a handwritten name and address on the back of the outer envelope (but were signed and dated).

On November 10, 2020, the Campaign filed five pleadings entitled “Notice of Appeal via Petition for Review of Decision by the Philadelphia County Board of Elections,” one for each of the five categories referenced above that the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed. In each petition for review, the Campaign alleged that this Court, in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), declared that absentee and mail-in ballots cast in violation of the Election Code’s mandatory requirements are void and cannot be counted. Petition for Review, 11/10/2020, ¶ 14. The Campaign further alleged that failures to include hand-written names, addresses and dates constituted violations of mandatory obligations under Sections 3146.6(a) and/or 3150.16(a) of the Election Code. *Id.* at 15-16. Accordingly, the Campaign alleged that the Board’s decisions with respect to the absentee and mail-in ballots in the above-referenced five categories were based on a clear error of law and must be reversed. *Id.* at 32.

On November 13, 2020, Judge Crumlish held oral argument on the issues raised in the Petition for Review. In response to questions from Judge Crumlish, counsel for the Campaign agreed that the Petition for Review was “not proceeding based on allegations of fraud or misconduct.” Transcript, 11/13/2020, at 13-14. She further agreed that the Campaign was not challenging the eligibility of the 8,329 voters in question and did not

contest either that all of the ballots at issue were signed by the voters or that they had been timely received by the Board. *Id.* at 30-31, 37. Instead, she indicated that the Campaign was “alleging that the ballots were not filled out correctly.” *Id.* at 14. Counsel for the DNC¹ argued that the failures to handwrite names, addresses and dates “are, at most, minor technical irregularities that the Supreme Court of Pennsylvania has repeatedly said do not warrant disenfranchisement.” *Id.* at 14. Counsel for the Philadelphia Board added that the Election Code includes no provision requiring “absolute technical perfection” when filling out the declaration on the outer envelope containing an absentee or mail-in ballot. *Id.* at 38.

Later that same day, Judge Crumlish entered five orders affirming the Philadelphia Board’s decision to count the contested ballots. In his orders, Judge Crumlish noted that while the declaration contained a specific directive to the voter to sign the declaration, it made no mention of filling out the date or other information. Trial Court Orders, 11/13/2020, ¶ 2. He further found that while the Election Code provides that while the voter shall “fill out” and date the declaration, the term “‘fill out’ is not a defined term and is ambiguous.” *Id.* at ¶ 4. He indicated that the outer envelope already contains a pre-printed statement of the voter’s name and address, and that “[n]either a date nor the elector’s filling out of the printed name or of the address are requirements necessary to prevent fraud.” *Id.* at ¶ 5-6. Concluding that “[t]he Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such

¹ DNA Services Corp./Democratic National Committee (hereinafter “DNC”) intervened in the proceedings before the trial court.

decree as right and justice may require[,]" *id.* at ¶ 8 (quoting 25 P.S. § 3157), Judge Crumlsh upheld the decision of the Philadelphia Board.

The Campaign filed appeals from Judge Crumlsh's orders in the Commonwealth Court on November 14, 2020, and the next day the Commonwealth Court issued an order consolidating the five appeals and setting an expedited briefing schedule. On November 17, 2020, the Philadelphia Board filed an application with this Court to exercise its extraordinary jurisdiction, 42 Pa.C.S. § 726, over the consolidated appeals, which we granted by order dated November 18, 2020.

In our order granting the Philadelphia Board's application for the exercise of extraordinary jurisdiction, we stated the issue to be decided as follows:

Does the Election Code require county boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed their ballot's outer envelopes but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged?

On November 10, 2020, the Allegheny County Board decided to canvass 2,349 mail-in ballots that contained a signed but undated declaration. Zicarelli challenged the decision in an appeal to the court of common pleas ultimately heard and decided by the Honorable Joseph James. It was not disputed that all 2,349 voters signed and printed their name and address on the outer envelopes and returned the ballots to the Allegheny County Board on time. Each of the ballots was processed in the Statewide Uniform Registry of Electors ("SURE") system and was time-stamped when it was delivered to the Allegheny County Board on or before November 3, 2020. At a hearing, via Microsoft Teams, on November 17, 2020, the Democratic Party and James Brewster (Zicarelli's opponent in the 45th Senatorial District race) moved to intervene, which motion was

granted. At the hearing, Zicarelli stated that she was not claiming voter fraud regarding the challenged ballots.

In an opinion and order dated November 18, 2020, Judge James affirmed the Allegheny County Board's decision to count the ballots. He concluded that the date provision in Section 3150.16(a) is directory, not mandatory, and that "ballots containing mere minor irregularities should only be stricken for compelling reasons," citing *Shambach v. Shambach*, 845 A.2d 793, 798 (Pa. 2004). Noting that the ballots were processed in the SURE system and time-stamped when delivered to the Allegheny County Board, he found that the technical omission of the handwritten date on a ballot was a minor technical defect and did not render the ballot deficient.

Zicarelli immediately appealed Judge James' decision to the Commonwealth Court and contemporaneously filed an application to this Court requesting our exercise of extraordinary jurisdiction, noting that the issue presented was accepted by this Court as part of the Philadelphia Board appeals. While the application was pending, the Commonwealth Court ordered expedited briefing and on November 19, 2020, issued an opinion and order reversing the Court of Common Pleas of Allegheny County and remanded. *In Re: 2,349 Ballots in the 2020 General Election; Appeal of: Nicole Zicarelli*, ___ A.3d ___, 1162 C.D. 2020 (Commw. Ct. 2020). Zicarelli then withdrew her application for extraordinary jurisdiction.

On November 20, 2020, this Court granted the Allegheny County Board's Petition for Allowance of Appeal limited to the question of whether the ballots contained in undated but signed outer envelopes should be invalidated. The opinion of the Commonwealth

Court will be discussed, as necessary, in the analysis that follows. The order was stayed pending our disposition of these consolidated cases.

The pertinent scope and standard of review follow: the Court of Common Pleas' decision is reviewed on appeal "to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made." *In re Reading Sch. Bd. of Election*, 634 A.2d 170, 171–72 (Pa. 1993). The Court of Common Pleas, in turn, could reverse the Philadelphia Board's decision only for an abuse of discretion or error of law. *See Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952). As the issue involves the proper interpretation of the Election Code, it presents a question of law and our standard of review is de novo and our scope of review is plenary. *See, e.g., Banfield v. Cortés*, 110 A.3d 155, 166 (Pa. 2015).

II. ARGUMENTS OF THE PARTIES

Although more fully developed in our analysis set forth later in this opinion, we here briefly summarize the arguments of the parties and intervenors.

The Campaign argues that the General Assembly set forth in the Election Code the requirements for how a qualified elector can cast a valid absentee or mail-in ballot. Campaign's Brief at 22. One of those requirements is for each elector to "fill out, date, and sign" the declaration on the Outside Envelope. *Id.* (citing 25 P.S. §§ 3146.6(a) and 3150.16(a)). According to the Campaign, this Court has repeatedly ruled that the requirements of the sections of Election Code relevant here impose mandatory obligations, and that ballots cast in contravention of the these requirements are void and cannot be counted. *Id.* at 23. As a result, the Campaign insists that the trial court erred

in affirming the Board's decision to count the 8,329 non-conforming absentee and mail-in ballots. *Id.*

The Philadelphia Board, conversely, contends that the Election Code does not require the Philadelphia Board to set aside timely-filed ballots by qualified electors that are merely missing handwritten names, street addresses, and/or dates on the signed voter declaration. Philadelphia Board's Brief at 12. Contrary to the Campaign's contention that the provisions of the Election Code at issue here impose exclusively mandatory requirements, the Philadelphia Board argues that Pennsylvania courts have long held that minor errors or omissions should not result in disenfranchisement, particularly in cases where the errors or omissions do not implicate the board's ability to ascertain the voter's right to vote or the secrecy or sanctity of the ballot. *Id.* Here, the Philadelphia Board notes that the Campaign does not allege that the voters at issue here were not qualified to vote and have not asserted that any fraud or other impropriety has occurred. *Id.* As such, it concludes that it acted properly and within its discretion in determining that these omissions were not a basis for setting aside those ballots. *Id.*

The DNC largely concurs with the Philadelphia Board's arguments, indicating that there is no statutory requirement that voters print their full name or address on the outer envelopes and that adding a date to the envelope serves no compelling purpose. DNC's Brief at 9-10.

Zicarelli argues further that, in regard to outer envelopes not containing a voter-supplied date, this Court's opinion in *In Re: Nov. 3, 2020 General Election*, No. 149 MM 2020, 2020 WL 6252803 (Pa. Oct. 23, 2020) definitively speaks to the mandatory nature of the date requirement and, without much extrapolation, requires that such ballots not be

counted. The Allegheny County Board agrees with its Philadelphia counterpart. It counters Zicarelli's reliance on *In Re Nov. 3, 2020 General Election* by noting that Zicarelli's challenge to the ballots for lack of a date is based on the premise that the date is essential to the validity of the signature. Allegheny County Board points out this is the precise type of challenge that was disavowed in the case upon which Zicarelli relies.

III. ANALYSIS

We begin by recognizing from the outset that it is the “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Shambach v. Birkhart*, 845 A.2d 793, 798 (Pa. 2004). “The Election Code must be liberally construed so as not to deprive ... the voters of their right to elect a candidate of their choice.” *Ross Nomination Petition*, 190 A.2d 719, 719 (Pa. 1963). It is therefore a well-settled principle of Pennsylvania election law that “[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Appeal of Norwood*, 116 A.2d 552, 554–55 (Pa. 1955). It is likewise settled that imbedded in the Election Code is the General Assembly's intent to protect voter privacy in her candidate choice based on Article VII, Section 4 of the Pennsylvania Constitution and to prevent fraud and to otherwise ensure the integrity of the voting process.

We agree with the Campaign's observation that in Sections 3146.6(a) and 3150.16(a), the General Assembly set forth the requirements for how a qualified elector may cast a valid absentee or mail-in ballot. Campaign's Brief at 22. We further agree that these sections of the Election Code specifically provide that each voter “shall fill out, date, and sign” the declaration on the outside envelope. *Id.* We do not agree with the Campaign's contention, however, that because the General Assembly used the word

“shall” in this context, it is of necessity that the directive is a mandatory one, such that a failure to comply with any part of it requires a board of elections to declare the ballot void and that it cannot be counted. It has long been part of the jurisprudence of this Commonwealth that the use of “shall” in a statute is not always indicative of a mandatory directive; in some instances, it is to be interpreted as merely directory. See, e.g., *Commonwealth v. Baker*, 690 A.2d 164, 167 (Pa. 1997) (citing *Fishkin v. Hi-Acres, Inc.*, 341 A.2d 95 (Pa. 1975)); see also *Commonwealth ex rel. Bell v. Powell*, 94 A. 746, 748 (Pa. 1915) (quoting *Bladen v. Philadelphia*, 60 Pa. 464, 466 (1869) (“It would not perhaps be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory and imperative.”)). The Campaign’s reliance on this Court’s recent decision in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) for the proposition it asserts is misplaced.

In *Pa. Democratic Party*, we held that the requirement in Section 3150.16(a) that a mail-in voter place his or her ballot in the inner secrecy envelope was a mandatory requirement and thus a voter’s failure to comply rendered the ballot void. *Pa. Democratic Party*, 238 A.3d at 380. In concluding that the use of the secrecy envelope was a mandatory, rather than a discretionary directive, we reviewed our prior decisions on the distinction between mandatory and discretionary provisions in the Election Code, including *Shambach v. Bickhart*, 845 A.2d 793 (Pa. 2004), *In re Luzerne County Return Board, Appeal of Elmer B. Weiskerger*, 290 A.2d 108 (Pa. 1972), and *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce*, 843 A.2d 1223 (Pa. 2004).

In *Shambach*, the Court declined to invalidate a write-in vote cast for a candidate who was named on the ballot, in direct violation of the Election Code's instruction that a voter could only write in a person's name if the name of said individual was "not already printed on the ballot for that office." *Shambach*, 845 A.2d at 795. In reaching that conclusion, the Court observed that "[m]arking a ballot is an imprecise process, the focus of which is upon the unmistakable registration of the voter's will in substantial conformity to the statutory requirements." *Id.* at 799 (quoting *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa 1945)).

In *Weiskerger*, this Court refused to invalidate a ballot based upon the "minor irregularity" that it was completed in the wrong color of ink. The provision of the Election Code in question provided that "[a]ny ballot that is marked in blue, black or blue-black ink ... shall be valid and counted." *Weiskerger*, 290 A.2d at 109 (citing 25 P.S. § 3063). In providing that ballots completed in the right color must be counted, we noted that the General Assembly "neither stated nor implied that ballots completed in a different color must not be counted." *Id.* We thus treated the instruction to use blue, black or blue-black ink as merely directory.

In *Pa. Democratic Party*, we compared these cases to our decision in *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce*, 843 A.2d 1223 (Pa. 2004), where we held that the Election Code's "in-person" ballot delivery requirement, see 25 P.S. § 3146.6, was mandatory, and that votes delivered by third persons must not be counted. *Appeal of Pierce*, 843 A.2d at 1231. There, we recognized that the in-person requirement served important purposes in the Election Code, including "limit[ing] the number of third persons who unnecessarily come in contact with the ballot[.]"

... provid[ing] some safeguard that the ballot was filled out by the actual voter, ... and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it.” *Id.* at 1232. We thus explained in *Pa. Democratic Party* that “the clear thrust of *Appeal of Pierce*, ... is that, even absent an express sanction, where legislative intent is clear and supported by a weighty interest like fraud prevention, it would be unreasonable to render such a concrete provision ineffective for want of deterrent or enforcement mechanism.” *Pa. Democratic Party*, 238 A.3d at 380 (citing *Appeal of Pierce*, 843 A.2d at 1232).

Based upon this comparison between *Shambach*, *Weiskerger* and *Appeal of Pierce*, in *Pa. Democratic Party* we determined that the decision in *Appeal of Pierce* provided the appropriate guidance for the analysis of the secrecy envelope requirement. We held that “[i]t is clear that the Legislature believed that an orderly canvass of mail-in ballots required the completion of two discrete steps before critical identifying information on the ballot could be revealed. The omission of a secrecy envelope defeats this intention.” *Pa. Democratic Party*, 238 A.3d at 380. Unlike in *Shambach* and *Weiskerger* which involved “minor irregularities,” the use of a secrecy envelope implicated a “weighty interest,” namely secrecy in voting protected expressly by Article VII, Section 4 of our state charter. *Id.* As such, we recognized the use of a secrecy envelope as a mandatory requirement and that failures to comply with the requirement required that the ballot must be disqualified.” *Id.*; see also *id.* at 378 (quoting *JPay, Inc. v. Dep’t of Corr. & Governor’s Office of Admin.*, 89 A.3d 756, 763 (Pa. Commw. 2014) (“While both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to

strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved.”)).

To determine whether the Election Code’s directive that the voter handwrite their names, address and the date of signing the voter declaration on the back of the outer envelope is a mandatory or directory instruction requires us to determine whether the intent of the General Assembly was clear and whether the failure to handwrite the information constitutes “minor irregularities” or instead represent “weighty interests,” like fraud prevention or ballot secrecy that the General Assembly considered to be critical to the integrity of the election.

(1) Failures to include handwritten names and addresses

Beginning with the Campaign’s contention that ballots may not be counted if a voter fails to handwrite their name and/or address under the full paragraph of the declaration on the back of the outer envelope, we conclude that given the factual record in this case and the mechanics of the pre-canvassing and canvassing procedures including the incorporation of reliance on the SURE system, this “requirement” is, at best, a “minor irregularity” and, at worst, entirely immaterial. More to the point, the direction to the voter to provide a handwritten name and/or address is not only not mandatory, it is not a directive expressed in the Election Code. Thus, these directions do not meet the first prong of the test used in *Pa. Democratic Party*: the clear intent of the General Assembly.

The Election Code does not require that the outer envelope declaration include a handwritten name or address at all. Instead, Sections 3146.4 (absentee) and 3150.14(b) (mail-in) provide only that the declaration must include “a statement of the elector's

qualifications, together with a statement that the elector has not already voted in the primary or election.” 25 P.S. §§ 3146.4, 3150.14(b). Aside from this information (none of which is relevant to the present issue), the General Assembly delegated to the Secretary of the Commonwealth the obligation to prescribe the form of declaration and envelope for absentee and mail-in ballots, presumably to allow the inclusion of information that would be helpful for administrative or processing purposes. *Id.*² As such, the decision to include spaces in the declaration for handwritten names and addresses was made solely by the Secretary of the Commonwealth, not the General Assembly. It would be a stretch to divine that the General Assembly was advancing any weighty interest for the inclusion of handwritten names and addresses in the declaration such that a voter’s failure to include them should result in the ballot not being counted. Moreover, the Campaign does not argue that the Secretary’s request for handwritten names and addresses implicated any “weighty interests” that would compel a finding that the request to provide them constituted a mandatory requirement.³

² None of the parties have challenged whether these provisions constituted improper delegations of legislative authority. *Protz v. Workers’ Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017).

³ Conversely, the Philadelphia Board and the DNC have both selectively relied upon guidance provided by the Secretary to the county boards of election that indicated that a voter’s failure to handwrite his/her name and address was not a ground to set the ballot aside. Philadelphia Board’s Brief at 19; DNC’s Brief at 15. They have directed the Court to the Guidance published on September 11, 2020, in which the Secretary advised that “[i]f the Voter’s Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing.” Guidance, 9/11/2020, at 3. As discussed *infra* at n.6, however, on September 28, 2020 the Secretary issued arguably contrary guidance stating that “[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted.” Guidance,

The Campaign argues that we should read the “handprinted name and address” requirement into the directives in Section 3146.6(a) and 3150.16(a) that the voter “fill out” the declaration. Campaign’s Brief at 30. Citing to dictionary definitions, the Campaign contends that “fill out” means “to write or type information in spaces that are provided for it.” *Id.* at 32. Because 8,349 voters did not “fill out” one or more spaces provided on the outer envelope provided in the declaration (including the voter’s name and/or address), the Campaign argues that those ballots were non-conforming and could not be counted. *Id.* at 29. The directive to “fill out” does not give any legislative definition to the specific information to be placed in the blank spaces. It is the weight of the information that must be tested in the analysis. As stated, since the General Assembly did not choose the information to be provided, its omission is merely a technical defect and does not invalidate the ballot.

Further, as Judge Crumlish observed, the term “fill out” is ambiguous.⁴ Trial Court Opinion, 11/13/2020, ¶ 4. As Judge Crumlish recognized, the term “fill out” is not a defined term under the Election Code. *Id.* Moreover, and contrary to the Campaign’s contention that no alternative understanding of the term “fill out” has been proffered, the Campaign has failed to recognize, **the voter’s name and address are already on the back of the outer envelope on a pre-printed label affixed no more than one inch**

9/28/20, at 9. Confusingly, she also incorporated by reference the September 11, 2020 Guidance. Both sets of Guidance are set forth on pages 8-10 *supra*.

⁴ Where an election statute is ambiguous, courts apply the interpretative principle that that “election laws ... ordinarily will be construed liberally in favor of the right to vote.” *Pa. Democratic Party*, 238 A.3d at 360–61.

from the declaration itself. A voter could reasonably have concluded that the blanks requesting his or her name and address needed to be “filled out” only if the name and/or address on the label was incorrect or incomplete, as it was unnecessary to provide information that was already on the back of the outer envelope.⁵ To add further confusion, the declaration itself can be read to refer to the label: “I hereby declare that I am qualified to vote from the below stated address” can be read to mean the address as already stated on the label.

The text of the Election Code provides additional evidence of the directory nature of the provisions at issue. With regard to individuals who are not able to sign their name due to illness or physical disability, the General Assembly imposed a requirement that the declarant provide his or her “complete address.” 25 P.S. § 3146.6(a)(3); 25 P.S. §

⁵ The DNC argues, with some persuasive force, that the Campaign’s requested interpretation of Pennsylvania’s Election Code could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons. Nobody acting under color of state law may deny anyone the right to vote “in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B).

Under this section, the so-called “materiality provision” of the Voting Rights Act, federal courts have barred the enforcement of similar administrative requirements to disqualify electors. *See, e.g., Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003) (disclosure of voter’s social security number is not “material” in determining whether a person is qualified to vote under Georgia law for purposes of the Voting Rights Act); *Washington Ass’n of Churches v. Reed*, 492 F.Supp.2d 1264 (W.D. Wash. 2006) (enjoining enforcement of “matching” statute, requiring state to match potential voter’s name to Social Security Administration or Department of Licensing database, because failure to match applicant’s information was not material to determining qualification to vote); *Martin v. Crittenden*, 347 F.Supp.3d 1302 (N.D. Ga. 2018), *reconsideration denied*, 1:18-CV-4776-LMM, 2018 WL 9943564 (N.D. Ga. Nov. 15, 2018) (voter’s ability to correctly recite his or her year of birth on absentee ballot envelope was not material to determining said voter’s qualifications).

3150.16(a.1). These provisions demonstrate that the General Assembly clearly knew how to impose such a requirement when it wishes to do so. *In re Nov. 3, 2020 Gen. Election*, ___ A.3d ___, 2020 WL 6252803, at *14 (Pa. 2020) (stating that the General Assembly's prior inclusion of a signature comparison requirement demonstrated that "it understands how to craft language requiring signature comparisons at canvassing when it chooses to do so"). Moreover, Sections 3146.6(a)(3) and 3150.16(a.1) contain a precise form of declaration, crafted by the General Assembly, pertaining to voters with disabilities evidencing the General Assembly's understanding of how to mandate a precise declaration without resort to delegating non-essential information to the Secretary.

Finally, the text of the Election Code further demonstrates the lack of any need for handwritten names and addresses. Section 3146.8(g)(3), which relates to the canvassing of official absentee ballots and mail-in ballots, provides, in relevant part:

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable.

25 P.S. § 3146.8(g)(3). The county board of elections' duty to keep a "Military Veterans and Emergency Civilians Absentee Voters File," which is not relevant to the current dispute, is governed by 25 P.S. § 3146.2c(b). Section 3146.2c(a) previously housed the board's duty to keep a "Registered Absentee and Mail-in Voters File." However, the General Assembly recently eliminated this directive. See 2020, March 27, P.L. 41, No.

12, § 8, imd. effective (deleting subsection (a), which required county board of elections to maintain at its office “a file containing the duplicate absentee voter's temporary registration cards of every registered elector to whom an absentee ballot has been sent”). By virtue of this amendment, the General Assembly eliminated one of the reference points that still appear in Section 3146.8(g)(3). The current Section 3146.2c(c) directs the county board to maintain the “the absentee voters' list” referenced in Section 3146.8(g)(3). The General Assembly also amended Section 3146.2c(c), which previously only directed the chief clerk to “prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee ballots shall have been issued,” to include such voting residents who were issued mail-in ballots. See 2019, Oct. 31, P.L. 552, No. 77, § 5.1, imd. effective (inserting “or mail-in” twice in subsection (c)).

As such, as relevant for our purposes, Section 3146.8(g)(3) directs that “the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the ... the absentee voters' list,” which, pursuant to Section 3146.2c(c), now also contains voters who received mail-in ballots. A close reading of the language chosen by the General Assembly here is telling. Section 3146.8(g)(3) directs the board to “examine the declaration **on the envelope**” and “compare the information **thereon**” to the absentee (and mail-in) voters' list. 25 P.S. § 3146.8(g)(3) (emphasis added). Reading these phrases together, it is clear that the General Assembly intended that the information to be compared to the absentee (and mail-in) voters' list is the information on the outer envelope which includes the pre-printed name and address. If

the General Assembly intended for the information written by the voter to be compared to the absentee voters' list, it would have used the term "therein," thus directing the board to compare the information contained "within" the declaration (the handwritten name and address).

The following sentence in this section further suggests that the General Assembly intended such bifurcation. Section 3146.8(g)(3) next states:

If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the ... the absentee voters' list ... verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3). Here, the board is directed to consider whether the declaration is sufficient (i.e., the examination contained in the previous sentence) and also ensure that the absentee voters' list confirms the voter's right to vote (i.e., the comparison of the printed information to the relevant list from the prior sentence).

(2) Failures to include dates

Both the Campaign and Ziccarelli argue that the requirement to state the date on which declaration was signed is a mandatory obligation requiring disenfranchisement for lack of compliance. We disagree, as we conclude that dating the declaration is a directory, rather than a mandatory, instruction, and thus the inadvertent failure to comply does not require that ballots lacking a date be excluded from counting. As reviewed hereinabove, in our recent decision in *Pa. Democratic Party*, we reiterated that the distinction between directory and mandatory instructions applies with respect to a voter's obligations under the Election Code, and that only failures to comply with mandatory

obligations, which implicate both legislative intent and “weighty interests” in the election process, like ballot confidentiality or fraud prevention, will require disqualification. *Pa. Democratic Party*, 238 A.3d at 379-80.

The Commonwealth Court and Zicarelli relied upon the Election Code’s use of the of “**shall** ... date” language in construing the date obligation as mandatory. *In Re: 2,349 Ballots in the 2020 General Election, Appeal of: Nicole Zicarelli*, ___ A.3d ___, 1162 C.D. 2020, 10 (Pa. Comm. 2020). Although unlike the handwritten name and address, which are not mentioned in the statute, the inclusion of the word “date” in the statute does not change the analysis because the word “shall” is not determinative as to whether the obligation is mandatory or directive in nature. That distinction turns on whether the obligation carries “weighty interests.” The date that the declaration is signed is irrelevant to a board of elections’ comparison of the voter declaration to the applicable voter list, and a board can reasonably determine that a voter’s declaration is sufficient even without the date of signature. Every one of the 8,329 ballots challenged in Philadelphia County, as well as all of the 2,349 ballots at issue in Allegheny County, were received by the boards of elections by 8:00 p.m. on Election Day, so there is no danger that any of these ballots was untimely or fraudulently back-dated. Moreover, in all cases, the receipt date of the ballots is verifiable, as upon receipt of the ballot, the county board stamps the date of receipt on the ballot-return and records the date the ballot is received in the SURE system. The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superflous.

Zicarelli offers two alternative “weighty interests” for our consideration. She first contends that the date on which the declaration was signed may reflect whether the

person is a “qualified elector” entitled to vote in a particular election. Pursuant to Section 3150.12b (entitled “Approval of application for mail-in ballot”), a board of elections may have determined that the person was a qualified elector and thus entitled to receive a mail-in ballot. Pursuant to Section 2811, however, to be a qualified elector, “[h]e or she shall have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within thirty days preceding the election.” 25 P.S. § 2811. As a result, Zicarelli contends that the person may have been qualified to vote in a particular voting district at the time of applying for a mail-in ballot, but no longer a qualified elector in that voting district on Election Day. Zicarelli’s Brief at 16.

This unlikely hypothetical scenario is not evidence of a “weighty interest” in the date on the document for assuring the integrity of Pennsylvania’s system for administering mail-in voting. Among other things, the canvassing statute, 25 P.S. § 3146.8(g)(3), directs the board to examine the declaration on the envelope of each ballot and compare the information thereon with that contained in the now defunct “Registered Absentee and Mail-in Voters File.” See discussion *supra* pp. 27-29. The date of signing the declaration will not be of any benefit in performing this task, as the name of the voter at issue will be on this list (as a result of his or her approval to receive a mail-in ballot), and the date of signing will provide no information with respect to whether or not he or she has left the voting district in the interim. Most critically, our current statutory framework includes no requirement that a county board of elections investigate whether an individual who had

been confirmed as a qualified elector at the time of approval to receive a mail-in ballot remains as a qualified elector on Election Day. If the General Assembly had so intended, it would certainly have expressly stated it, as opposed to nebulously tucking such an unprecedented requirement into the instructions to the Secretary for designing the declaration.

Second, Zicarelli argues that the date of signature of the declaration will serve to prevent double voting, as “whether an elector has already voted in the election for which the ballot is issued, by its very nature, depends on the date on which the declaration was signed.” Zicarelli’s Brief at 16. Boards of elections do not use signatures or any handwritten information to prevent double voting. Duplicate voting is detected by the use of bar codes through the SURE system, and the board identifies the earlier cast vote by referencing the date it received the ballot, not the date on which the declaration was signed.

Zicarelli and the Commonwealth Court insist that this Court “has already held that mail-in ballots with undated declarations are not ‘sufficient’ and, thus, must be set aside.” Zicarelli’s Brief at 9; *In Re: 2,349 Ballots in the 2020 General Election*, 1162 C.D. 2020, at 10. In support of this contention, they reference an observation in our recent decision in *In re November 3, 2020 General Election*, ___ A.3d ___, 2020 WL 6252803 (Pa. 2020), that when assessing the sufficiency of a voter’s declaration, “the county board is required to ascertain whether the return envelope has been filled out, dated, and signed – and if it fails to do so then the ballot cannot be designated as “sufficient” and must be set aside.”⁶

⁶ In her brief, Zicarelli cites to the Guidance distributed by the Secretary of the Commonwealth on September 28, 2020 to the county boards of elections, advising that

Id. at *12-13. This statement is being taken out of context. Our statement in 2020 *General Election* was in reference to the limitations on what an election board is directed by the statute to do when assessing the sufficiency of a voter's declaration for the express purpose of indicating what they were not to do, i.e., signature comparisons. The question in *In Re: Nov. 3, 2020 General Election* was a narrow one. We did not address (as it was not at issue) whether a county board of elections could find a declaration as sufficient even though it was undated. That question requires an entirely different analysis that

“[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted.” As noted in footnote 3 *supra*, however, the Secretary also issued Guidance on September 11, 2020, which was cited with approval by the Philadelphia Board and the DNC. No party referenced both sets of Guidance, however, even though the September 28 Guidance incorporated the September 11 Guidance. See Guidance, 9/28/2020, at 9 (“For more information about the examination of return envelopes, please refer to the Department’s September 11, 2020 Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes.”).

In any event, we will not consider this Guidance in making our decision. Neither of the parties explain how the potentially contradictory directives are to be understood. More importantly, the Secretary has no authority to definitively interpret the provisions of the Election Code, as that is the function, ultimately, of this Court. The Secretary also clearly has no authority to declare ballots null and void. “[I]t is the Election Code's express terms that control, not the written guidance provided by the Department and as this Court repeatedly has cautioned, even erroneous guidance from the Department or county boards of elections cannot nullify the express provisions of the Election Code.” *In re Scroggin*, 237 A.3d 1006, 1021 (Pa. 2020). Moreover, the Secretary has no authority to order the sixty-seven county boards of election to take any particular actions with respect to the receipt of ballots. 25 P.S. § 2621(f.2).

Finally, with respect to the September 28 Guidance indicating that undated ballots must be set aside, we note that in addition to the Philadelphia and Allegheny County Boards, at least two other boards of elections also did not follow it. *Donald J. Trump for President Inc. v. Bucks Cnty. Bd. of Elections*, No. 2020-05786 (Bucks Cty. Ct. Com. Pl.); *Donald J. Trump for President, Inc., et al. v. Montgomery Cnty. Bd. of Elections*, No. 2020-18680 (Nov. 13, 2020). Both the Bucks County and Montgomery County Courts of Common Pleas affirmed the counting of the ballots even though the declarations had not been filled out in full. Each of the courts of common pleas appropriately applied this Court’s precedent in doing so.

depends in significant part on whether dating was a mandatory, as opposed to a directive, requirement. We have conducted that analysis here and we hold that a signed but undated declaration is sufficient and does not implicate any weighty interest. Hence, the lack of a handwritten date cannot result in vote disqualification.

IV. CONCLUSION

As we recognized in *Pa. Democratic Party*, “while both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved.” *Pa. Democratic Party*, 238 A.3d at 378. Here we conclude that while failures to include a handwritten name, address or date in the voter declaration on the back of the outer envelope, while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters. As we acknowledged in *Shambach*, “ballots containing mere minor irregularities should only be stricken for compelling reasons.” *Shambach*, 845 A.2d at 799; *see also Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945) (“[T]he power to throw out a ballot for minor irregularities ... must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons.”). Having found no compelling reasons to do so, we decline to intercede in the counting of the votes at issue in these appeals.

The decision of the Philadelphia Court of Common Pleas is hereby affirmed. The decision of the Commonwealth Court is hereby reversed and the decision of the Allegheny County Court of Common Pleas is reinstated.

Justices Baer and Todd join the opinion.

Justice Wecht concurs in the result and files a concurring and dissenting opinion.

Justice Dougherty files a concurring and dissenting opinion in which Chief Justice Saylor and Justice Mundy join.

APPENDIX B

[J-116-2020]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: CANVASSING OBSERVATION	:	No. 30 EAP 2020
	:	
APPEAL OF: CITY OF PHILADELPHIA	:	Appeal from the November 5, 2020,
BOARD OF ELECTIONS	:	Single-Judge Order of the Honorable
	:	Christine Fizzano Cannon of the
	:	Commonwealth Court at No. 1094
	:	CD 2020, reversing the November 3,
	:	2020 Order of the Honorable Stella
	:	Tsai of the Court of Common Pleas
	:	of Philadelphia County at November
	:	Term 2020, No. 07003
	:	
	:	SUBMITTED: November 13, 2020

OPINION

JUSTICE TODD

DECIDED: November 17, 2020

This appeal arises out of the processing of mail-in and absentee ballots received from voters in Philadelphia County in the November 3, 2020 General Election. Specifically, Appellee Donald J. Trump, Inc. (the “Campaign”) orally moved for the Philadelphia County Court of Common Pleas to give its representative more proximate access to the canvassing activities being carried out by Appellant, the Philadelphia County Board of Elections (the “Board”). The trial court denied relief, the Commonwealth Court reversed, and the Board now appeals that order. For the following reasons, we vacate the order of the Commonwealth Court, and reinstate the trial court’s order denying the Campaign relief.

I. Background

This dispute concerns the Board's pre-canvassing and canvassing of mail-in and absentee ballots at the Philadelphia Convention Center. According to the Board, in advance of the election, it arranged the workspace of its employees at this facility in a manner that it considered best suitable for the processing and maintenance of the security of the estimated 350,000 absentee and mail-in ballots it anticipated receiving, while ensuring that the social distancing protocols for COVID-19 promulgated by the federal Centers for Disease Control were maintained and the voter's privacy in his or her ballot was protected, and providing a candidate or campaign representative with the ability to observe the entirety of the pre-canvassing and canvassing process. N.T. Hearing, 11/3/20, at 10-11.¹

Under the Board's authority, a designated area of the Convention Center was divided into discrete sections, each devoted to various aspects of the pre-canvassing and canvassing process. *Id.* at 22. Each section contained three rows of fifteen folding tables with each table separated by 5-6 feet. *Id.* at 24. In the first section, workers examined the back of the ballot return envelopes and then, based on that examination, sorted the envelopes into different trays. *Id.* at 27. In the next section, ballots in their secrecy envelopes were first extracted from the ballot return envelope by machine, and then, while encased in their secrecy envelopes, were sent on to another machine which sliced open the secrecy envelope and removed the ballot from within. *Id.* at 28. During this phase, ballots without secrecy envelopes – so-called “naked” ballots – were segregated and placed into a separate tray.² *Id.* at 30.

¹ Except as otherwise noted, such citations are to the notes of testimony of the hearing before the trial court.

² Ballots not placed into the provided secrecy envelopes are invalid. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020).

Pursuant to the Election Code, designated observers for campaigns or candidates were permitted to physically enter the Convention Center hall and observe the entirety of this process; however, the Board erected a waist-high security fence to separate the observers from the above-described workspace of Board employees. The fence, behind which observers could freely move, was separated from the first row of employees' desks in each section by a distance of approximately 15-18 feet. *Id.* at 23. Board employees used this "buffer" area between the security fence and their workspace to enter or leave their work areas for their shifts, or to take scheduled breaks. *Id.* at 30-31.

On the morning of November 3, 2020 – Election Day – the Campaign sent a designated representative, Attorney Jeremy Mercer, to observe the pre-canvassing and canvassing process. Attorney Mercer entered the Convention Center at 7:00 a.m. and remained there throughout the entire day. He testified that he was able to move freely along the length of the security fence and observe the employees engaged in their pre-canvassing and canvassing activities from various vantage points. *Id.* at 21. He related that, while he could see the Board employees in the first section of the workspace examining the back of the ballot return envelopes, from his position, he could not read the actual declarations on the ballot envelopes. *Id.* at 27. Regarding the ballot extraction activities in the next section, Attorney Mercer testified that he could see employees removing the ballots contained in secrecy envelopes from the return envelopes, and that, when "watching closely," he could discern if any return envelopes contained naked ballots. *Id.* at 30. However, he stated that he could not see whether there were any markings on the security envelopes themselves.³ *Id.* at 38.

³ The Election Code prohibits the security envelope from containing any "text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference." 25 P.S. § 3146.8(g)(4)(ii).

At 7:45 a.m. on Election Day, the Campaign filed a suit in the Philadelphia Court of Common Pleas challenging the location where observers such as Attorney Mercer could watch the process. The Campaign subsequently withdrew that action, without prejudice, but then refiled it at 9:45 p.m. that night. The trial court subsequently conducted an evidentiary hearing that same night utilizing the “Zoom” videoconference tool, which enabled Attorney Mercer to testify remotely.

After hearing Attorney Mercer’s testimony and argument from the Campaign and the Board, the trial court rejected the Campaign’s primary argument, raised orally during the hearing, that Section 3146.8(b) of the Election Code – which allows designated watchers or observers of a candidate “to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded,” 25 P.S. § 3146.8(b) – requires that the observers have the opportunity to “meaningfully . . . see the process.” N.T. Hearing, 11/3/20, at 49. In rejecting the argument, the trial court noted that Section 3146.8 contained no language mandating “meaningful observation”; rather, the court interpreted the section as requiring only that the observer be allowed to be “present” at the opening, counting, and recording of the absentee or mail-in ballots. Trial Court Opinion, 11/4/20, at 3-4.

The court observed that Attorney Mercer’s testimony that he could not see individual markings on the secrecy envelopes, or determine whether the signature on all the ballot envelopes was properly completed, did not establish a violation of Section 3416.8, inasmuch as that statute “provides for no further specific activities for the watchers to observe, and no activities for the watchers to do other than simply ‘be present’.” *Id.* at 4. The court opined that, under this section, “[w]atchers are not directed to audit ballots or to verify signatures, to verify voter address[es], or to do anything else that would require a watcher to see the writing or markings on the outside of either

envelope, including challenging the ballots or ballot signatures.” *Id.* Consequently, that same day, the trial court denied the Campaign’s request that the Board modify the work area to allow for closer observation of the ongoing ballot canvassing. The court indicated, however, that it was not discouraging the Board from providing an additional corridor for observers along the side of the tables to watch the proceedings, provided COVID-19 protocols and voter information secrecy protections were maintained.⁴ Trial Court Order, 11/3/20.

The Campaign immediately appealed to the Commonwealth Court, and the matter was assigned to the Honorable Christine Fizzano Cannon.⁵ Judge Fizzano Cannon held a status conference on the night of November 4, 2020, and issued an order on the morning of November 5, 2020, which reversed the trial court. She directed the trial court to enter an order by 10:30 a.m. to require “all candidates, watchers, or candidate representatives be permitted to be present for the canvassing process pursuant to 25 P.S. § 2650 and/or 25 P.S. § 3146.8 and to be permitted to observe all aspects of the canvassing process within 6 feet, while adhering to all COVID-19 protocols.” Commonwealth Court Order, 11/5/20.

In her opinion, filed later that day, Judge Fizzano Cannon focused her analysis on what she considered to be the relevant governing provisions of the Election Code, Section 3146.8(b) and Section 3146.8(g)(1.1). Section 3146.8(b) provides:

Watchers shall be permitted to be *present* when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.

⁴ It should be noted that the pre-canvassing and canvassing activities were also broadcast live on YouTube.

⁵ The Pennsylvania Democratic Party (“Intervenor”) was granted leave to intervene in these proceedings by the Commonwealth Court.

25 P.S. § 3146.8(b) (emphasis added). Section 3146.8(g)(1.1) states, in relevant part:

The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting . . . One authorized representative of each candidate in an election and one representative from each political party shall be permitted to *remain in the room* in which the absentee ballots and mail-in ballots are pre-canvassed.

25 P.S. § 3146.8(g)(1.1) (emphasis added).

Judge Fizzano Cannon noted that the parties offered competing interpretations of the phrases “present,” and “to remain in the room,” with the Board arguing that these terms require only that the observer be physically present in the room where the ballot counting occurs; whereas the Campaign contended that these phrases required the observer to be able to *observe* “meaningfully,” in addition to being physically present. Judge Fizzano Cannon deemed each of these interpretations to be reasonable, and, hence, concluded the statutory language was ambiguous.

Because these provisions of the Election Code had as their purpose “maintaining the integrity of the elective process in the Commonwealth,” the judge determined that the language in question “imports upon . . . candidates’ representatives at least a modicum of observational leeway to ascertain sufficient details of the canvassing process for the purpose of intelligently assessing and/or reporting to the candidate represented the details of the canvassing process.” Commonwealth Court Opinion, 11/5/20, at 5. In her view, in order for representatives to fulfill their reporting duty to their candidate, they are required to “have the opportunity to observe the processes upon which they are to report,” *id.*, and so mere physical presence of the observers was insufficient to guarantee this “meaningful observation,” *id.* at 6.

Judge Fizzano Cannon then found that, based on Attorney Mercer’s testimony that, while he was physically present in the room where the pre-canvassing and

canvassing processes were occurring, the distance from which he was observing those processes, as well as the physical barriers in the room, prevented him from observing the ballots being processed, the ballot envelopes, the secrecy envelopes, and any markings on the secrecy envelopes, depriving him of the ability to actually observe those processes “in any meaningful way.” *Id.* at 8. Consequently, the judge concluded that the trial court erred as a matter of law in determining that the Board had complied with the Election Code. The Board filed an emergency petition for allowance of appeal with our Court on the morning of November 5, 2020.

While this petition was pending, that same day, the Campaign filed a one-page “Complaint and Motion for Emergency Injunction” in the United States District Court for the Eastern District of Pennsylvania alleging, *inter alia*, that, in the aftermath of the Commonwealth Court’s order in the instant case, the Board was violating the Election Code by “refusing to allow any representatives and poll watchers for President Trump and the Republican Party” to observe the counting of the ballots, and that the “counting continues with no Republicans present.” See Complaint and Motion for Emergency Injunction in *Donald J. Trump For President, Inc. v. Philadelphia County Board of Elections*, No. 20-5533 (E.D. Pa. filed Nov. 5 2020) (hereinafter “*Trump*”) (attached as Exhibit 2 to Board’s Brief), at ¶¶ 4 & 5.

That case was assigned to District Court Judge Paul S. Diamond, who held a hearing on the request for an emergency injunction at 5:30 p.m. on November 5, 2020. During the hearing, counsel for the Campaign stated that the Campaign had “a nonzero number of people in the room.” N.T. Hearing in *Trump*, 11/5/20 at 10. Judge Diamond, seeking clarification of the meaning of the term “nonzero”, asked counsel for the Campaign directly: “as a member of the bar of this Court, are people representing the

Donald J. Trump for President [campaign], representing the plaintiff in that room?” *Id.* at 11. Counsel replied “yes.” *Id.*

Because the District Court recognized that the petition for allowance of appeal filed by the Board was pending before our Court, and that a decision from our Court on the proper interpretation of the governing provisions of the Election Code would obviate the need for it to rule on a question of state law, the District Court encouraged the parties to reach an interim accommodation. Thus, the Board and the Campaign reached an agreement, which was entered on the record in open court before Judge Diamond, under which the crowd control barrier, which the Board had moved to within six feet of the first row of tables in its employees’ work area as the result of the Commonwealth Court decision, would remain in that position, and that all campaign observers would have equal access to positions behind that barrier to watch the canvassing process. *Id.* at 38-40. Judge Diamond deferred action on the merits of the underlying claims in the lawsuit, which remains pending.

Subsequently, on November 9, 2020, the Campaign filed yet another federal lawsuit, in the United States District Court of the Middle District of Pennsylvania, seeking to enjoin Pennsylvania from certifying the results of the November 3, 2020 General Election or, alternatively, to exclude from the certified results “the tabulation of absentee and mail-in and ballots for which [its] watchers were prevented from observing during the pre-canvass and canvass in the County Election Boards.” Complaint for Declaratory and Injunctive Relief in *Donald J. Trump, Inc., et.al. v. Boockvar*, No. 20-CV-02078 (M.D. Pa. filed Nov. 9, 2020) (Exhibit 1 to Board’s Brief), at 84. This matter was assigned to District Court Judge Matthew Brann who promptly issued an order setting an expedited schedule for the Campaign to file motions for injunctive relief, and for the Board to file a responsive motion thereto as well as a motion to dismiss. Notably, however, on November 15, 2020,

the Campaign filed an amended complaint, removing all counts which were based on canvassing access. See First Amended Complaint Verified Complaint for Declaratory and Injunctive Relief in *Donald J. Trump, Inc., et.al. v. Boockvar*, No. 20-CV-02078 (M.D. Pa. filed Nov. 15, 2020).

During the interim, on November 9, 2020, our Court granted the Board's emergency petition for allowance of appeal on the following issues:

1. Whether, as a matter of statutory construction pursuant to Pennsylvania law, the Commonwealth Court erred in reversing the trial court, which concluded that Petitioner City of Philadelphia Board of Elections' regulations regarding observer and representative access complied with applicable Election Code requirements.

2. Whether the issue raised in Petitioner's petition for allowance of appeal is moot.

3. If the issue raised in Petitioner's petition for allowance of appeal is moot, does there remain a substantial question that is capable of repetition yet likely to evade review, and, thus, fall within an exception to the mootness doctrine.

In our order, we directed the Prothonotary to establish an expedited briefing schedule; we also indicated that our grant order was not a stay of the Board's canvassing process, which is ongoing as of this writing.⁶

II. Mootness

⁶ Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives, have filed a motion to intervene in this matter before our Court, as well as an accompanying brief. While we deny this motion, we, nevertheless, accept the accompanying brief as an *amicus* brief.

We begin by addressing whether the central legal issue in this matter – involving an interpretation of the provisions of the Election Code establishing campaign access requirements to ballot canvassing activities – is moot. See *Stuckley v. Zoning Hearing Board of Newtown Township*, 79 A.3d 510, 516 (Pa. 2013) (we will generally not address matters where there is no actual case or controversy between the parties). Both parties and Intervenor argue that this case is not moot because the Board continues to count ballots, and the Campaign continues to want its representatives to have maximal access to the canvassing process.

We conclude that, because ballots are still being canvassed by the Board at the time of this writing, the legal question before us is not moot.⁷ In this regard, we note that the interim agreement between the parties entered in the federal litigation being overseen by Judge Diamond did not purport to resolve this question, and, indeed, Judge Diamond expressly refrained from addressing it as he viewed it as purely a question of Pennsylvania law which could be definitively resolved only by our Court. We will, therefore, proceed to address the merits of the issue before us.

III. Access under the Election Code

A. Arguments of the Parties

The Board argues that the Election Code granted to it the express statutory authority “[t]o make and issue such rules, regulations and instructions, not inconsistent

⁷ Even were the ballot counting process to conclude prior to our final disposition of this matter, we regard this issue before us as one which is capable of repetition but likely to evade review, and therefore subject to our review under this exception to the mootness doctrine. See *Reuther v. Delaware County Bureau of Elections*, 205 A.3d 302, 306 n.6 (Pa. 2019) (“Given the abbreviated time frame applicable to elections and the amount of time that it takes for litigation to reach this Court, this exception is particularly applicable when the question presented relates to an election dispute.”).

with law, as they may deem necessary for the guidance of . . . elections officers and electors.” Board Brief at 32 (quoting 25 P.S. § 2642(f)). Thus, it reasons that the access rules it established for ballot processing in Philadelphia County – which were based on its perceived need for protecting its workers’ safety from COVID-19 and physical assault from those individuals who have contact with its workers; ensuring security of the ballots; efficiently processing large numbers of ballots; protecting the privacy of voters; and ensuring campaign access to the canvassing proceedings – are a valid exercise of its authority. The Board maintains that these rules can be invalidated by a court only if they are inconsistent with the Election Code.

In determining whether its access rules are consistent with the Election Code, the Board contends that only two provisions of the Code are relevant: 25 P.S. § 3146.8(g)(1.1) (specifying that “[o]ne authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed”), and Section 3146.8(g)(2) (providing that “[o]ne authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are canvassed.”).

The Board rejects the relevance of Section 3146.8(b), given that it sets forth the access requirements for “watchers”.⁸ The Board characterizes this provision as vestigial

⁸ Section 3146.8(b) provides:

Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.

in nature, reflecting the manner in which absentee ballots were handled prior to the 2006 and 2019 amendments to the Election Code which, respectively, added Section 3146.8(g)(2) and Section 3146.8(g)(1.1). Prior to those amendments, absentee ballots received by a board of elections were taken to the electors' local polling places to be canvassed, and, thus, candidates' designated poll watchers were permitted by Section 3146.8(b) to remain in the room at the polling place while the absentee ballots were canvassed. According to the Board, Sections 3146.8(g)(1.1) and (2) established that all mail-in and absentee ballots would be pre-canvassed and canvassed at a central location designated by the board of elections; hence, poll watchers are not granted access to these proceedings. Consequently, in the Board's view, the rights of the Campaign's designated representative in this matter are delineated exclusively by Sections 3146.8(g)(1.1) and (2).

The Board contends that these statutory provisions should be construed in accordance with the plain meaning of their terms, *i.e.*, requiring only that a candidate's authorized representative be permitted to remain in the room while the ballots are pre-canvassed or canvassed. The Board notes that the Campaign's representative was, in fact, permitted to be in the room at the Convention Center where the ballots were being pre-canvassed and canvassed at all times during this process, just as these provisions require. Relatedly, the Board contends that, even if Section 3146.8(b) of the Election Code were deemed to be applicable herein, its requirements were met as well, given that the Campaign's representative was present at all times when absentee and mail-in ballots were opened, counted, and recorded.

Moreover, the Board emphasizes that, contrary to the Commonwealth Court's conclusion, the evidence of record indicated that Attorney Mercer could see every portion of the pre-canvassing and canvassing process and, as a result, could confirm that the only ballots which were scanned and tabulated were those which had been removed from secrecy envelopes, and that the outer ballot envelope had been inspected for sufficiency and then sorted.

The Board points out that Attorney Mercer's complaints about being unable to read the actual declarations on the ballot envelopes, or his inability to see whether the secrecy envelopes contained improper markings, were relevant only to his desire to determine if the ballots met the requirements of the Election Code. However, the Board stresses that our Court very recently, in *In re: November 3, 2020 General Election*, ___ A.3d.____, 2020 WL 6252803 (Pa. Oct. 23, 2020), interpreted the Election Code as precluding time-of-canvassing challenges by campaign representatives; hence, the Board maintains that a candidate's representative has no need for the information about which Attorney Mercer complains, as the representative cannot lodge a challenge based on it. Most importantly, however, from the Board's perspective, there is nothing in the statutory language of Sections 3146.8(g)(1.1) and (2) which grants a candidate's representative an unqualified right of access to that kind of information during the pre-canvassing and canvassing process.⁹

The Campaign responds that "the plain meaning and purpose of the statutes at issue is to provide the public the opportunity to observe and vet the canvassing and

⁹ Intervenor's brief endorses the Board's contention that the Commonwealth Court erred in its interpretation of the relevant provisions of the Election Code, but it does not develop a separate argument to support this claim.

tabulation of the vote.” Campaign Brief at 17. The Campaign reasons that, as the Election Code gives a candidate’s representative the right to be “present” and to “remain in the room” during the canvassing of absentee and mail-in ballots, citing 25 P.S. § 2650 (“Every candidate shall be entitled to be *present* in person or by attorney in fact duly authorized, and to participate in any proceeding before any county board whenever any matters which may affect his candidacy are being heard, including any computation and canvassing of returns of any primary or election or recount of ballots or recanvass of voting machines affecting his candidacy.” (emphasis added)); *id.* § 3146.8(b) (allowing watchers to “be *present* when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded” (emphasis added)); *id.* § 3146.8(g)(2) (providing that an “authorized representative of each candidate in an election and one representative from each political party shall be permitted to *remain in the room* in which the absentee ballots and mail-in ballots are canvassed” (emphasis added)), these terms should be broadly interpreted consistent with their overall purpose of allowing public observation of the vote and the counting thereof. The Campaign rejects the Board’s interpretation as “a hyper-technical focus on the words themselves,” that disregards this purpose. Campaign Brief at 19.

The Campaign argues that, under the Board’s interpretation, merely being in the far end of a room like the Convention Center, which is as large as a football field, would be sufficient to comport with these requirements. This, in the Campaign’s view, “defies logic and reasonableness.” *Id.* at 20. The Campaign contends that the Board’s setup – imposing a barrier and having some tables in the area over a hundred feet away from the edge of the security fence – effectively deprived its representative of the ability to be truly

present, and effectively eliminates the representative's ability to perform his or her role of ensuring openness and transparency in the electoral process.

The Campaign denies that it was seeking the right to challenge mail-in or absentee ballots at the time of canvassing; rather, it claims that it was merely seeking the right to observe "in a meaningful way" the Board's conduct of the electoral process so that it could "challenge that process through appropriate litigation." Campaign Brief at 22 (emphasis omitted). The Campaign asserts its ability to do so is vital given that these canvassing activities have a high prospect of human error.

B. Analysis

As this issue presents a question of statutory interpretation under Pennsylvania law, our standard of review is *de novo*, and our scope of review is plenary. *Danganan v. Guardian Protection Services*, 645 Pa. 181, 179 A.3d 9, 15 (2018). Our objective is, therefore, to ascertain and effectuate the intent of the General Assembly. *Id.*; *see also* 1 Pa.C.S. § 1921(a). It is well established that "[t]he best indication of legislative intent is the plain language of the statute." *Crown Castle NG East v. Pennsylvania Public Utility Commission*, 234 A.3d 665, 674 (Pa. 2020). In ascertaining the plain meaning of statutory language, we consider it in context and give words and phrases their "common and approved usage." *Commonwealth by Shapiro v. Golden Gate National Senior Care*, 194 A.3d 1010, 1027-28 (Pa. 2017). When the words of a statute are free and clear of all ambiguity, they are the best indicator of legislative intent; hence, in such circumstances, "we cannot disregard the letter of the statute under the pretext of pursuing its spirit." *Fletcher v. Pennsylvania Property & Casualty Insurance Guarantee Association*, 603 Pa. 452, 985 A.2d 678, 684 (2009) (citing 1 Pa.C.S. § 1921(b)). Consistent with these

principles, when interpreting a statute “we must listen attentively to what the statute says, but also to what it does not say.” *Discovery Charter School v. School District of Philadelphia*, 166 A.3d 304, 321 (Pa. 2017). Moreover, regarding the factual findings of the trial court, we must defer to those findings if they are supported by the evidence. *Gentex Corp. v. WCAB (Morack)*, 23 A.3d 528, 534 (Pa. 2011); *Generette v. Donegal Mutual Insurance Company*, 957 A.2d 1180, 1189 (Pa. 2008).

As a threshold matter, given the specific issue in this case — the degree of access required by the Election Code for an “authorized representative” of a candidate to the pre-canvassing and canvassing proceedings of an election board — we regard Sections 3146.8(g)(1.1) and (2) of the Code to be the governing statutory provisions, as they directly set forth the rights of such individuals. Section 2650, offered by the Campaign, by its plain terms is inapplicable, as we are addressing the right of access of a campaign’s representative to canvassing proceedings, not a candidate or his “attorney in fact”. Section 3146.8(b) is likewise not controlling, given that it applies only to the right of “watchers” to be present while ballots are canvassed. The Election Code contains specific certification requirements for an individual to be appointed as a “watcher,” see 25 P.S. § 2687 (“Appointment of watchers”), and there is no evidence of record establishing that Attorney Mercer met these requirements, and, critically, he did not identify himself as a watcher, but rather as “one of the representatives designated by the Trump campaign . . . to observe the pre-canvass.” N.T. Hearing, 11/3/20, at 20-21.

As recited above, Section 3146.8(g)(1.1) requires only that an authorized representative “be permitted to *remain in the room* in which the absentee ballots and mail-in ballots are pre-canvassed,” 25 P.S. § 3146.8(g)(1.1) (emphasis added), and Section

3146.8(g)(2) likewise mandates merely that an authorized representative “be permitted to *remain in the room* in which the absentee ballots and mail-in ballots are canvassed.” 25 P.S. § 3146.8(g)(2) (emphasis added). While this language contemplates an opportunity to broadly observe the mechanics of the canvassing process, we note that these provisions do not set a minimum distance between authorized representatives and canvassing activities occurring while they “remain in the room.” The General Assembly, had it so desired, could have easily established such parameters; however, it did not. It would be improper for this Court to judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so. See *Sivick v. State Ethics Commission*, ___ A.3d ___. 2020 WL 5823822, at *10 (Pa. filed Oct. 1, 2020) (“It is axiomatic that we may not add statutory language where we find the extant language somehow lacking.”).

Rather, we deem the absence of proximity parameters to reflect the legislature’s deliberate choice to leave such matters to the informed discretion of county boards of elections, who are empowered by Section 2642(f) of the Election Code “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections officers.” 25 P.S. § 2642(f).

In the case at bar, the Board promulgated regulations governing the locations in which authorized representatives were permitted to stand and move about while observing the pre-canvassing and canvassing process. The Board’s averments that it fashioned these rules based on its careful consideration of how it could best protect the security and privacy of voters’ ballots, as well as safeguard its employees and others who would be present during a pandemic for the pre-canvassing and canvassing process,

while, at the same time, ensuring that the ballots would be counted in the most expeditious manner possible, were undisputed by the Campaign. We discern no basis for the Commonwealth Court to have invalidated these rules and impose arbitrary distance requirements.

Significantly, as to any opportunity to observe the mechanics of the canvassing process, the evidence of record, provided through the Campaign's own witness, Attorney Mercer, whom the trial court deemed to be credible, indicates that the Board's rules regarding where campaign representatives could remain in the room to view the pre-canvassing and canvassing process did not deprive Attorney Mercer of the ability "to actually observe the . . . process in any meaningful way," as the Commonwealth Court concluded, Commonwealth Court Opinion, 11/5/20, at 8, and the Campaign presently argues. According to Attorney Mercer's candid testimony, which the trial court accepted as credible, from his vantage point, he could view the entirety of the pre-canvassing and canvassing process. Clearly, then, Attorney Mercer had the opportunity to observe the mechanics of the canvassing process. Specifically, Attorney Mercer witnessed Board employees inspecting the back of ballot envelopes containing the voter's declaration, before sending them on for processing; witnessed ballots being removed from their secrecy envelopes, and naked ballots which had been delivered to the Board without a secrecy envelope being segregated from ballots which arrived within such envelopes; saw that the ballot processing methods utilized by the Board were not destroying the ballot envelopes containing the voter's declaration; and perceived that the ballot secrecy envelopes were being preserved during their processing. See N.T. Hearing, 11/3/20, at 20-21, 27, 30, 38; Trial Court Order, 11/3/20 ("The [Campaign's] witness provided copious

testimony as to his ability to observe the opening and sorting of ballots.”). Although Attorney Mercer related that he could not view the actual declarations on the ballot envelopes, nor examine individual secrecy envelopes for improper markings, as the trial court properly determined, this information would only be necessary if he were making challenges to individual ballots during the pre-canvassing and canvassing process, which appeared to be his primary motivation in seeking such information. *See id.* at 37-38; Trial Court Order, 11/3/20 (“His concerns pertained to his inability to observe the writing on the outside of the ballots. Given that observers are directed only to observe and not to audit ballots, we conclude, based on the witness’s testimony, that the Board of Elections has complied with the observation requirements under 25 P.S. [§] 3146.8.”). As discussed above, such challenges are not permissible under the Election Code. Thus, as found by the trial court, Attorney Mercer was able to appropriately observe that the Board’s employees were performing their duties under the Election Code.

In sum, we conclude the Board did not act contrary to law in fashioning its regulations governing the positioning of candidate representatives during the pre-canvassing and canvassing process, as the Election Code does not specify minimum distance parameters for the location of such representatives. Critically, we find the Board’s regulations as applied herein were reasonable in that they allowed candidate representatives to observe the Board conducting its activities as prescribed under the Election Code. Accordingly, we determine the Commonwealth Court’s order was erroneous. Thus, we vacate that order, and reinstate the trial court’s order.

Jurisdiction relinquished.

Justices Baer, Donohue, Dougherty and Wecht join the opinion.

Chief Justice Saylor files a dissenting opinion in which Justice Mundy joins.

Justice Mundy files a dissenting opinion.

APPENDIX C

**[J-113-2020]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: NOVEMBER 3, 2020 GENERAL ELECTION	:	No. 149 MM 2020
	:	
	:	
	:	
PETITION OF: KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA	:	SUBMITTED: October 16, 2020
	:	

OPINION

JUSTICE TODD

DECIDED: October 23, 2020

On October 14, 2020, our Court granted the application of the Secretary of the Commonwealth, Kathy Boockvar (“Secretary”), to assume King’s Bench jurisdiction¹ and consider her request for declaratory relief, limited to answering the following question: “Whether the Election Code² authorizes or requires county election boards to reject voted absentee or mail-in ballots during pre-canvassing and canvassing³ based on signature

¹ As we have recently explained, our Court’s King’s Bench jurisdiction is derived from Article V, § 2 of the Pennsylvania Constitution and 42 Pa.C.S. § 502, and “is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.” *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020). We may exercise this power of review even where, as here, no dispute is pending in a lower court of this Commonwealth. *Id.*

² The Pennsylvania Election Code, 25 P.S. §§ 2600-3591 (“Election Code” or “Code”).

³ As defined by the Election Code, the process of “pre-canvassing” is “the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.” 25 P.S. § 2602. The process of “canvassing” is “the gathering

analysis where there are alleged or perceived signature variances?” *In Re: November 3, 2020 General Election, Petition of Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania*, 149 MM 2020, 2020 WL 6110774 (Pa. filed Oct. 14, 2020) (order). For the reasons that follow, we conclude that the Election Code does not authorize or require county election boards to reject absentee or mail-in ballots during the canvassing process based on an analysis of a voter’s signature on the “declaration”⁴ contained on the official ballot return envelope for the absentee or mail-in ballot. We, therefore, grant the Secretary’s petition for declarative relief, and direct the county boards of elections not to reject absentee or mail-in ballots for counting, computing, and tallying based on signature comparisons conducted by county election officials or employees, or as the result of third-party challenges based on such comparisons.

I. Facts and Procedural History

As our Court has recently observed, “[i]n October 2019, the General Assembly of the Commonwealth of Pennsylvania enacted Act 77 of 2019,^[5] which, *inter alia*, created for the first time in Pennsylvania the opportunity for all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on

of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots.” *Id.* § 2602. At times herein, we refer to these two stages broadly as “canvassing.”

⁴ The voter’s declaration is a pre-printed statement required to appear on the ballot return envelope containing a voter’s absentee or mail-in ballot declaring: that the voter is qualified to vote the ballot enclosed in the envelope, and that the voter did not already vote in the election for which the ballot was issued. 25 P.S. § 3146.2. The declaration also contains lines for the voter to print his or her name and address, a space for the voter to sign his or her name or make a mark if unable to sign, and a space for the voter to enter the date on which he or she executed the declaration. *Id.* § 3146.6.

⁵ Act of October 31, 2019, P.L. 552, No. 77 (hereinafter, “Act 77”).

Election Day.” *Pennsylvania Democratic Party v. Boockvar*, 2020 WL 5554644, at *1 (Pa. Sept. 17, 2020). Subsequently, in March 2020, the legislature made further revisions to the Election Code via the passage of Act 12 of 2020,⁶ which, among other things, authorized for the June 2, 2020 primary election,⁷ and for all subsequent elections, the mail-in voting procedures established by Act 77.⁸

Because of the substantial nature of the recent Code amendments, as well as the anticipated massive increase in the number of mail-in and absentee ballots which county boards of elections would be confronted with due to the COVID-19 pandemic, in order to ensure that the procedures set forth in the Election Code regarding pre-canvassing and canvassing of absentee and mail-in ballots would be uniformly applied and implemented by county boards of elections, Secretary Boockvar issued two written guidance documents for those boards to follow when canvassing such ballots.

In the first guidance document issued on September 11, 2020 to all county boards, Secretary Boockvar set forth the procedure the boards were to follow upon receipt of an absentee or mail-in ballot. This guidance directed the county boards to examine the declaration contained on the ballot return envelope containing the absentee or mail-in ballot. It further directed the county board to “compare the information on the outer envelope, i.e., the voter’s name and address, with the information contained in the ‘Registered Absentee and Mail-In Voters File, the absentee voter’s list and/or the Military Veterans’ and Emergency Civilians Absentee Voters File.’” Pennsylvania Department of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return*

⁶ Act of March 27, 2020, P.L. 41, No. 12 (hereinafter, “Act 12”).

⁷ This election was rescheduled from May 17, 2020 due to the COVID-19 pandemic.

⁸ We collectively refer to Act 77 and Act 12 as the “recent Code amendments.”

Envelopes, 9/11/20, at 3, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>. The Secretary advised that, if the declaration is signed and the county board is satisfied that the declaration is sufficient, then the absentee or mail-in ballot should be approved for canvassing unless it is challenged in accordance with the Election Code. The Secretary specifically cautioned the county boards of elections in this regard that “[t]he Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.” *Id.*

Subsequent to our Court’s decision in *Boockvar, supra*, the Secretary issued supplemental guidance to all county boards concerning, *inter alia*, matters addressed by our decision – *i.e.*, the establishment by county boards of satellite offices, provision of drop boxes for voters to return absentee and mail-in ballots, and the mandatory requirements that such ballots be returned only by the voter and be enclosed in a secrecy envelope. In this supplemental guidance, the Secretary also directed the county boards to set aside ballots which were returned to them without the declaration envelope having been “filled out, dated and signed.” Pennsylvania Department of State, *Guidance Concerning Civilian Absentee And Mail-In Ballot Procedures*, 9/28/20, at 9, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedures.pdf>. This guidance buttressed her earlier instruction, reiterating that “[t]he Election Code does not permit county election officials to reject applications or voted ballots based solely on

signature analysis. . . . No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.” *Id.*

Meanwhile, Intervenors in the instant matter, Donald J. Trump for President, Inc., and the Republican National Committee, filed suit in the United States District Court for the Western District against the Secretary over several election issues.⁹ See *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966 (W.D. Pa.). In response to the Secretary’s guidance to the county boards, on September 23, 2020, Intervenors filed an amended complaint in that matter challenging Secretary Boockvar’s interpretation of the Election Code as precluding county boards from rejecting absentee and mail-in ballots based on a signature comparison.

On October 1, 2020, Intervenors filed a motion for summary judgment in the federal action alleging, *inter alia*, that the Secretary’s guidance was contrary to the Election Code and, thus, constituted an infringement on the “fundamental right to vote and to a free and fair election.” Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment filed in *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966 (W.D. Pa.) (Exhibit D to Secretary’s Application for Extraordinary Relief), at 15-19, 45-50. Intervenors sought, as relief, the entry of an injunction directing the Secretary to withdraw her guidance, and, also, to require county boards of elections to compare signatures on

⁹ This lawsuit challenged, as an alleged violation of the due process and equal protection guarantees of the 14th Amendment to the United States Constitution, *inter alia*, the Secretary’s allowance in the upcoming election of the use of drop boxes, satellite election offices for the collection of absentee and mail-in ballots, and the counting of ballots which were returned without a secrecy envelope, and the requirement in the Election Code that poll watchers reside in the county in which they sought to serve in this capacity.

applications for absentee and mail-in ballots, and the ballots themselves, with the voter's permanent registration record. *Id.*

The Honorable J. Nicholas Ranjan denied Intervenors' motion for summary judgment, and granted judgment in favor of the Secretary. *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5997680 (W.D. Pa. filed Oct. 10, 2020) (hereinafter "*Trump*"). Relevant to the present dispute, in his scholarly and comprehensive supporting opinion, Judge Ranjan concluded that "the plain language of the Election Code imposes no requirement for signature comparison for mail-in and absentee ballots and applications." *Trump* at *53. In reaching this conclusion, Judge Ranjan analyzed the provisions of the Election Code governing pre-canvassing and canvassing of absentee and mail-in votes returned by the elector, set forth in Section 3146.8(g), which provides:

§ 3146.8. Canvassing of official absentee ballots and mail-in ballots

* * *

(g)(1)(i) An absentee ballot cast by any absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).

(ii) An absentee ballot cast by any absentee elector as defined in section 1301(i), (j), (k), (l), (m) and (n), an absentee ballot under section 1302(a.3) or a mail-in ballot cast by a mail-in elector shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

(1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections

shall provide at least forty-eight hours' notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

(2) The county board of elections shall meet no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not included in the pre-canvass meeting. The meeting under this paragraph shall continue until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed. The county board of elections shall not record or publish any votes reflected on the ballots prior to the close of the polls. The canvass process shall continue through the eighth day following the election for valid military-overseas ballots timely received under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot). A county board of elections shall provide at least forty-eight hours' notice of a canvass meeting by publicly posting a notice on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are canvassed.

(3) When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that

the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

(4) All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district as follows:

(i) The county board shall open the envelope of every unchallenged absentee elector and mail-in elector in such manner as not to destroy the declaration executed thereon.

(ii) If any of the envelopes on which are printed, stamped or endorsed the words "Official Election Ballot" contain any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii) The county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.

(iv) Following the close of the polls, the county board shall record and publish the votes reflected on the ballots.

(5) Ballots received whose applications have been challenged and ballots which have been challenged shall be placed unopened in a secure, safe and sealed container in the custody of the county board until it shall fix a time and place for a formal hearing of all such challenges, and notice shall be given where possible to all absentee electors and mail-in electors thus challenged and to every individual who made a challenge. The time for the hearing shall not be later than seven (7) days after the deadline for all challenges to be filed. On the day fixed for said hearing, the county board shall

proceed without delay to hear said challenges, and, in hearing the testimony, the county board shall not be bound by the Pennsylvania Rules of Evidence. The testimony presented shall be stenographically recorded and made part of the record of the hearing.

(6) The decision of the county board in upholding or dismissing any challenge may be reviewed by the court of common pleas of the county upon a petition filed by any person aggrieved by the decision of the county board. The appeal shall be taken, within two (2) days after the decision was made, whether the decision was reduced to writing or not, to the court of common pleas setting forth the objections to the county board's decision and praying for an order reversing the decision.

(7) Pending the final determination of all appeals, the county board shall suspend any action in canvassing and computing all challenged ballots received under this subsection irrespective of whether or not appeal was taken from the county board's decision. Upon completion of the computation of the returns of the county, the votes cast upon the challenged official absentee ballots that have been finally determined to be valid shall be added to the other votes cast within the county.

25 P.S. § 3146.8(g) (footnotes omitted).

Judge Ranjan discerned nothing in the text of these provisions which requires county boards of elections to “verify” the signatures on mail-in and absentee ballots – that is, to examine the signatures to determine whether or not they were authentic, *Trump* at *53, and thus rejected Intervenors’ argument that Section 3146.8(g)(3) requires county boards of elections to engage in signature comparison and verification. In Judge Ranjan’s view, the county board of elections is required under this statutory provision to verify only the proof of the voter’s identification by examining the voter’s driver’s license number, the last four digits of his or her social security number, or other specifically approved form of

identification which is required by Section 2602(z.5) of the Election Code.¹⁰ Indeed, Judge Ranjan noted that nowhere in Section 3146.8(g)(3) does the term “signature” appear. *Trump*, at *55.

¹⁰ This statutory section provides:

The words “proof of identification” shall mean:

(1) In the case of an elector who has a religious objection to being photographed, a valid-without-photo driver's license or a valid-without-photo identification card issued by the Department of Transportation.

(2) For an elector who appears to vote under section 1210, a document that:

(i) shows the name of the individual to whom the document was issued and the name substantially conforms to the name of the individual as it appears in the district register;

(ii) shows a photograph of the individual to whom the document was issued;

(iii) includes an expiration date and is not expired, except:

(A) for a document issued by the Department of Transportation which is not more than twelve (12) months past the expiration date; or

(B) in the case of a document from an agency of the Armed forces of the United States or their reserve components, including the Pennsylvania National Guard, establishing that the elector is a current member of or a veteran of the United States Armed Forces or National Guard which does not designate a specific date on which the document expires, but includes a designation that the expiration date is indefinite; and

(iv) was issued by one of the following:

(A) The United States Government.

(B) The Commonwealth of Pennsylvania.

(C) A municipality of this Commonwealth to an employee of that municipality.

(D) An accredited Pennsylvania public or private institution of higher learning.

(E) A Pennsylvania care facility.

(3) For a qualified absentee elector under section 1301 or a qualified mail-in elector under section 1301-D:

Judge Ranjan found that, while 25 P.S. §§ 3146.6(a) and 3150.16(a) require a voter submitting an absentee or mail-in ballot to “fill out and sign the declaration” printed on the ballot return envelope, the county board’s duty under these sections is merely to examine the declaration and determine if these requirements have been comported with. Critically, in his view, this language did not require that a county board inquire into the authenticity of the signature; rather, the county boards were required to determine only that a voter had supplied his signature in the declaration.

Judge Ranjan observed that, by contrast, other provisions of the Election Code such as those governing in-person voting, see 25 P.S. § 3050(a.3)(2), allow a vote to be challenged where a voter’s signature on the voting certificate executed at the polls is deemed not to be authentic when compared to the signature recorded in the district register of voters. Likewise, other sections of the Election Code allow boards of elections to reject provisional ballots based on an election official’s conclusion that the voter’s signature on the ballot envelope is not authentic, see 25 P.S. § 3050(a.4)(5)(i)-(ii), and allow election officials to reject nominating petitions based on the official’s conclusion that

(i) in the case of an elector who has been issued a current and valid driver's license, the elector's driver's license number;

(ii) in the case of an elector who has not been issued a current and valid driver's license, the last four digits of the elector's Social Security number;

(iii) in the case of an elector who has a religious objection to being photographed, a copy of a document that satisfies paragraph (1); or

(iv) in the case of an elector who has not been issued a current and valid driver's license or Social Security number, a copy of a document that satisfies paragraph (2).

25 P.S. § 2602(z.5) (footnotes omitted).

the signatures contained therein are not authentic, see 25 P.S. § 2936. From Judge Ranjan's perspective, these provisions of the Code demonstrated that the Pennsylvania General Assembly knew how to require signature verification when they so desired, and the fact they did not do so in Section 3146.8(g)(3) indicated that signature verification was not a requirement for absentee or mail-in ballots.

Judge Ranjan also considered the effect of interpreting Section 3146.8(g)(3) to require signature comparison. In his view, doing so would create a risk that voters would be disenfranchised, given that mail-in and absentee ballots are kept securely stored until election day when the pre-canvassing process begins, and the Election Code contains no requirement that voters whose ballots are deemed inadequately verified be apprised of this fact. Thus, unlike in-person voters, mail-in or absentee voters are not provided any opportunity to cure perceived defects in a timely manner.¹¹

In the instant matter, on October 4, 2020, just before Judge Ranjan issued his decision, Secretary Boockvar filed with this Court an application seeking invocation of our King's Bench authority, and seeking, *inter alia*, a declaration that, under the Election Code, county boards of elections are precluded from rejecting absentee or mail-in ballots at canvassing based upon signature comparisons, in accordance with her guidance to the county boards. Thereafter, the Secretary submitted a letter to our Court pursuant to Pa.R.A.P. 2501 apprising us of Judge Ranjan's decision. In this letter, the Secretary

¹¹ Judge Ranjan additionally rejected Intervenors' claims that a lack of signature comparison requirements violated the guarantees of the United States Constitution to substantive due process and equal protection. Because the present issue which we have accepted for our King's Bench review concerns only a pure question of state law involving interpretation of our Commonwealth's Election Code, we need not discuss Judge Ranjan's resolution of those claims.

noted that Judge Ranjan’s opinion concluded that her guidance to the county boards of elections was “uniform and non-discriminatory” and “informs the counties of the current state of the law as it relates to signature comparison.” Secretary’s Letter to Supreme Court Prothonotary, 10/11/20, at 2 (quoting *Trump* at *61). Nevertheless, recognizing that our Court is the final word on the interpretation of Pennsylvania law, the Secretary maintained her request for our Court to grant King’s Bench review. *Id.* (“[T]he district court’s opinion, while timely and persuasive, is not authoritative. Only this Court can render the ultimate determination concerning Pennsylvania law.”).

As indicated above, our Court granted the Secretary’s application for invocation of our King’s Bench authority because we determined the Secretary presented an issue of public importance that required our immediate intervention. *See supra* note 1. In our order granting review, we also granted the petitions to intervene of Donald J. Trump for President Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee (“Intervenors”). We denied the petitions for intervention of Elizabeth Radcliffe, a qualified elector, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives, Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader. However, these parties were granted leave to file *amicus* briefs.¹² We additionally granted leave for the Brennan Center for Justice, the Urban League of Pittsburgh, the Bucks,

¹² After the filing deadline set in our order, Senate President Pro Tempore Scarnati and Senate Majority Leader Corman filed an application for leave to file an *amicus* brief *nunc pro tunc*, alleging that technical difficulties with our electronic filing system prevented timely filing their *amicus* brief. We grant the application.

Chester, Montgomery and Philadelphia County Boards of Elections, and the Pennsylvania Alliance for Retired Persons to file *amicus* briefs.

II. Arguments of the Parties

The Secretary first highlights the fact that, when a voter applies for a mail-in ballot, Sections 3150.12(a) and (b)(1)-(2) of the Election Code require the voter to fill out an application form listing his name, address, date of birth, voting district, and the length of time he has resided in the voting district.¹³ According to the Secretary, the paper version of that form also requires a voter to sign a declaration that he or she is eligible to vote in the election for which he is requesting a ballot.¹⁴ Upon receipt of this application, a county board of elections confirms whether the applicant is qualified to receive a mail-in ballot under Section 3250.12b by verifying the proof of identification supplied with the application, such as the voter's drivers' license number or the last four digits of the voter's social security number, and the county board compares that information with the voter's permanent registration card. The Secretary contends that this comparison process is all that is required by the Election Code, and that there is no provision therein which requires county boards of elections to compare signatures for purposes of verification, which is why, the Secretary points out, the application can be completed and submitted electronically through a Commonwealth website.

Once this verification is completed, the Secretary proffers that the Code requires the application be marked approved and a ballot issued. See 25 P.S. § 3150.12b(a)(1).

¹³ The Secretary argues that absentee ballot application and approval procedures set forth in 25 P.S. §§ 3146.2 and 3146.2b are similar and, hence, for the sake of convenience, discusses only the mail-in balloting provisions.

¹⁴ This form is available on the Secretary's website at https://www.votespa.com/Register-to-Vote/Documents/PADOS_MailInApplication.pdf.

The Secretary emphasizes that the only permissible challenge to the ballot application under Section 3150.12b(a)(2) is that the applicant was not a qualified elector.

With regard to the pre-canvassing and canvassing procedures for absentee and mail-in ballots set forth in Section 3146.8 of the Election Code,¹⁵ the Secretary notes that the pre-canvassing process, which entails opening the ballot return envelopes, removing the ballots, and counting, computing and tallying them, can begin no earlier than 7:00 a.m. on election day. When the return envelope is opened during that process, according to the Secretary, the only examination which the county board may conduct under Section 3146.8(g)(3) and 3146.2c(c)¹⁶ is to compare “the ‘information’ on the envelope—i.e., the

¹⁵ Section 3146.8, by its title, “Canvassing of official absentee ballots and mail-in ballots,” and its plain terms, governs both the pre-canvassing and canvassing of absentee and mail-in ballots.

¹⁶ Section 3146.2c(c) provides:

Not less than five days preceding the election, the chief clerk shall prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee or mail-in ballots shall have been issued. Each such list shall be prepared in duplicate, shall be headed “Persons in (give identity of election district) to whom absentee or mail-in ballots have been issued for the election of (date of election),” and shall be signed by him not less than four days preceding the election. He shall post the original of each such list in a conspicuous place in the office of the county election board and see that it is kept so posted until the close of the polls on election day. He shall cause the duplicate of each such list to be delivered to the judge of election in the election district in the same manner and at the same time as are provided in this act for the delivery of other election supplies, and it shall be the duty of such judge of election to post such duplicate list in a conspicuous place within the polling place of his district and see that it is kept so posted throughout the time that the polls are open. Upon written request, he shall furnish a copy of such list to any candidate or party county chairman.

25 P.S. § 3146.2c(c).

voter's name and address—with the names and addresses on the lists of approved absentee and mail-in voters.” Secretary’s Application for Extraordinary Relief, 10/04/20, at 19. The Secretary stresses that no other examination is permitted under the plain terms of the Code.

If the county board’s examination determines that the declaration is sufficient, and the voter’s name and address appears in the lists of approved absentee and mail-in voters, then, according to the Secretary, the Code requires the ballots to be counted. 25 P.S. § 3146.8(g)(3) and (4). The Secretary asserts that the only exception involves challenges to a voter’s eligibility raised at the ballot application stage under Section 3150.12b(a)(2).¹⁷ The Secretary contends that such challenges must be made by 5:00 p.m. on the Friday before election day and, thus, cannot be made during the pre-canvassing procedure (which does not begin until election day).

The Secretary argues that there is no provision of the Election Code which allows or requires the county boards of elections to entertain challenges “based on perceived signature mismatches,” Secretary’s Application for Extraordinary Relief, 10/04/20, at 20, or to reject absentee or mail-in ballots because of such an assessment. The Secretary notes that the General Assembly knows how to draft provisions requiring signature comparison, as it did for the in-person voting process governed by Section 3050(a.3)(2), which directs election officials to compare the signature of the voter signing the voter certificate at the polls with the district register, and then to make the determination of whether the signature on the voter certificate is genuine. Moreover, unlike for in-person

¹⁷ See *also* 25 P.S. § 3146.2b(b) and (c) (limiting challenges to approval of application for absentee ballots to the ground that the applicant was not a “qualified absentee elector” or a “qualified elector”).

voting, there is no provision in the Code which requires a voter to be notified that his signature has been challenged during the canvassing process; hence, a voter whose ballot is rejected during canvassing because of a perceived signature mismatch has no opportunity to respond to the challenge and have his ballot counted. In sum, the Secretary contends that requiring signature comparison during canvassing would improperly add a requirement to the Election Code which the legislature did not see fit to include.

Although the Secretary views the Election Code in this regard to be clear and unambiguous, she notes that, even if we were to find it to be ambiguous, we must still reject a signature comparison requirement, given that there are no standards or guidelines contained within the Code governing how an election official should perform such a comparison. In this vacuum, the Secretary asserts individual county boards will improvise “*ad hoc*” procedures, which would vary from county to county, creating a significant risk of error and uncertainty in the review of ballots. Secretary’s Application for Extraordinary Relief, 10/04/20, at 24. In the Secretary’s view, this would constitute a denial of equal protection to voters whose ballots were challenged and rejected under such varying and imprecise standards. This process would also present an “unjustified risk of disenfranchisement,” *id.* at 25, given that a voter’s ballot could be rejected without any opportunity to be heard on the issue.

Intervenors respond that the Election Code’s use of the term “shall” in Sections 3146.6(a) and 3150.16(a) with respect to the requirement that electors sign the declaration on the outside of the ballot return envelope, together with the Code’s companion requirement that county boards examine the declaration and determine if it is

“sufficient,” mandates that county boards conduct signature verification. Intervenor Supplemental Brief at 6. Intervenor develops that, “because a voter’s noncompliance with the signature mandate ‘renders the ballot invalid,’ that mandate necessarily contemplates the ‘enforcement mechanism’ of county boards engaging in—and invalidating ballots during the pre-canvass or canvass based upon—verification of the voter’s signature.” *Id.* Intervenor maintains that the “mandate” established by these statutory provisions “authorizes and requires signature verification and invalidation of ballots based upon signature mismatch.” *Id.* Additionally, Intervenor maintains that, because Section 3148.8(g)(3) requires a determination of whether a declaration is “sufficient,” and establishes that a declaration will only be sufficient when signed by the elector, this “encompasses the enforcement mechanism of signature analysis and verification during the pre-canvass and canvass.” *Id.* Further, Intervenor insists that objections can be made at canvassing to ballots revealing signature mismatches.

Although contending that these provisions of the Election Code are clear, Intervenor asserts that principles of statutory construction also support their suggested interpretation. Specifically, Intervenor maintains that signature comparison is necessary to prevent fraud, and that prior decisions from lower courts of the Commonwealth have endorsed this practice to effectuate this purpose. *See id.* at 7-8 (citing *Appeal of Orsatti*, 598 A.2d 1341 (Pa. Cmwlth. 1991); *In re Canvass of Absentee Ballots of Nov. 2, 1965, Gen. Election*, 39 Pa. D. & C.2d 429 (Montg. Cty. Common Pleas 1965); *Fogleman Appeal*, 36 Pa. D. & C.2d 426 (Juniata Cty. Common Pleas 1964); *In re City of Wilkes-Barre Election Appeals*, 44 Pa. D. & C.2d 535 (Luzerne Cty. Common Pleas 1967)). Intervenor also suggests the fact that, when a ballot return envelope is scanned upon

receipt by a county board of elections, the voter's registration card, which includes his or her signature, as contained in the Commonwealth's "SURE" ("Statewide Uniform Registry of Electors") system appears on the election official's computer screen. Intervenors view this fact as indicating that even the Secretary believes signature verification is required.

Addressing the potential impacts of the competing interpretations, Intervenors suggest that the Secretary's interpretation implicates due process and equal protection concerns, given that voters who vote in person are subject to signature verification, whereas those who vote by mail-in or absentee ballots would not be. Intervenors contend we should avoid an interpretation of the Code that results in such potential constitutional violations.

Intervenors rebuff the practical difficulties of implementing a system of signature verification raised by the Secretary, asserting that Chester County has already promulgated and produced such a system.¹⁸ Intervenors further dispute that voters could be disenfranchised without their knowledge based on enforcement of a signature comparison requirement. They point to the notice, hearing, and judicial review provisions in Section 3146.8(g)(5)-(7) for adjudicating ballot challenges, which they contend would allow a voter whose signature has been challenged during canvassing to have the challenge adjudicated and thereby preserve their right to vote.

III. Analysis

As the issue on which we accepted King's Bench review is purely one of statutory interpretation, our standard of review is *de novo*, and our scope of review is plenary. *Danganan v. Guardian Protective Services*, 179 A.3d 9, 15 (Pa. 2018). In

¹⁸ Notably, Chester County filed an *amicus* brief supporting the Secretary's position.

matters of statutory interpretation, our objective is to ascertain and effectuate the intent of the General Assembly. *Id.*; see also 1 Pa.C.S. § 1921(a). As we have so oft observed, “[t]he best indication of legislative intent is the plain language of the statute.” *Crown Castle NG East v. Pennsylvania Public Utility Commission*, 234 A.3d 665, 674 (Pa. 2020). In ascertaining the plain meaning of statutory language, we consider it in context and give words and phrases their “common and approved usage.” *Commonwealth by Shapiro v. Golden Gate National Senior Care*, 194 A.3d 1010, 1027-28 (Pa. 2017). When the words of a statute are free and clear of all ambiguity, they are the best indicator of legislative intent; hence, in such circumstances, “we cannot disregard the letter of the statute under the pretext of pursuing its spirit.” *Fletcher v. Pennsylvania Property & Casualty Insurance Guarantee Association*, 985 A.2d 678, 684 (Pa. 2009) (citing 1 Pa.C.S. § 1921(b)).

Turning to the text of the governing statutory provisions, Section 3146.8(g)(3) of the Election Code enumerates only three duties of the county boards of elections during the pre-canvassing and canvassing process:

- (1) to “examine the declaration on the envelope of each ballot not set aside under subsection (d) [requiring rejection of ballots for deceased voters] and shall compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File,’ whichever is applicable”;
- (2) to verify “the proof of identification as required under this act,” and
- (3) to be “satisfied that the declaration is sufficient and the information contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File’ verifies his right to vote.”

25 P.S. § 3146.8(g)(3).

If an absentee or mail-in ballot comports with these statutory requirements, and it has not been challenged under Section 3146.2b (providing for challenges to approval of absentee ballot application on the ground that the applicant was not a “qualified absentee

elector,” or a “qualified elector”), or Section 3150.12b (providing that the exclusive means for challenging a mail-in ballot application is “on the grounds that the applicant was not a qualified elector”),¹⁹ then Section 3146.8(g)(4) requires the ballot to be considered “verified” and directs that it “shall be counted and included with the returns of the applicable election district.” 25 P.S. § 3146.8(g)(4)(a). The only exception is set forth in Section 3146.8(g)(4)(ii), which requires that, “[i]f any of the envelopes on which are printed, stamped or endorsed the words ‘Official Election Ballot,’ contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.” *Id.* § 3146.8(g)(4)(ii).

To assess the signature analysis question before us, we review in turn each of the three canvassing duties set forth above from Section 3146.8(g)(3). First, as noted, the county boards must examine the declaration on the ballot return envelope and then “compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File.” *Id.* § 3146.8(g)(3).

Initially, we note that, with respect to the “Registered Absentee and Mail-in Voters File,” it seems this file, previously utilized, is now a virtually empty relic. Prior to the recent Code amendments, subsection (a) of Section 3146.2c specified that this file was to

¹⁹ As the Secretary has argued, the plain text of these provisions requires challenges to applications for mail-in ballot applications to be brought no later than 5:00 p.m. on the Friday before the election. 25 P.S. § 3150.12b(a)(2). Likewise, challenges to absentee ballot applications of registered voters, except for those permanently registered, must be brought by that same deadline. *Id.* § 3146.2b(c). Finally, challenges which are brought to a registered voter who is on the permanent registration list must be brought by the deadline for receipt of absentee ballots. *Id.* § 3146.2b(b). Hence, none of these challenges may be brought during the canvassing process.

contain duplicate “voter's temporary registration cards.”²⁰ See *id.* § 3146.2c(a) (effective to Oct. 30, 2019). Indeed, the provision provided that these registration cards “shall constitute” the file, indicating the file had no other content. *Id.* Critically, however, with the passage of Act 12, the legislature deleted subsection (a). Act 12, § 8 (deleting 25 P.S. § 3146.2c(a)). Thus, while the canvassing provisions of 25 P.S. § 3146.8(g)(3) still require a voter’s declaration to be compared against the file, that comparison would appear to be a meaningless exercise. The only informational remnant in the file, if it is still being maintained, is that set forth in Sections 3146.2(h) and 3150.12(e), requiring a voter’s absentee and mail-in ballot application number to be entered in the file. Manifestly, there is no present requirement that the file contain the type of signature information necessary to perform the signature comparison Intervenor’s contend is mandatory.

With respect to a comparison of the declaration against the absentee voters’ list and the “Military Veterans and Emergency Civilians Absentee Voters File,” as highlighted by the Secretary, see Secretary’s Application for Extraordinary Relief, 10/04/20, at 19 n.14, the only lists against which such a comparison may be conducted are those which

²⁰ This provision then provided, in full:

The county board of elections shall maintain at its office a file containing the duplicate absentee voter's temporary registration cards of every registered elector to whom an absentee ballot has been sent. Such duplicate absentee voter's temporary registration cards shall be filed by election districts and within each election district in exact alphabetical order and indexed. The registration cards so filed shall constitute the Registered Absentee Voters File for the Primary or Election of (date of primary or election) and shall be kept on file for a period commencing the Tuesday prior to the day of the primary or election until the day following the primary or election or the day the county board of elections certifies the returns of the primary or election, whichever date is later. Such file shall be open to public inspection at all times subject to reasonable safeguards, rules and regulations.

25 P.S. § 3146.2c(a) (effective to Oct. 30, 2019).

the county boards are required to keep under subsections (b) and (c) of Section 3146.2c.

Those subsections provide:

(b) The county board of elections shall post in a conspicuous public place at its office a master list arranged in alphabetical order by election districts setting forth the name and residence, and at primaries, the party enrollment, of (1) every military elector to whom an absentee ballot is being sent, each such name to be prefixed with an "M"; (2) every bedridden or hospitalized veteran outside the county of his residence who is not registered and to whom an absentee ballot is being sent, each such name to be prefixed with a "V"; and (3) every registered elector who has filed his application for an absentee ballot too late for the extraction of his original registration card and to whom a ballot is being sent and every qualified elector who has filed his application for an absentee ballot and is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting, each such name to be prefixed with a "C." This list shall be known as the Military, Veterans and Emergency Civilians Absentee Voters File for the Primary or Election of (date of primary or election) and shall be posted for a period commencing the Tuesday prior to the day of the primary or election until the day following the primary or election or the day on which the county board of elections certifies the returns of the primary or election, whichever date is later. Such file shall be open to public inspection at all times subject to reasonable safeguards, rules and regulations. This posted list shall not contain any military address or reference to any military organization. Upon written request, the county board shall furnish a copy of such list to any candidate or party county chairman.

(c) Not less than five days preceding the election, the chief clerk shall prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee or mail-in ballots shall have been issued. Each such list shall be prepared in duplicate, shall be headed "Persons in (give identity of election district) to whom absentee or mail-in ballots have been issued for the election of (date of election)," and shall be signed by him not less than four days preceding the election. He shall post the original of each such list in a conspicuous place in the office of the county election board and see that it is kept so posted

until the close of the polls on election day. He shall cause the duplicate of each such list to be delivered to the judge of election in the election district in the same manner and at the same time as are provided in this act for the delivery of other election supplies, and it shall be the duty of such judge of election to post such duplicate list in a conspicuous place within the polling place of his district and see that it is kept so posted throughout the time that the polls are open. Upon written request, he shall furnish a copy of such list to any candidate or party county chairman.

25 P.S. § 3146.2c(b) and (c).

Notably, the only information required to be kept in these lists is, as the Secretary highlights, the names and addresses of registered voters, and, in the case of voters serving in the military, even their addresses need not be disclosed. Consequently, in comparing a declaration against these lists, a county board may determine only whether the name and address information the voter has listed on the ballot envelope matches.²¹ There is no signature information in these lists for county election officials to compare against a voter's signature on his declaration; therefore, pursuant to the plain language of the Election Code, these lists cannot facilitate the signature comparison Intervenor maintain is required.

Next, in canvassing the ballots under Section 3146.8(g)(3), the county boards must verify "the proof of identification as required under this act." As indicated above, see *supra* note 9, Section 2602(z.5)(3)(i)-(iv) of the Election Code enumerates the various *types* of identification which a voter may utilize in completing a ballot application. Consequently, we conclude the county board's duty in this regard is to check the identification listed on the voter's mail-in or absentee ballot to see if it is of the *type* permitted by the Election Code, and to verify that it is valid. This duty does not, however, require or authorize county boards to go further and compare the signature on the voter's

²¹ This comparison process operates to eliminate ballots of voters who have provided a different name entirely than that which appears on these lists.

mail-in or absentee ballot to ensure that it is the same as that which appears on the form of identification the voter has listed on the application. Hence, this unambiguous provision likewise does not permit or require signature comparison.

Finally, a county board is required to determine if the ballot declaration is “sufficient.” 25 P.S. § 3146.8(g)(3). The requirements for a ballot declaration are set forth in Section 3146.6(a) (absentee ballots) and Section 3150.16(a) (mail-in ballots). Both sections require that the elector “fill out, date and sign the declaration.” *Id.* §§ 3146.6(a), 3150.16(a). Thus, in determining whether the declaration is “sufficient” for a mail-in or absentee ballot at canvassing, the county board is required to ascertain whether the declaration on the return envelope has been filled out, dated, and signed. This is the extent of the board’s obligation in this regard. In assessing a declaration’s sufficiency, there is nothing in this language which allows or compels a county board to compare signatures. Accordingly, we decline to read a signature comparison requirement into the plain and unambiguous language of the Election Code, as Intervenors urge us to do, inasmuch as the General Assembly has chosen not to include such a requirement at canvassing.

Even if there were any ambiguity with respect to these provisions, we observe that the General Assembly has been explicit whenever it has desired to require election officials to undertake an inquiry into the authenticity of a voter’s signature. *See, e.g.,* 25 P.S. § 3050(a.3)(2) (governing procedures for in-person voting at polling places and requiring an “election officer” to “compare the elector's signature on his voter's certificate with his signature in the district register,” and based “upon such comparison . . . if the signature on the voter's certificate, as compared with the signature as recorded in the district register, *shall not be deemed authentic by any of the election officers*, such elector shall not be denied the right to vote for that reason, but shall be considered challenged

as to identity,” and requiring the voter to execute an affidavit and provide proof of his identity in order to vote (emphasis added)); *id.* § 3050(a.4)(5)(i) (“Except as provided in subclause (ii), if it is determined that [an individual who attempts to cast an in-person ballot at a polling place, but whose name did not appear on the district register of eligible voters] was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector’s registration form *and, if the signatures are determined to be genuine*, shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election.” (emphasis added)).

In this regard, we note that, when the Election Code was first promulgated by the General Assembly in 1937, it contained explicit signature comparison requirements for canvassing certain absentee ballots. See Act of June 3, 1937, P.L. 1333, No. 320. Article XIII of that law, a precursor of the current mail-in ballot procedures, provided certain military service members the right to use mail-in ballots, referred to as “Detached Soldier’s Ballots.” Similar to today’s mail-in ballots, the service member was required to complete an affidavit on an outer envelope, along with the jurat of his witnessing officer, and then place his completed ballot inside that outer envelope. *Id.* § 1329. In canvassing such ballots, the county boards were instructed to “open such registered letter and after examining the affidavit and jurat, [to] *compare the signature of such absent voter with his signature upon any register or other record in their possession. If the county board is satisfied that the signatures correspond and that the affidavit and jurat are sufficient*, they shall announce the name of the elector and shall give any person present an opportunity to challenge the same” *Id.* § 1330 (emphasis added). Absent any challenge, such

ballots were counted. Notably, in 1945, this signature comparison language was removed from the Code.²²

We draw two inferences from this early history. First, the legislature understands how to craft language requiring signature comparisons at canvassing when it chooses to do so, as it did in 1937. Second, in the 1937 Code, the legislature drew a clear distinction between assessing the *sufficiency* of the ballot affidavit (and jurat) and a *comparison* of the ballot signature. The legislature having subsequently stripped out the signature comparison language from the Code, we ought not to construe, as Intervenors suggest, the remaining sufficiency determination as incorporating a signature comparison.

Our conclusion that Section 3146.8(g)(3) of the Election Code does not impose a duty on county boards to compare signatures is also consistent with the recent evolution of the Election Code, wherein the legislature expanded the allowances for voting by mail. Notably, at the same time it liberalized voting by mail, the legislature first restricted, and then eliminated, the ability of third-parties to challenge ballots at canvassing.

Prior to the recent Code amendments, absentee ballots were the only permissible form of voting by mail. At that time, at canvassing, after a county board was satisfied that the declaration on an absentee ballot was sufficient, the Code provided that the board “shall announce the name of the elector and shall give any candidate representative or party representative present an opportunity to challenge any absentee elector” on

²² Act of March 9, 1945, P.L. 29, No. 17, §§ 9-10. Thereafter, as set forth in the 1945 amendment, the county board was required to maintain a “Military File” containing the names and addresses of service members sent absentee ballots, *id.* § 10 (reenacting Section 1305 of Act of 1937), something akin to the “Military Veterans and Emergency Civilians Absentee Voters File” in the present Election Code. Also, like the current Code, at canvassing, the board was required to review only the ballot affidavit (and jurat) to determine “[i]f the board is satisfied that the affidavit and jurat are sufficient and that the elector has qualified.” *Id.* § 10 (reenacting Section 1307 of Act of 1937). Thus, signature comparison was no longer part of the county board’s canvassing obligations.

specified grounds. See 25 P.S. § 3146.8(g)(3) (effective Nov. 9, 2006 to Mar. 13, 2012).²³ There were three permissible grounds for challenge: that the absentee elector was not a qualified elector; that the absentee elector, despite alleging otherwise, was present in his municipality of residence on election day; or that the absentee elector, despite alleging otherwise, was in fact able to appear at the polling place on election day. *Id.*

However, when the legislature first allowed for no-excuse mail-in voting in 2019, the legislature simultaneously reduced the bases on which canvassing challenges could be made by eliminating the present-in-his-municipality objection (albeit while allowing the remaining challenges to be asserted against mail-in ballots). See Act 77, § 7 (amending 25 P.S. § 3146.8(g)(3)). Then, in 2020, the legislature eliminated time-of-canvassing challenges *entirely* from Section 3146.8(g)(3). See Act 12, § 11 (amending 25 P.S. § 3146.8(g)(3) to eliminate the challenging grounds and procedures, and amending Section 3146.8(g)(2) to eliminate the proviso that “Representatives shall be permitted to challenge any absentee elector or mail-in elector in accordance with the provisions of paragraph (3)”). Accordingly, the Election Code presently provides no mechanism for time-of-canvassing challenges by candidate or party representatives. See 25 P.S. § 3146.8(g)(4) (“All absentee ballots which have not been challenged under section 1302.2(c) [pertaining to absentee ballot *applications*] and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) [pertaining to mail-in ballot *applications*] and that have been verified under paragraph (3) shall be counted and included with the returns of the

²³ A similar procedure was provided to allow poll watchers to challenge ballots. 25 P.S. § 3146.8(e) (effective Nov. 9, 2006 to Mar. 13, 2012). However, this procedure was deleted in its entirety in 2019. See Act 77, § 7 (deleting 25 P.S. § 3146.8(e)).

applicable election district . . .”).²⁴ Moreover, as is plain from the above account, at no time did the Code provide for challenges to ballot *signatures*.²⁵

Presumably, in expanding voting by mail, the legislature sought to streamline the process for canvassing such ballots, perhaps to avoid undermining the expansion effort by eliminating the prospect that voters – including a potentially large number of new mail-in voters – would be brought before the board or the courts to answer third-party challenges. Regardless, Intervenors would have us interpret the Election Code, which now does not provide for time-of-canvassing ballot challenges, and which never allowed for signature challenges, as both requiring signature comparisons at canvassing, and allowing for challenges on that basis. We reject this invitation.

It is a well established principle of statutory interpretation that that we “may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.” *Sivick v. State Ethics Commission*, 2020 WL 5823822, at *10 (Pa. Oct. 1, 2020). It is not our role under our tripartite system of governance to engage in judicial legislation and to rewrite a statute in order to supply terms which are not present therein, and we will not do so in this instance.

IV. Conclusion

²⁴ Admittedly, there are some vestiges remaining in the Election Code of the prior, now eliminated, system for time-of-canvassing ballot challenges. See, e.g., 25 P.S. § 3146.8(f) (requiring a \$10 deposit for each challenge to an absentee or mail-in ballot application *or ballot*); *id.* § 1308(g)(5) (discussing procedures for handling “[b]allots received whose applications have been challenged and *ballots which have been challenged*” (emphasis added)). Now untethered to a procedure for asserting time-of-canvassing challenges in Section 3146.8(g)(3), however, we view the references to ballots in these provisions to be the overlooked remnants of a prior, now eliminated, process.

²⁵ For this reason, we reject Intervenors’ contention that the notice, hearing, and judicial review provisions in Section 3146.8(g)(5)-(7) pertain to adjudicating signature challenges.

For all of the aforementioned reasons, we grant the Secretary's petition for declarative relief, and hold that county boards of elections are prohibited from rejecting absentee or mail-in ballots based on signature comparison conducted by county election officials or employees, or as the result of third-party challenges based on signature analysis and comparisons.

Chief Justice Saylor and Justices Baer, Donohue, Dougherty and Wecht join the opinion.

Justice Mundy concurs in the result.

APPENDIX D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee	:	
and/or Mail-in Ballots of	:	
November 3, 2020 General Election	:	
	:	
v.	:	No. 1191 C.D. 2020
	:	Submitted: November 23, 2020
Appeal of: Donald J. Trump for	:	
President, Inc.	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE COHN JUBELIRER**

FILED: November 25, 2020

Donald J. Trump for President, Inc. (Appellant) appeals from the Order of the Court of Common Pleas of Bucks County (common pleas) that overruled the Appellant’s objections to certain absentee and/or mail-in ballots, denied Appellant’s requested relief, and dismissed Appellant’s appeal from the Bucks County Board of Elections’ (Board) determination that the challenged ballots were valid and could be counted in the General Election of November 3, 2020 (Election).¹ Appellant argues the Board violated the Election Code² (Code) when it did not reject and, over objection, accepted 2,177 ballots on the basis that they did not comply, in some way, with Sections 3146.6 or 3150.16 of the Code, 25 P.S. §§ 3146.6 (absentee electors),

¹ Others challenged the Board’s decision to common pleas, but only Appellant has filed a notice of appeal from the common pleas’ Order.

² Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2601-3591.

3150.16 (mail-in electors). Appellant has since withdrawn some of the challenges, and of the remaining challenges, all but 69 ballots are resolved by a recent decision of the Supreme Court; common pleas' Order with regard to those ballots is, therefore, affirmed for that reason. The remaining 69 ballots were received with secrecy envelopes that were "unsealed." The statute unambiguously requires that secrecy envelopes shall be "securely seal[ed]," 25 P.S. §§ 3146.6(a), 3150.16(a), and that the board of elections shall "break the seals" on these envelopes before counting the ballots. Section 3146.8(g)(4)(iii) of the Code, 25 P.S. § 3146.8(g)(iii).³ Therefore, in future elections, the sealing requirement should be treated as mandatory and if unsealed secrecy envelopes are received, this will invalidate the ballots contained therein. However, because of the facts and circumstances in this case, this interpretation will be applied prospectively. Common pleas' Order is, therefore, affirmed with regard to those 69 ballots.

The parties filed a joint stipulation of facts with common pleas setting forth the following facts relevant to the Court's resolution of this appeal. On November 3, 2020, the Board met to pre-canvass absentee and mail-in ballots as set forth in Section 3146.8(g) of the Code. (Stip. ¶ 17.) During the course of the Board's canvass meeting on November 7, 2020, and with Authorized Representatives present and given an opportunity to provide argument, the Board considered whether certain voter declarations on the outer envelope were "sufficient" to meet the requirements of Section 3146.8(g). (*Id.* ¶ 18.) The Board separated the ballots into 10 different categories, and accepted some of the categories for canvassing and rejected others. (*Id.* ¶ 19.) Of the categories accepted for canvassing, Appellant challenged six to common pleas. Those six categories were:

³ This section was added by Section 11 of the Act of March 6, 1951, P.L. 3.

- Category 1: 1,196 ballots whose outer envelopes did not contain a handwritten date or contained only a partial handwritten date.
- Category 2: 644 ballots whose outer envelopes did not include a handwritten name or address.
- Category 3: 86 ballots whose outer envelopes contained a partial written address.
- Category 4: 246 ballots whose outer envelopes contained mismatched addresses.
- Category 5: 69 ballots with “unsealed” secrecy envelopes.
- Category 6: 7 ballots whose secrecy envelopes had markings that did not identify the elector’s identity, political affiliation, or candidate preference.

(*Id.* ¶ 24.) During the hearing before common pleas, Appellant withdrew its challenges to Categories 4 and 6, (Hr’g Tr. at 114-15; common pleas’ op. at 6; common pleas’ November 23, 2020 Order Clarifying the Record.) Therefore, these challenges will not be discussed further.

The parties stipulated that “[w]hen received by [the Board,] each of the challenged ballots was inside a [secrecy] envelope, and the [secrecy] envelope was inside a sealed outer envelope with a voter’s declaration that had been signed by the elector.” (Stip. ¶ 45.) On the outer envelope “is a checklist for the voter, asking: “Did you . . . [p]ut your ballot inside the secrecy envelope and place it in here?” (*Id.* ¶ 10). With regard to Category 5 ballots, the parties stipulated that the Board “could not determine whether the [secrecy] envelopes were initially sealed by the elector but later became unsealed.” (*Id.* ¶ 46.) The electors whose ballots are being challenged have not been notified. (*Id.* ¶ 47.) The stipulation clearly establishes that Appellant does not allege, and there is no evidence of, fraud, misconduct, impropriety, or undue influence. (*Id.* ¶¶ 27-30.) Further, Appellant does not allege,

and there is no evidence, that the Board counted ballots that did not contain signatures on the outer envelope or “‘naked ballots,’ (ballots that did not arrive in a secrecy envelope).” (*Id.* ¶¶ 31-32.) Last, Appellant does not allege, and there is no evidence, that the electors who cast these votes were ineligible to vote, that votes were cast by or on the behalf of a deceased elector, or that votes were cast by someone other than the elector. (*Id.* ¶¶ 33-35.)

In addition to these stipulated facts, common pleas held a hearing, at which Thomas Freitag, the Board’s Director (Director), testified. (Hr’g Tr. at 63-64.) Director testified about the Board’s process in reviewing the ballots in general, the challenged ballots, and the Board’s determinations to accept or reject challenged ballots that were missing information on the outer envelopes. (*Id.* at 68-96.) Relevant specifically to Category 5 challenges, Director indicated that “the privacy of the ballots [were not] jeopardized in any manner[,]” there was no “view of the ballots” “to his knowledge,” and that there was no “way to determine by the Board whether or not [the secrecy envelope] had been sealed at one point and became unsealed.” (*Id.* at 97-98.) He testified that the Board provided the envelopes, including the secrecy envelopes, which were the type that had “to be either moistened by licking or water or glue,” and agreed that people would have to rely on the type of envelopes provided by the Board as to the quality of the seal. (*Id.* at 98-99.) Director agreed that the Board discussed the possibility that voters may have concerns about licking the envelopes, given the pandemic, which appeared to be a factor in its decisions. (*Id.* at 99.) He further agreed that the “ballots that were enclosed within unsealed [secrecy] envelopes” were “enclosed within [the] outer envelope.” (*Id.*) Director was subjected to limited cross-examination., but not on this issue. The parties then provided argument on the various challenges. Following

the hearing, common pleas issued an opinion and order rejecting the challenges and dismissing the appeal of the Board's decision. Appellant now appeals to this Court.⁴

As to Categories 1 through 3, which challenged the ballots on the basis of a deficiency on the outer envelopes, common pleas held that the information missing was not mandatory under the Election Code, but directory and, therefore, its absence would not invalidate those ballots. (Common pleas' op. at 14-19.) Appellant challenges these determinations before this Court. However, after the filing of the appeal, the Supreme Court of Pennsylvania rejected these same legal challenges in *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election* (Pa., Nos. 31-35 EAP 2020 and 29 WAP 2020, filed November 23, 2020) (*Philadelphia/Allegheny*), slip op. 19-32.⁵ In doing so, the Supreme Court "conclude[d] that the . . . Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged." *Id.*, slip op. at 3. Appellant acknowledges this holding in its brief, but points out that, per a majority of the Supreme Court, dating the outer envelope is a mandatory requirement, but would be applied prospectively. (Appellant's Brief (Br.) at 27.)

⁴ Common pleas' decision is reviewed on appeal "to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made." *In re Reading Sch. Bd. Election*, 634 A.2d 170, 171-72 (Pa. 1993). Issues involving the proper interpretation of the Code is a question of law, and the Court's standard of review is de novo and scope of review is plenary. *Banfield v. Cortes*, 110 A.3d 155, 166 (Pa. 2015.)

⁵ DNC Services Corporation/Democratic National Committee, an appellee here, filed an application for extraordinary relief with the Supreme Court requesting the Supreme Court exercise its extraordinary jurisdiction powers over this appeal, but this application was denied by the Supreme Court by order dated November 24, 2020.

This Court is bound by the Supreme Court’s decision,⁶ and, applying that decision, there was no error in common pleas rejecting Appellant’s challenges to Categories 1 through 3.⁷

The sole remaining issue before this Court is whether the ballots identified in Category 5, which are those ballots that were enclosed, but did not appear to be “sealed,” in the secrecy envelope, must be invalidated under the Code. In rejecting Appellant’s challenge to this category, common pleas explained that the ballots at issue were not “naked ballots,” which would have been invalid pursuant to the Supreme Court’s decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 378-80 (Pa. 2020). Common pleas held that “[t]here is no factual evidence that supports a conclusion that the envelopes had not been sealed by the elector prior to” the time of canvassing. (Common pleas op. at 20.) Instead, common pleas pointed to the parties’ stipulation that “[w]ith respect to Category 5 . . . [the Board] could not determine whether the [secrecy] envelopes were initially sealed by the elector but later became unsealed.” (*Id.* (quoting Stip. ¶ 46).) Accordingly, common pleas found “there [was] no evidence that the electors failed to ‘securely seal [the ballot] in the [secrecy] envelope,’ as required by the . . . Code.” (*Id.* (first and third alteration added).) It explained that “[t]he elector was provided the envelope by the government” and “[i]f the glue on the envelope failed[,] that would be the responsibility of the government.” (*Id.*) Therefore, common pleas held “[t]here

⁶ Notably, the Supreme Court referenced common pleas’ decision in this matter and held that common pleas “appropriately applied th[e Supreme] Court’s precedent” in affirming the counting of these ballots. *Philadelphia/Allegheny*, slip op. at 32-33 n.6.

⁷ To the extent Appellant seeks to “incorporate” Equal Protection arguments into this case that were raised in other cases, Appellant did not raise such claims before common pleas and, therefore, the Court will not consider them. Pennsylvania Rule of Appellate Procedure 302(a), Pa.R.A.P. 302(a) (“Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.”).

[was] insufficient evidence to determine whether the specific language of the mandated law was violated” and “it would be an injustice to disenfranchise these voters when it cannot be shown that the ballots in question were not ‘securely sealed’ in the [secrecy] envelope prior to the canvassing of those ballots,” particularly where “there ha[d] been no suggestion or evidence that the absence of a sealed inner envelope in anyway jeopardized the privacy of the ballot.” (*Id.*)

Appellant, citing *Boockvar*, argues that the requirements of Sections 3146.6(a) and 3150.16(a) are mandatory, not directory. According to Appellant, the Supreme Court has recognized that these requirements of the Code “are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed -- particularly where . . . they are designed to reduce fraud.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1234 (Pa. 2004) (*Appeal of Pierce*). Therefore, Appellant argues, “absentee or mail-in ballots cast in contravention of the requirements of [Section 3146.6(a) and 3150.16(a) of the Code] are ‘void’ and cannot be counted.” (Appellant’s Br. at 23 (quoting *Appeal of Pierce*, 843 A.2d at 1234).)

The Board, as an appellee, argues that the deficiencies set forth in Category 5 are minor technical deficiencies related to the sealing of the secrecy envelopes and should be treated like other minor mistakes that do not require that the ballots be stricken. The Board maintains that there is no evidence that these 69 electors did not comply with the statutory language or that the secrecy of the ballots was in any way compromised. *Boockvar*, the Board asserts, requires that the ballots must be **enclosed** in the secrecy envelopes or the ballots should be disqualified. 238 A.3d at 380. Here, there is no dispute that the ballots were fully enclosed in the secrecy envelopes, consistent with the holding in *Boockvar*, and, as a factual matter, there

could be no determination as to whether the secrecy envelopes were sealed by the electors and later became unsealed. Given that the Court cannot tell whether the electors made errors in casting their ballots, and the lack of any allegation of fraud, the Board argues there is no compelling reason to disenfranchise these electors. *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954).

Appellee DNC Services Corporation/Democratic National Committee (DNC) asserts there is no statutory requirement that the voter must seal the secrecy envelope in order for the ballot to be counted. Further, it asserts that the word “seal” is not a term of art and is not defined by the Code, is ambiguous and, per a dictionary definition, commonly means “to close” or “to make secure,” and there is no allegation that the secrecy envelopes were not closed or the ballots were not secure in the envelopes. (DNC’s Br. at 16-17.) DNC argues that noncompliance with this requirement does not justify disenfranchisement because, unlike with “naked ballots,” the identity of the electors was protected, which is consistent with the statutory purpose.⁸

Relevant here are Sections 3146.6(a), 3150.16(a), and 3146.8(g)(4)(ii) and (iii) of the Code. Section 3146.6(a) states, in pertinent part:

at any time after receiving an official absentee ballot, but on or before eight o’clock P.M. the day of the primary or election, **the elector shall**, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, **enclose and securely seal the same in the envelope on which is printed, stamped or endorsed “Official Election Ballot.** This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election

⁸ DNC argues this Court does not have jurisdiction to consider this matter; however, our Supreme Court’s order denying DNC’s request for that Court to exercise its powers of extraordinary jurisdiction confirms this Court’s jurisdiction.

district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added). Section 3150.16(a) contains the nearly identical statement that “**the mail-in elector shall**, in secret, proceed to mark the ballot . . . and then fold the ballot, **enclose and securely seal the same in the envelope** on which is printed, stamped or endorsed ‘Official Election Ballot’” and “[t]his envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector” 25 P.S. § 3150.16(a) (emphasis added).

Section 3146.8(g)(4)(ii) and (iii), governing “Canvassing of official absentee ballots and mail-in ballots,” specifies that

(4) All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district as follows:

. . . .

(ii) If any of the envelopes on which are printed, stamped or endorsed the words “Official Election Ballot” contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii) **The county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.**

25 P.S. § 3146.8(g)(4)(ii), (iii) (emphasis added).

The parties present three legal interpretive approaches to whether these 69 ballots were properly accepted by the Board when they were enclosed, but not sealed, in the secrecy envelope at the time of canvassing. Appellant argues this requirement is mandatory and allows for **no** exception. The Board and DNC argue that this requirement is directory and noncompliance with that requirement is a minor defect that should be excused. The Board alternatively argues, in accordance with common pleas' reasoning, that as a factual matter, a violation of this requirement by the electors has not been established, and, in the absence of compelling reasons, such as allegations of fraud or infringement on the electors' secrecy, the electors should not be disenfranchised.

“[T]he polestar of statutory construction is to determine the intent of the General Assembly.” *Appeal of Pierce*, 843 A.2d at 1230. Generally, “the best indication of the legislative intent is the plain language of a statute.” *Id.* (citation omitted). In construing that language, “[w]ords and phrases shall be construed according to the rules of grammar and according to their common and approved usage” *Id.* (citation omitted). The Court is mindful that, “[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” *Id.* (citation omitted). It is only when the words of the statute “are not explicit” that the Court may then “resort to other considerations, such as the statute’s perceived ‘purpose,’ in order to ascertain legislative intent.” *Id.* (citation omitted). The Court is likewise mindful that, as our Supreme Court has explained, “all things being equal, the [Code] will be construed liberally in favor of the right to vote but, at the same time, we cannot ignore the clear mandates of the . . . Code.” *Id.* at 1231.

The operative provisions at issue here involve the statutory direction that “the elector shall . . . fold the ballot, **enclose and securely seal** the same in the envelope on which is printed, stamped or endorsed ‘Official Election Ballot.’” 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). At canvassing, “[t]he county board shall then **break the seals** of such envelopes, remove the ballots and count” 25 P.S. § 3146.8(g)(4)(iii) (emphasis added).

The provisions that are at issue here are contained within sections that our Supreme Court has found to contain both mandatory and directory provisions. However, particularly applicable here, the Supreme Court in *Boockvar* held that “the secrecy provision language in Section 3150.16(a) is **mandatory** and the mail-in elector’s failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid.” *Boockvar*, 238 A.3d at 380 (emphasis added). In *Boockvar*, our Supreme Court considered whether county boards of election should be required to “clothe and count naked ballots,” that is, place ballots that were returned to the county board without the secrecy envelopes into an envelope and count them. 238 A.3d at 374. As here, the Supreme Court was presented with conflicting assertions that this requirement was directory or mandatory. After examining the statutory text, the Court concluded that the legislative intent was for the “**secrecy envelope provision**” to be mandatory, citing article VII, section 4 of the Pennsylvania Constitution, providing that “secrecy in voting shall be preserved,” PA. CONST. art. VII, § 4, and Section 3146.8(g)(4)(ii). The Supreme Court explained that the two statutory provisions, dealing with the same subject, “must be read *in pari materia*.” *Boockvar*, 238 A.3d at 378. Based on that statutory language, the Supreme Court held that it was clear that the legislature intended “that, during the collection and canvassing processes, when the outer envelope in which the ballot

arrived is unsealed and **the sealed ballot** removed, it should not be readily apparent who the elector is, with what party [the elector] affiliates, or for whom the elector has voted.” *Id.* (emphasis added). Per the Court, “[t]he secrecy envelope properly unmarked **and sealed** ensures that result, unless it is marked with identifying information, in which case that goal is compromised” and that “[t]he omission of a secrecy envelope defeats this intention.” *Id.* at 378, 380 (emphasis added). The Supreme Court in *Boockvar* found the matter analogous to the issue in *Appeal of Pierce*, where there was a challenge to absentee ballots that were delivered to the county board of election by third persons in violation of the Code’s “in-person” delivery requirement. *Id.* at 379. In *Appeal of Pierce*, the Supreme Court held that the “so-called technicalities of the . . . Code,” such as the requirement that an elector personally deliver the elector’s absentee ballot, “are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed – particularly where, as here, they are designed to reduce fraud.” 843 A.2d at 1234. Therefore, the Court in that case, found that the in-person delivery requirement was mandatory and the absentee ballots delivered in contravention of this mandatory provision were void. *Id.*

The Court recognizes that the unsealed envelopes here could be viewed as a less substantial noncompliance than an elector’s failure to use the secrecy envelope, as the ballots here were actually enclosed in the secrecy envelope and then in the sealed outer envelope. However, the language relating to securely sealing the secrecy envelope is encompassed within the provision directing the use of the secrecy envelope, which the Supreme Court found mandatory in *Boockvar*. That the legislature intended the secrecy envelopes to remain sealed until the ballots are counted is further evidenced by the directive in Section 3146.8(g)(4)(iii) that “[t]he

county board **shall then break the seals of such envelopes**, remove the ballots and **count**” 25 P.S. § 3146.8(g)(4)(iii) (emphasis added). Such language, when read *in pari materia* with Sections 3146.6(a) and 3150.16(a), reflects that the legislature intended the secure sealing of the secrecy envelope to be mandatory. *Boockvar*, 238 A.3d at 378. Accordingly, Appellant’s argument that this directive is mandatory such that an elector’s noncompliance results in a ballot that is not valid is supported by the statutory language and *Boockvar*.

The parties stipulated that these challenged ballots were “unsealed” in the secrecy envelopes when canvassing of the ballots was to begin. The text of the Code unambiguously states that the elector “shall . . . enclose and securely seal the [ballot] in the envelope . . . ,” 25 P.S. §§ 3146.6(a), 3150.16(a), and that, at canvassing, “[t]he county board shall then break the seals of such envelopes, remove the ballots and count,” 25 P.S. § 3146.8(g)(4)(iii). The legislature did not merely require the envelope to be sealed, but specified that it be “**securely**” sealed. 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). The Code unambiguously requires the envelopes remain sealed until the county board of elections can “break the seals” of the secrecy envelopes. 25 P.S. § 3146.8(g)(4)(iii). When the text of the statute is clear and unambiguous, those words best reflect the legislative intent, and “the letter of [the unambiguous language] is not to be disregarded under the pretext of pursuing its spirit.” *Appeal of Pierce*, 843 A.2d at 1230 (citation omitted).

Justice Wecht recently in *Philadelphia/Allegheny* highlighted that there are times a Court should give prospective application to a ruling under the Code. Slip op. at 17-18 (Wecht, J., concurring). Citing *In Appeal of Zentner*, 626 A.2d 146 (Pa.1993), as precedent, Justice Wecht concurred in the decision of the Court to count the ballots that were undated, and would prospectively apply a more strict

interpretation of the statute favored by three other justices. As did Justice Wecht, this Court recognizes the tremendous challenges presented by the massive expansion of mail-in voting, and the lack of precedential rulings on the requirement of a “securely sealed” secrecy envelope. Moreover, the parties stipulated in this case reveals that the instructions on the outer envelope for the elector stated only that the ballot should be placed in the secrecy envelope and did not specify that the envelope needed to be securely sealed or the consequences of failing to strictly adhere to that requirement. *See Philadelphia/Allegheny*, slip op. at 20 (Wecht, J., concurring). Moreover, in this case, it cannot be established that the electors did not seal the secrecy envelope. Importantly, the Court must point out that there are absolutely **no allegations** of any fraud, impropriety, misconduct, or undue influence, that anyone voted who was not eligible to vote, or that the secrecy of the ballots cast was jeopardized. For these reasons, the decision of the Court will be applied prospectively, and the 69 ballots will not be invalidated.

Accordingly, common pleas’ Order is affirmed.




RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvass of Absentee :
and/or Mail-in Ballots of :
November 3, 2020 General Election :
: :
v. : No. 1191 C.D. 2020
: :
Appeal of: Donald J. Trump for :
President, Inc. :

ORDER

NOW, November 25, 2020, the Order of the Court of Common Pleas of Bucks County, entered in the above-captioned matter, is **AFFIRMED** in accordance with the foregoing opinion.



RENÉE COHN JUBELIRER, Judge

APPENDIX E

In re 2,349 Ballots in 2020 General Election

Decided Nov 19, 2020

No. 1162 C.D. 2020

11-19-2020

In Re: 2,349 Ballots in the 2020 General Election Appeal of: Nicole Zicarelli

MEMORANDUM OPINION BY JUDGE BROBSON

Submitted: November 19, 2020 **BEFORE: HONORABLE P. KEVIN BROBSON, Judge HONORABLE PATRICIA A. McCULLOUGH, Judge HONORABLE MICHAEL H. WOJCIK, Judge**

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE BROBSON

Nicole Zicarelli, a Republican candidate for State Senator from the 45th Senatorial District in the General Election (Candidate), initiated a statutory appeal under the Pennsylvania Election Code¹ (Election Code) in the Court of Common Pleas of Allegheny County (Common Pleas Court) from a decision by the Allegheny County Board of Elections (Elections Board) to canvass and count 2,349 absentee or mail-in ballots for the November 3, 2020 General Election (General Election) notwithstanding the lack of a date of signature by the elector on the statutorily required elector declaration on the outside envelope of the ballots. On appeal, the Common Pleas Court rejected the Campaign Committee's arguments and affirmed the Elections Board's decision in a

² November 18, 2020 Order.² *2

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

² On application by Candidate, this Court issued an Order late on November 18, 2020, enjoining the Elections Board from canvassing and counting the disputed ballots and directed that the Elections Board segregate those ballots pending further order of the Court.

The Committee filed a timely appeal from the Common Pleas Court's order with this Court, contending that the disputed ballots are invalid and cannot be counted. The parties have submitted briefs in support of their respective arguments on the merits.

Given the exigency,³ we dispense with an extensive summary of the parties' respective positions on appeal. Generally, the Candidate alleges that the absentee and mail-in ballots that are the subject of this appeal are defective and, therefore, cannot be counted under the Election Code. The Elections Board and DNC Services Corp./Democratic National Committee (DNC)⁴ generally contend that we must interpret and apply the Election Code to enfranchise, rather than disenfranchise voters. This means, according to the Elections Board and the DNC, that what they term "minor irregularities" in elector declarations can, and in this case should, be overlooked in the absence of any evidence of fraud.

³ "The integrity of the election process requires immediate resolution of disputes that prevent certification." *In re 2003 Election for Jackson Twp. Supervisor*, 840 A.2d 1044, 1046 (Pa. Cmwlt. 2003) (Kelly, S.J.).

⁴ Though not a named party originally, the Common Pleas Court granted the DNC intervenor status as a respondent.

Each county board of election is required to provide the mail-in ballot elector with the following: (1) two envelopes—an inner secrecy envelope in which the executed ballot is placed and an outer mailing envelope in which the secrecy envelope (containing the executed ballot) is placed for mailing (or drop off); (2) a list of candidates, if authorized; and (3) "the uniform instructions in form and substance as prescribed by the Secretary of the Commonwealth and nothing else." Sections 1304 and 1304-D(c) of the Election Code, 25 P.S. §§ 3146.4, 3150.14(c). The outer mailing envelope must include an elector declaration and the name and ³ address of the proper county board of election. Sections 1304 and 1304-D(a) of the Election Code. The form of the declaration is left up to the Secretary of the Commonwealth (Secretary). It must, however, include "a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election." Sections 1304 and 1304-D(b) of the Election Code. The Secretary adopted a form declaration that includes the required statutory language and space for the elector to sign, date, and fill out the elector's name and address.

In its recent decision in *In re November 3, 2020 General Election*, ___ A.3d ___ (Pa., No. 149 MM 2020, filed Oct. 23, 2020), the Pennsylvania Supreme Court reviewed the requirements in the Election Code with respect to the elector declaration on mail-in and absentee ballots. To execute a mail-in or absentee ballot, the Election Code requires the elector to "fill out, date and sign the declaration printed on [the outside] envelope." Sections 1306(a) and 1306-D(a), 25 P.S. §§ 3146.6(a), 3150.16(a). During the pre-canvass or canvass of mail-in and absentee ballots, the board of election "is required to determine if the ballot declaration is 'sufficient.'" *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 25 (quoting Section 1308(g)(3) of the Election Code,⁵ 25 P.S. § 3146.8(g)(3)). With respect to determining the sufficiency of the declaration, the Pennsylvania Supreme Court explained the boards of election's obligation: "[I]n determining whether the declaration is 'sufficient' for a mail-in or absentee ballot at canvassing, the county board *is required* to ascertain whether the declaration on the return envelope has been filled out, *dated*, and signed. This is the extent of the board's obligation in this regard." *Id.* (emphasis added). ⁴

⁵ Added by the Act of March 6, 1951, P.L. 3.

The concern that an elector might fail to "fill out" the declaration in full, let alone date and sign the declaration, in part prompted the Pennsylvania Democratic Party and Democratic elected official and candidates (Democratic Party) to initiate a suit in this Court's original jurisdiction against the Secretary and every Pennsylvania county board of election earlier this year, seeking declaratory and injunctive relief. The Pennsylvania Supreme Court, pursuant to Section 726 of the Judicial Code, 42 Pa. C.S. § 726, assumed jurisdiction over the case to address issues relating to the interpretation and implementation of Act 77 of 2019⁶—the statute that amended the Election Code to authorize mail-in voting (a/k/a no-excuse absentee voting).

⁶ Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

Among the issues/concerns raised by the Democratic Party was that electors may submit their mail-in or absentee ballots with "minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372 (Pa. 2020). The Democratic Party asked the Pennsylvania Supreme Court to require county boards of election to give those electors notice and an opportunity to cure the defective ballots. In advancing that argument, the Democratic

Party relied on the same principles the Board relies on in this case—*i.e.*, liberal construction of the Election Code requirements and the favoring of enfranchising voters, not disenfranchising them. *Id.* at 372-73. The Secretary opposed the relief requested:

Unlike the other claims asserted herein, the Secretary opposes [p]etitioner's request for relief in this regard. She counters that there is no statutory or constitutional basis for requiring the [b]oards [of election] to contact voters when faced with a defective ballot and afford them an opportunity to cure defects. The Secretary further notes that, while [p]etitioner relies on the Free and Equal Elections Clause [of the

5 *5

Pennsylvania Constitution], that Clause cannot create statutory language that the General Assembly chose not to provide.

The Secretary submits that so long as a voter follows the requisite voting procedures, he or she "will have an equally effective power to select the representative of his or her choice." Emphasizing that [p]etitioner presents no explanation as to how the [b]oards [of election] would notify voters or how the voters would correct the errors, the Secretary further claims that, while it may be good policy to implement a procedure that entails notice of defective ballots and an opportunity to cure them, *logistical policy decisions like the ones implicated herein are more properly addressed by the Legislature, not the courts.*

Pa. Democratic Party v. Boockvar, 238 A.3d at 373 (emphasis added) (citations omitted) (quoting *League of Women Voters v. Cmwlth.*, 178 A.3d 737, 809 (Pa. 2018)). Apparently persuaded by the Secretary's arguments, the Pennsylvania Supreme Court rejected the request for a judicially mandated notice and opportunity to cure:

Upon review, we conclude that the [b]oards [of election] are not required to implement a "notice and opportunity to cure" procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly. Put simply, as argued by the parties in opposition to the requested relief, [p]etitioner has cited no constitutional or statutory basis that would countenance imposing the procedure [p]etitioner seeks to require (*i.e.*, having the [b]oards [of election] contact those individuals whose ballots the [b]oards [of election] have reviewed and identified as including "minor" or "facial" defects—and for whom the [b]oards [of election] have contact information—and then afford those individuals the opportunity to cure defects until the [federal Uniformed and Overseas Citizens Absentee Voting Act⁷] deadline).

While the Pennsylvania Constitution mandates that elections be "free and equal," it leaves the task of effectuating that mandate to the Legislature. As noted herein, although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the "notice and opportunity to cure" procedure sought by [p]etitioner. *To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a "notice and*

6 *6

opportunity to cure" procedure to alleviate that risk is one best suited for the Legislature. We express this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania's government. Thus, for the reasons stated, the [p]etitioner is not entitled to the relief it seeks in Count III of its petition.

Id. at 374 (emphasis added) (citation omitted).

⁷ 52 U.S.C. §§ 20301-20311.

We must presume that the Elections Board was aware of the Pennsylvania Supreme Court's decision in *In re: November 3, 2020 General Election* and its earlier decision in *Pennsylvania Democratic Party* when the Elections Board began the canvass and pre-canvass process for mail-in and absentee ballots. The Elections Board chose, nonetheless, to ignore its obligations under the Election Code to determine the sufficiency of the mail-in and absentee ballots at issue, as recapitulated by the Supreme Court in *In re: November 3, 2020 General Election*, and apparently took the Pennsylvania Supreme Court's decision in *Pennsylvania Democratic Party* as both a ruling against a notice and opportunity to cure remedy for defective ballots and an invitation to, instead, simply *ignore* defects when canvassing and pre-canvassing. In so doing, the Elections Board even acted in conflict with September 28, 2020 guidance from the Secretary: "At the pre-canvass or canvass, as the case may be, the county board of election[] should . . . [s]et aside any ballots without a filled out, dated and signed declaration envelope." Pennsylvania Dep't of State, *Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures*, 9/28/2020, at 8, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedure%20.pdf> (last visited Nov. 20, 2020).⁸ Where the Elections Board tacitly derived its authority to ignore its statutory obligation to determine the sufficiency of ballots and to violate the will of the General Assembly reflected in Act 77, approved by the Governor, and the guidance of the Secretary is a mystery.

⁸ We note that the Pennsylvania Supreme Court cited to this supplemental guidance from the Secretary in its opinion in *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 4.

The General Assembly's authority in this regard, however, is certain. Under the United States Constitution, the General Assembly determines the "Times, Places and Manner of holding Elections for . . . Representatives," subject to any rules that Congress may establish.⁹ The General Election, during which the voters of Pennsylvania select their representatives to the United States House of Representatives, falls within the provision. Even in cases involving the right to vote, the rules of statutory construction apply. *See In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 19-20; *Pa. Democratic Party*, 238 A.3d at 355-56. The Pennsylvania Supreme Court has already determined that the above statutory language regarding the casting and pre-canvassing and canvassing of mail-in and absentee ballots is "plain," *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 24, and "unambiguous," *id.*, slip op. at 25, with respect to an elector's obligation to "fill out, date and sign" the declaration and the county board of election's obligation to determine the sufficiency of that declaration. The constitutionality of these provisions is not in question here. It is not the judiciary's role, let alone the role of the Elections Board, to relax or ignore requirements that the General Assembly, with the Governor's approval, chose to include in the Election Code.

⁹ U.S. Const. art. I, § 4, cl. 1 ("Elections Clause"). The full text of the Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

In this regard, while we recognize the well-settled principle of statutory construction that the Election Code should be liberally construed in favor of voter enfranchisement, not disenfranchisement, like all principles of statutory construction this rule is only implicated where there is ambiguity in the Election Code. *See In re: Canvassing Observation*, ___ A.3d ___, (Pa., No. 30 EAP 2020, filed Nov. 13, 2020), slip op. at 15-16; *Pa.*

Democratic Party, 238 A.3d at 356. In *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223 (Pa. 2004), the Pennsylvania Supreme Court reversed a decision by this Court that would have allowed the Elections Board to count absentee ballots that were hand-delivered by a third person on behalf of electors *who were not disabled*. Then, and now, the Election Code expressly prohibits this practice. This Court's reason for disregarding the mandatory language of the Election Code that authorized only "in person" delivery as an alternative to mail was our view "that it was more important to protect the interest of the voters by not disenfranchising them than to adhere to the strict language of the statute under these circumstances." *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 839 A.2d 451, 460 (Pa. Cmwlth.) (en banc), *rev'd*, 843 A.2d 1223 (Pa. 2004).

In reversing this Court, the Pennsylvania Supreme Court looked to the rules of statutory construction. *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d at 1230. Critically for purposes of this matter, in terms of the Election Code, the Supreme Court held: "[A]ll things being equal, the law will be construed liberally in favor of the right to vote *but at the same time, we cannot ignore the clear mandates of the Election Code.*" *Id.* at 1231 (emphasis added). *9 The relevant language in Section 1306(a) of the Election Code provided at the time what it provides today: "[T]he elector *shall* send [the absentee ballot] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election." (Emphasis added.) The Supreme Court held that the General Assembly's use of the word "shall" had a clear "imperative or mandatory meaning." *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d at 1231. While the appellees argued that the word should be construed liberally (as directory and not mandatory) in favor of the right to vote, the Supreme Court disagreed:

In Section [1306(a)], there is nothing to suggest that an absentee voter has a choice between whether he mails in his ballot or delivers his ballot in person, or has a third-party deliver it for him. To construe Section [1306(a)] as merely directory would render its limitation meaningless and, ultimately, absurd.

Id. at 1232.¹⁰ Alternatively, even if the statutory language were ambiguous, the Court held that "there is an obvious and salutary purpose—grounded in hard experience—behind the limitation upon the delivery of absentee ballots." *Id.* The court explained:

The provision at issue limits the number of third persons who unnecessarily come in contact with the ballot and thus provides some safeguard that the ballot was filled out by the actual voter, and not by a perpetrator of fraud, and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper

10 *10

with it, or even to destroy it. The provision, thus, is consistent with the spirit and intent of our election law, which requires that a voter cast his ballot alone, and that it remain secret and inviolate.

Id. (citation omitted). The Supreme Court concluded:

Our precedent is clear: we cannot simply ignore substantive provisions of the Election Code. . . . [S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed—particularly where, as here, they are designed to reduce fraud.

Id. at 1234.

10 The dissent chooses to rely on *Appeal of James*, 105 A.2d 64 (Pa. 1954), a case that did not involve mail-in or absentee ballots, but whether actual votes cast for one candidate in particular on election day should count where the intent of the electors to vote for that particular candidate was clearly manifested, albeit imperfectly, on the actual ballot. *Appeal of James* does not stand for the proposition that courts can and should disregard the clear and unambiguous terms of the Election Code, as the Pennsylvania Supreme Court's more recent pronouncements cited above establish. This case is about whether electors followed the law in submitting their ballots. Accordingly, *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election* is much more on point than *Appeal of James*.

Here, we agree with, and are bound by, the Pennsylvania Supreme Court's ruling in *In re: November 3, 2020 General Election* that Sections 1306(a) (absentee ballots), 1306-D(a) (mail-in ballots), and 1308(g)(3) (pre-canvass and canvass) of the Election Code, are plain and unambiguous. The General Assembly's use of the word "shall" in these provisions has a clear imperative and mandatory meaning. *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d at 1231. The elector "**shall** . . . fill out, date and sign the declaration." The board of election "**shall** examine the declaration on the envelope of each ballot" and be "satisfied that the declaration is sufficient." A sufficient declaration is one where the elector filled out, dated, and signed the declaration. *In re: November 3, 2020 Gen. Election*, ___ A.3d at ___, slip op. at 25. To remove the date requirement would constitute a judicial rewrite of the statute, which, as the Pennsylvania Supreme Court recently held, "would be improper." *In re: Canvassing Observation*, ___ A.3d at ___, slip. op. at 17.¹¹ *11

11 See also *In re Silcox*, 674 A.2d 224, 225 (Pa. 1996) (holding that signatures on nomination petition without date must be stricken under clear and unambiguous language of statute, reasoning that "until the legislature chooses to amend [the statutory requirement for a date], we are constrained to find that the elector shall sign the petition as well as add . . . date of signing").

As noted above, the Election Code requires the county boards of election to determine whether absentee and mail-in ballots are satisfactory. Under the law, a satisfactory ballot is one where the elector has filled out, signed, and dated the statutorily-required declaration. This was the policy choice of the General Assembly and the Governor in approving Act 77, and it is not the role of this Court or the Elections Board to second guess those policy choices. It is a myth that all ballots must be counted in the absence of proof of fraud. Ballots, under the law, may be set aside for "fraud or error." See Section 1407(b) of the Election Code, 25 P.S. § 3157 (emphasis added). While there may not be an allegation of fraud in this matter, there was clear error *at two levels*. First, the electors erred in failing to date their declarations, as required by the Election Code.¹² Second, the Elections Board erred when it failed to execute its duty during the canvass and pre-canvass process to determine the sufficiency of the declarations and set deficient ballots aside. Accordingly, the Common Pleas Court erred as a matter of law by failing to reverse the Elections Board's determinations with respect to counting these defective mail-in and absentee ballots.

12 This is not a situation involving an ambiguity or question as to what an elector must do to cast a ballot and, seeking assistance, a confused elector relies on advice of a local election official. As noted above, the Pennsylvania Supreme Court has already held that there is no ambiguity in this scheme as far as what the Election Code requires of the elector and the boards of election in determining whether a mail-in or absentee ballot is satisfactory. Moreover, there is simply no evidence that the electors who signed their declarations in this case failed to date the declaration in reliance on advice from a public official. See *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1234 n.14 (rejecting reliance argument where no evidence of reliance and where alleged advice is in clear contravention of law).

Even if we were to conclude that one of the relevant provisions of the Election Code suffered from some ambiguity that required us to resort to statutory construction to discern the General Assembly's intent, our result would be the same. *12 As was the case in *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, there is an obvious and salutary purpose behind the requirement that a voter date the declaration. The date provides a measure of security, establishing the date on which the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector's eligibility to cast the ballot, as reflected in the body of the declaration itself.¹³

¹³ In this regard, it does not matter whether the ballots at issue in this case were, setting aside these defects, otherwise valid. Our Election Code does not contemplate a process that bogs down county boards of election or the many election day volunteers to track down voters who committed errors of law in casting their ballots in order to verify the information that the elector, through his or her own negligence, failed to provide on the elector's mail-in or absentee ballot. See *Pa. Democratic Party*, 238 A.3d at 373-34. Decisions as to whether these defective ballots must be set aside are to be made at the canvass or pre-canvass based on objective criteria established by the General Assembly and what is before the elections board—that being the ballot itself. See *id.* at 388-89 (Wecht, J., concurring).

While we realize that our decision in this case means that some votes will not be counted, the decision is grounded in law. It ensures that the votes will not be counted because the votes are invalid as a matter of law. Such adherence to the law ensures equal elections throughout the Commonwealth, on terms set by the General Assembly. The danger to our democracy is not that electors who failed to follow the law in casting their ballots will have their ballots set aside due to their own error; rather, the real danger is leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory), providing a patchwork of unwritten and arbitrary rules that will have some defective ballots counted and others discarded, depending on the county in which a voter resides. Such a patchwork system does not guarantee voters an "equal" election,¹⁴ *13 particularly where the election involves inter-county and statewide offices. We do not enfranchise voters by absolving them of their responsibility to execute their ballots in accordance with law.

¹⁴ "Elections shall be free and equal." Pa. Const. art. I, § 5.

Accordingly, the Common Pleas Court's order is reversed. This matter is remanded to the Common Pleas Court to issue an order sustaining the Campaign Committee's challenge to the Elections Board's determination and directing the Elections Board to exclude the challenged 2,349 ballots from the certified returns of election for the County of Allegheny under Section 1404 of the Election Code, [25 P.S. § 3154](#).

/s/ _____

14 P. KEVIN BROBSON, Judge *14 **ORDER**

AND NOW, this 19th day of November, 2020, the November 18, 2020 Order of the Court of Common Pleas of Allegheny is REVERSED, and this matter is REMANDED to the court of common pleas for further proceedings in accordance with the accompanying opinion.

/s/ _____

15 P. KEVIN BROBSON, Judge *15 BEFORE: HONORABLE P. KEVIN BROBSON, Judge HONORABLE PATRICIA A. McCULLOUGH, Judge HONORABLE MICHAEL H. WOJCIK, Judge DISSENTING OPINION BY JUDGE WOJCIK

I respectfully dissent from the majority's decision to reverse the order of the Court of Common Pleas of Allegheny County (trial court) in this matter.

The Pennsylvania Supreme Court has explained:

'The power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons. * * * 'The purpose in holding elections is to register the actual expression of the electorate's will' and that 'computing judges' should endeavor 'to see what was the true result.' There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.'

In resolving election controversies it would not be amiss to consider the following criteria:

1. Was any specific provision of the Election Code violated?

16 *16

2. Was any fraud involved?

3. Was the will of the voter subverted?

4. Is the will of the voter in doubt?

5. Did the loser suffer an unfair disadvantage?

6. Did the winner gain an unfair disadvantage?

Appeal of James, 105 A.2d 64, 67 (Pa. 1954) (citation omitted). It is undisputed that only the first of the foregoing six criteria is at issue with respect to the contested ballots herein.

Regarding the submission of a vote by absentee ballot, Section 1306(a) of the Pennsylvania Election Code¹⁵ provides, in relevant part:

¹⁵ Act of June 3, 1937, P.L. 1333, added by the Act of March 6, 1951, P.L. 3, as amended, 25 P.S. §3146.6(a).

[A]t any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

Likewise, with respect to voting by mail-in ballot, Section 1306-D(a) of the Pennsylvania Election Code¹⁶

17 states: *17

16 Added by the Act of October 31, 2019, P.L. 552, 25 P.S. §3150.16a.

At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

In light of the foregoing statutory requirements, the majority seeks to disenfranchise 2,349 registered voters who timely returned their absentee or mail-in ballots to the Allegheny County Board of Elections (Board), which ballots were sealed in secrecy envelopes and inserted in sealed outer envelopes containing a declaration that the voters signed, but did not date, and which ballots the Board received by 8:00 p.m. on the date of the General Election, November 3, 2020. Unlike the majority, I do not believe that *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), compels such a massive disenfranchisement as that case addressed a voter's ability to cure a "minor" defect on a mail-in or absentee ballot declaration page that consisted of a voter failing to "fill out, date and sign the declaration." In contrast, this case involves neither a voter's ability to cure a
18 defective declaration page nor an unsigned declaration page. Moreover, as *18 noted above, this case does not involve any claim that any of the ballots in question were in any way fraudulent.

There is no dispute that the voters who cast the questioned 2,349 ballots were qualified, registered electors. Moreover, there is no allegation that any of the 2,349 voters in question had voted more than once. Importantly, there is no allegation that the subject 2,349 ballots were not received by the Board prior to the deadline for receipt on General Election Day. The only sin that would lead these votes to be discarded is that the qualified, registered voters failed to enter a date on the declaration portion of the ballot's outer envelope. I would agree that an entirely blank declaration properly would be discarded, as this is the situation contemplated by *Boockvar*. I would suppose that a declaration that the voter did not sign likewise would be discarded, as there would be no confirmation that the ballot is genuinely that of the registered elector. Both of these results would ameliorate purported voter fraud, which is not at issue here.

What then is the protection afforded by the insertion of a date in the declaration? I would posit that it is to ensure that the ballot was timely cast, that is, before the 8:00 p.m. deadline on General Election Day. This interest is protected in this case by the Board's procedures, *i.e.*, the ballots were processed in the Statewide Uniform Registry of Electors and time stamped when received by the Board. Thus, I would hold that this process ensures that the ballots were timely cast.

The majority posits that the voter's entry of the date onto the declaration is material in that it measures a point in time to establish a voter's eligibility to cast a vote. This is simply incorrect, as the date on which a voter fills
19 in a mail-in or absentee ballot is not the critical date, it is receipt on or before *19 General Election Day that is determinative. If a voter fills in a mail-in or absentee ballot, including the complete declaration, and dies prior to General Election Day, the vote is not valid regardless of when it was executed.¹⁷

¹⁷ In this regard, I strongly disagree with the majority's reliance on case law interpreting the inapposite provisions of the Pennsylvania Election Code requiring the inclusion of the date of signature on nomination petitions as that requirement implicates a distinct consideration relating to the timeliness of the circulation of the petitions. As indicated, the

timeliness of the ballots cast herein is not at issue.

I view the requirement of a voter-inserted date on the declaration as similar to the issue of the color of ink that is used to fill in the ballot. As outlined above, Sections 1306(a) and 1306-D(a) of the Pennsylvania Election Code plainly state the voter "**shall**, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen." 25 P.S. §§3146.6(a), 3150.16(a) (emphasis added). Our Supreme Court approved the marking of absentee ballots with green or red pen to be appropriate despite the General Assembly's use of the word "shall" when describing the method of marking the ballots. See *In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972). There, our Supreme Court construed the Election Code liberally so as to not disenfranchise Pennsylvania voters over a technicality.¹⁸ In
20 light of the foregoing criteria, I would do so here as well, and I *20 would not blithely disenfranchise those 2,349 voters who merely neglected to enter a date on the declaration of an otherwise properly executed and timely-submitted ballot.

¹⁸ Similarly, I would revisit the so-called "naked ballot" issue where counties have been instructed to disqualify mail-in and absentee ballots that were returned without first being sealed in the "secrecy envelope." I believe that the "secrecy envelope" is an anachronism that should have been abandoned when the Pennsylvania Election Code was recently amended. Under the prior version, absentee ballots were delivered to the corresponding polling places and opened there after the polls closed on General Election Day. Typically, there were a mere handful of absentee ballots at each poll. Without the "secrecy envelope," there was a high probability that the poll worker would know the voters whose absentee ballots were opened there, which would impair those voters' right to cast a secret ballot. As a result of the recent amendments to the Pennsylvania Election Code, mail-in and absentee ballots are retained at a centralized location and opened *en masse* beginning on General Election Day. Under the current regime, in cases of "naked ballots," I would favor a voter's right to cast a vote over the right to cast a secret ballot, because I believe that it is extremely unlikely that the election official who opens the envelope would know the voter whose ballot is being processed. -----

Accordingly, unlike the majority, I would affirm the trial court's order in this case.

/s/_____

MICHAEL H. WOJCIK, Judge

APPENDIX F

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

NICOLE ZICCARELLI,

No. GD 20-011793

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

MEMORANDUM AND ORDER OF COURT

Respondent,

Honorable Joseph M. James

and

PENNSYLVANIA DEMOCRATIC PARTY
AND JAMES BREWSTER,

Copies Sent To:

Intervenors.

Matthew H. Haverstick, Esquire
Andrew F. Szefi, Esquire
Allan J. Opsitnick, Esquire
Michael J. Healey, Esquire

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

NICOLE ZICCARELLI,

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

Respondent

and

PENNSYLVANIA DEMOCRATIC
PARTY AND JAMES BREWSTER,

Intervenors.

No. GD 20-011793

MEMORANDUM AND ORDER OF COURT

James, J.

November 18, 2020

Petitioner Nicole Zicarelli, candidate for the Senate of Pennsylvania from the 45th Senatorial District, filed a Petition for Review of Decision by the Respondent Allegheny County Board of Elections (“the Board”) on November 16, 2020, seeking to set aside

approximately 300 provisional ballots cast by voters in the November 3, 2020 General Election. Voters were required to sign on two lines and on these ballots they only signed one. Petitioner seeks review of the Board's decision to overrule Petitioner's objection to count these ballots. The Court conducted a hearing on November 17, 2020 via Microsoft Teams. The Pennsylvania Democratic Party and James Brewster moved to intervene in the action. Petitioner and the Board did not object and the motion was granted by the Court. Petitioner stated that she was not claiming any voter fraud regarding the challenged ballots. The Board argues that if an error or defect is caused by the misrepresentation or error of the election administration, the voter should not be penalized. Here, voters presented at their polling location and voted with a provisional ballot. Poll workers handed them all of the materials and gave them instructions how to fill out the outer envelope. Many people are unfamiliar with this process and rely on the information given to them at the polling location. Pennsylvania law holds that there is a breakdown in the administrative process when the facts demonstrate that "an administrative board or body is negligent, acts improperly or unintentionally misleads a party." Union Electric Corp. v. Board of Property Assessment, 746 A.2d 581, 584 (Pa. 2000). In construing election laws, while we must strictly enforce all provisions to prevent fraud, the overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise. See, James Appeal, 105 A.2d 64 (Pa. 1954), In re Luzerne Cty. Return Bd., 290 A.2d 108, 109 (Pa. 1972). Similarly, in the In re Nomination Petitions of Howells case, 20 A.3d 617, (Pa. Cmwlth. 2011), an incumbent candidate running for magisterial district judge was given erroneous instructions by the Lehigh County Board of Elections about filing his statement of financial

interest. The Commonwealth Court held that given his reliance upon erroneous information provided by the county elections department that fatal error was curable. Finally, in In re Hall Nomination Petition, 362 A.2d 475, 477 (Pa. 1976), a candidate's petition was presented for filing within the deadline established by the Election Code but was not properly filed due to an error by the Election Bureau and not by the candidate himself. Keeping in mind that the Election Code must be liberally construed so as not to deprive an individual of his right to run for office or the voters their right to elect a candidate of their choice, the Court permitted the candidate to file *nunc pro tunc*.

In light of the fact that there is no fraud alleged in this case, these provisional ballots submitted by registered and eligible voters must be counted. They should not be penalized because they were given and relied on incorrect information by the election administration. The Petition for Review is denied and the Board's decision is affirmed.

Joseph M. James

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

NICOLE ZICCARELLI,

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

Respondent,

and

PENNSYLVANIA DEMOCRATIC
PARTY AND JAMES BREWSTER,

Intervenors.

No. GD 20-011793

ORDER OF COURT

And NOW, this 18th day of November 2020, upon consideration of the Petition For Review In the Nature Of A Statutory Appeal filed by Nicole Zicarelli, and any responses thereto, it is hereby ORDERED that the Petitioner's appeal is dismissed and the decision of the Board of Elections is affirmed.

BY THE COURT:

Joseph M. James

TROUPIS 0010202

APPENDIX G

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvassing Observation :
 :
Appeal of: Donald J. Trump :
for President, Inc. :
 : No. 1094 C.D. 2020

ORDER

AND NOW, November 5, 2020, upon review of arguments contained in briefs submitted by Donald J. Trump for President, Inc. (Appellant), the Philadelphia County Board of Elections, and the Pennsylvania Democratic Party, it is hereby ORDERED that the November 4, 2020 order of the Court of Common Pleas of Philadelphia County (trial court) denying Appellant’s oral motion to allow closer observation of the canvassing of ballots is REVERSED. The matter is REMANDED to the trial court to enter an ORDER no later than 10:30 a.m. today, November 5, 2020, effective immediately, requiring that all candidates, watchers, or candidate representatives be permitted to be present for the canvassing process pursuant to 25 P.S. § 2650 and/or 25 P.S. § 3146.8 and be permitted to observe all aspects of the canvassing process within 6 feet, while adhering to all COVID-19 protocols, including, wearing masks and maintaining social distancing. Opinion to follow.

s/Christine Fizzano Cannon

Christine Fizzano Cannon, Judge

Order Exit
11/05/2020

APPENDIX H

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT
TRIAL DIVISION – CIVIL SECTION**

IN RE:	:	Election Matter
	:	
CANVASSING OBSERVATION	:	
	:	NOVEMBER TERM 2020
	:	No. 07003
	:	(201107003)
	:	
APPEAL OF DONALD J. TRUMP for PRESIDENT, INC.	:	1094 CD 2020

OPINION

Tsai, J.

I. Introduction

Donald J. Trump for President, Inc. (“Appellant”) has taken an appeal from our November 3, 2020 Order denying his oral petition to conduct closer inspection of the ballot canvassing process at the Philadelphia Convention Center. In his oral petition, Appellant argued that the Commissioners did not provide his designated observers meaningful access to observe the Election Board employees who are canvassing the absentee and mail-in ballots under 25 P.S. § 3146.8(b) so they could report back to the Candidate as to the integrity of the canvassing process. Appellant had filed two similar motions earlier in the day, but withdrew them both without prejudice and presented the instant petition to the Election Court about 15 minutes before Election Court was scheduled to close at 10 p.m. EST. Based on the testimony of the witness presented by Appellant in support of the Petition, we found that the accommodations afforded to campaign representatives to observe the Election Board employees complied with the relevant provisions of the Election Code and denied the Petition.

For the reasons that follow, we respectfully ask this Court to affirm our decision.

II. Factual Findings

Appellant's representative, Jeremy Mercer, is a volunteer for Appellant's campaign. He served as an observer of the canvassing process on November 3, 2020 starting at 7 a.m. throughout the entire day. Mr. Mercer testified via Zoom technology.

The observer described how the canvassing room is set up. There are 3 rows of 15 tables spaced apart and observers are asked to stand behind a metal barrier facing the first table, which is about 15-18 feet away. Nov. 3, 2020 Tr. at 21:20-24:23. From that vantage point, Mr. Mercer can see the workers prepare the forms for evaluation, examine them, and sort the ballot into separate bins. He also described in detail the various stages of the process that he could observe, including "extraction" from about 20 feet away, "where the ballot envelopes are being fed through machines to slice them open so that what's inside the outer envelope can be removed, and then another set of what appear to be the same or very similar machines so that the inner secrecy envelopes then can be sliced open so that what's inside those can be removed." Nov. 3, 2020 Tr. At 28:14-30.

When asked about impediments to his line of sight, he identified the easels that identify each section of the canvassing process around which he can move. Nov. 3, 2020 Tr. 23:2-11. The observer was free to walk around the premises as he wished except beyond the metal safety or "crowd control" barrier. He recounted the specific steps followed by the staff to canvass a ballot. He cited concerns about the long distance between him and the employees, not because he could not see what they were doing, but because he could not see individual markings on the ballot or whether the signature page was completed properly and assess whether the Election Board employee was

handling the ballot properly under the Election Code. He was able to use binoculars, but he did not find them to be useful because the process is fast. Nov. 3, 2020 Tr. 36:2-14.

The Board designed the layout of the Philadelphia Convention Center for the canvassing process in keeping with CDC guidelines on social distancing between individuals and safety protocols.¹ In creating this physical layout, the Board struck the proper balance between the observer's ability to observe the canvassing process and the paramount interest of voter privacy, as there are declaration envelopes that are being opened, secrecy envelopes that are being opened, and ballots that are being extracted.²

III. Discussion

This Court ordered as it did based on our analysis of the statutory provision invoked by the Appellant, 25 P.S. § 3146.8(b), which states: "Watchers [also referred to herein as "observers"] shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded." Despite Appellant's argument that the Board of Elections was not providing observers the opportunity to "meaningfully observe" the canvassing of ballots, Appellant was unable to point to any statutory language or case law using the word "meaningful" or elaborating on what constitutes "meaningful observation."

¹ The Election Board allows the public to observe the canvassing process on You Tube on their website at <https://youtu.be/-Zzb-7EH-MQ>

² The observer, who has worn a mask while observing the canvassing, testified that he saw Election Board workers who occasionally stood shoulder to shoulder, contrary to the CDC social distancing guidelines. The Appellant appears to contend that these incidents undercut the legitimacy of the social distancing guidelines which have influenced the design of the layout for observers. We do not believe these occasional, likely necessary, instances of shoulder-to-shoulder interactions between fellow workers to carry out their canvassing duties, is a legitimate reason to direct the Board to relax its current distancing requirements on observers.

Furthermore, § 3146.8(b), explicitly allows only for the watchers to “be present” for three activities: (1) the opening of the envelopes containing the ballots, (2) the counting of the ballots, and (3) the recording of the ballots.

The Appellant presented a witness, Jeremy Mercer, who provided copious testimony as to his ability to observe the opening and sorting of ballots. He testified as to his ability to observe the ballots being opened, placed in trays, and sorted – including the separation of so-called “naked ballots,” which do not have inner secrecy envelopes. This satisfies the three explicit objects of the statute. The witness’s concerns, however, pertained to his inability to observe the writing on the outside of the ballots. But observing the writing on the outside of the ballots is not necessary in order to simply be able to “be present” to watch the **opening** of the ballots or to watch the **counting and recording** of the ballots. The statute provides no further specific activities for the watchers to observe, and no activities for the watchers to do other than simply “be present.” Watchers are not directed to audit ballots or to verify signatures, to verify voter address, or to do anything else that would require a watcher to see the writing or markings on the outside of either envelope, including challenging the ballots or ballot signatures.³

³ “[I]n 2020, the legislature eliminated time-of-canvassing challenges *entirely* from Section 3146.8(g)(3). ... Accordingly, the Election Code presently provides no mechanism for time-of-canvassing challenges by candidate or party representatives. ... Moreover, as is plain from the above account, at no time did the Code provide for challenges to ballot *signatures*.”

Presumably, in expanding voting by mail, the legislature sought to streamline the process for canvassing such ballots, perhaps to avoid undermining the expansion effort by eliminating the prospect that voters – including a potentially large number of new mail-in voters – would be brought before the board or the courts to answer third-party challenges. Regardless, Intervenor would have us interpret the Election Code, which

Moreover, the Pennsylvania courts have clearly delineated the purpose of having watchers observe canvassing by making “a distinction between votes which are improperly cast and the subsequent mismanagement of votes by the election board, when those votes were completed correctly by the absentee voter.” *In re Canvass of Absentee Ballots of Gen. Election*, 39 Pa. D. & C.2d 429, 433 (Pa. Com. Pl. 1965).

The court further elaborated that:

In the first situation, the strict requirements must be followed to protect the individual's vote; in the latter case, although strict compliance is desired, it is not mandatory, because slight irregularities can be anticipated in the overall handling of absentee ballots. In the latter case, the principles of liberal interpretation should apply, consistent with the above-quoted approach of the Perles case, supra, viz.: “Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it ...”D’

Id. at 433-34.

That line of reasoning ultimately led the court to hold that even when it does not condone a short-cutting of canvassing procedures under the act, such short-cutting does not by itself seriously breach the legislative intent. *See id.* at 434.⁴ The court thus

now does not provide for time-of-canvassing ballot challenges, and which never allowed for signature challenges, as both requiring signature comparisons at canvassing, and allowing for challenges on that basis. We reject this invitation.” *In re November 3, 2020 Gen. Election*, 149 MM 2020, 2020 WL 6252803, at *14 (Pa. Oct. 23, 2020) (footnotes, citations and quotations omitted).

⁴ “The Montgomery County Board of Elections, prior to the general election of November 2, 1965, met with representatives of both the Democratic and Republican Committees of this county for the purposes of setting up a facile procedure to expedite the handling of absentee ballots within the county. At that meeting, on September 7, 1965, it was agreed that certain procedures required for technical compliance with the dictates of the Absentee Voting Act would be eliminated or modified, so that, at time of canvass, there would be less confusion and involvement. This proposal was approved by Horace A. Davenport, Esq., the solicitor for the county board of elections, Peter P. Stevens, chief clerk for the election board, Sheldon W. Farber, Esq., attorney for the County Democratic Committee, and John G. Kauffman, Esq., attorney for the

denied a “general ‘blanket’ challenge presented by petitioner to all the absentee ballots on the basis of the election board’s departure from the statutory directions.” *Id.*

Likewise, we also recognized that canvassing arrangements may arguably be less than what the observer may deem as optimal without rising to the level of violating the statute, especially when the procedures need to be modified to promote safety during the COVID-19 pandemic. We therefore noted in our order that we “would not discourage the Board from considering the implementation of arrangements to allow for an additional corridor for observation along the side of the canvassing tables if feasible – subject to spatial distancing under COVID-19 and voting privacy requirements.” *In re: Canvassing Observation*, Order of November 3, 2020.

Additionally, in *In re Recanvassing of the First Election Dist. of Jefferson Twp.*, 12 Pa. D. & C.4th 536 (Pa. Com. Pl. 1991), the court reasoned that “the Election Code speaks only of canvassing absentee ballots, not single ones,” and that the “intent of the statute [is] to preserve and insure the secrecy and anonymity of the voter.” *Id.* at 538. Indeed, if watchers like the witness were permitted to observe the canvassing of ballots closely enough to view the names and addresses on single ballots, they would be going beyond the purpose of the statute, which is only to provide for the canvassing of the ballots **writ large**. The watchers would also threaten the secrecy and anonymity of the voter in direct frustration of the statute’s purpose. If the watcher intends to observe the canvassing with the intent of voiding ballots, we must emphasize that we “will not disenfranchise a voter for an act that may be contrary to procedure for

Republican Committee of the county.” *In re Canvass of Absentee Ballots of Gen. Election*, 39 Pa. D. & C.2d 429, 433 (Pa. Com. Pl. 1965)

canvassing the vote,” as ballots are not to be voided “because of some minor irregularities or inconsistencies in the canvassing of the ballots.” *Id.* at 538, 539.

Overall, the watchers’ purpose is not to audit the individual ballots, and “meaningful observation” or “meaningful access” is not a legally recognized reason for a watcher getting close enough to do so. Indeed, the term “meaningful” is not even used in the statute. We note that a similar conclusion has been reached in a similar case in Nevada. In that case, the court explained that the statute provides that “[t]he county...shall allow members of the general public to observe the counting of the ballots...,” but does not “use the modifier ‘meaningful.’” *Kraus v. Cegavske*, First Judicial Dist. Of Nevada, Case No. 20 OC 00142 1B, Dept. 2, October 29, 2020, at p. 10. That court also specifically noted that “Petitioners seem to request ... observation of all information involved in the ballot counting process so they can verify the validity of the ballot, creating in effect a second tier of ballot counters and/or concurrent auditors of the ballot counting election workers,” adding that the “statutes created observers not counters, validators, or auditors.” *Id.* at 10-11.

IV. Conclusion

Appellant's witness, Jerry Mercer, provided exacting and copious testimony as to his ability to observe the opening and sorting of ballots. Given that observers are directed only to observe and not to audit ballots, we conclude, based on the witness's testimony, that the Board of Elections has complied with the observation requirements under 25 P.S. § 3146.8 and that Appellant is not entitled to the relief that he seeks.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Stary", is written over a horizontal line.

**J.
Presiding Election Day Judge**

APPENDIX I

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
 IN THE COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
 ELECTION COURT- General Election: November 3, 2020



In Re: : ELECTION MATTER
 :
Canvassing Observation : NOVEMBER TERM, 2020
 :
 _____ : NO. 7003

ORDER

AND NOW, this 3rd day of November, 2020, in connection with the matter of: petition by Donald J. Trump for President Inc. to allow closer observation of canvassing of ballots, upon consideration of the:

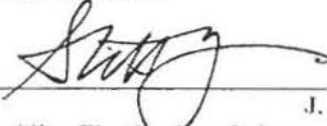
- oral Petition and Argument and any responses thereto written Petition and Argument and any responses thereto
- testimony and evidence presented by the witnesses and Argument; or
-

IT IS HEREBY ORDERED and DECREED that:

The oral motion to allow closer observation of the canvassing of ballots is DENIED for the following reasons:

The Petitioner's witness provided copious testimony as to his ability to observe the opening and sorting of ballots. His concerns pertained to his inability to observe the writing on the outside of the ballots. Given that observers are directed only to observe and not to audit ballots, we conclude, based on the witness's testimony, that the Board of Elections has complied with the observation requirements under 25 P.S. 3146.8. We, however, would not discourage the Board from considering the implementation of arrangements to allow for an additional corridor for observation along the side of the canvassing tables if feasible – subject to spatial distancing under COVID-19 and voting privacy requirements.

BY THE COURT:


 _____ J.
 Presiding Election Day Judge

Page 1 of 1

IMPORTANT NOTICE

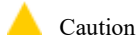
This Order is issued by the Judge assigned by the President Judge of the Court of Common Pleas to decide legal issues which may arise in connection with the above Election. Failure to comply with the terms of this order may result in contempt proceedings and the imposition of criminal or civil penalties. Any interested party should consult an attorney, or rules of court, for additional information regarding the impact of this order and how to request appropriate relief.

Certified copies of this order may be obtained through the Office of Judicial Records, OJR_Civil@courts.phila.gov upon the payment of the required fee. Notes of testimony of the hearing may be requested through the Court Reporters Office, Land Title Building, 100 S. Broad Street, Second Floor, Philadelphia, PA by completing a Request for Transcript form. See www.courts.phila.gov/departments/courtreporters.

The following Parties participated in connection with the above matter:

Name of Party	Name of Attorney
Donald J. Trump for President Inc.	LINDA KOLMS, ESQ
City of Philadelphia	SEAN MCGRATH, ESQ
PA Dems	SUJAN LIN, ESQ.

APPENDIX J



Caution

As of: December 16, 2020 9:19 PM Z

In re November 3, 2020 Gen. Election

Supreme Court of Pennsylvania

October 14, 2020, Decided

No. 149 MM 2020

Reporter

2020 Pa. LEXIS 5327 *; 2020 WL 6110774

IN RE: NOVEMBER 3, 2020 GENERAL ELECTION.
PETITION OF: KATHY BOOCKVAR, SECRETARY OF
THE COMMONWEALTH OF PENNSYLVANIA

Subsequent History: Petition granted by [In re November 3, 2020 Gen. Election, 2020 Pa. LEXIS 5560, 2020 WL 6252803 \(Pa., Oct. 23, 2020\)](#)

Prior History: [Donald J. Trump for President v. Boockvar, 2020 U.S. Dist. LEXIS 147232 \(W.D. Pa., Aug. 13, 2020\)](#)

Judges: [*1] Justice Dougherty files a concurring statement. Justice Baer files a dissenting statement. Chief Justice Saylor and Justice Mundy dissent.

Opinion

ORDER

PER CURIAM

AND NOW, this 14th day of October, 2020, the Application for King's Bench relief is **GRANTED**, limited to the following issue:

Whether the Election Code authorizes or requires county election boards to reject voted absentee or mail-in ballots during pre-canvassing and canvassing based on signature analysis where there are alleged or perceived signature

variances?

The Court will decide this issue based on the current filings; however, supplemental filings are permitted to be submitted by Friday, October 16, 2020, at 5 p.m. No other filings will be permitted thereafter.

Further, the motions to intervene filed by the following entities are **GRANTED**: Donald J. Trump for President, Inc., Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee. The motions to intervene filed by the following individuals are **DENIED**: Elizabeth Radcliffe, a qualified elector, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives, [*2] Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader. See *Pa.R.C.P. 2329(2)*. However, those individuals denied intervenor status are granted leave of court to file briefs as *amicus curiae*, pursuant to *Pa.R.A.P. 531*.

The motion for leave to file an *amicus* brief filed by the Brennan Center for Justice is **GRANTED**.

Any filings submitted by the Court's deadline by a non-party or non-intervenor will be accepted as an *amicus* brief.

Justice Dougherty files a concurring statement

Justice Baer files a dissenting statement.

Chief Justice Saylor and Justice Mundy dissent.

Concur by: DOUGHERTY

Concur

CONCURRING STATEMENT**JUSTICE DOUGHERTY**

I reluctantly agree that our exercise of King's Bench jurisdiction is warranted in this unique and time-sensitive case of substantial importance. *See, e.g., Friends of Danny DeVito v Wolf*, 227 A.3d 872, 884 (Pa. 2020) (granting review of matter of "public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law"). My hesitation largely tracks Justice Baer's concern over the arguable lack of a clear case or controversy before us. *See* Dissenting Statement at 1 (Baer, J.). However, I respectfully believe the proper course [*3] is not to elevate form over substance, and I ultimately depart from Justice Baer's assessment that the present legal question was resolved in *Donald J. Trump for President, Inc. v. Boockvar, No. 2:20-cv-966, 2020 U.S. Dist. LEXIS 188390 (W.D. Pa. filed October 10, 2020)*.

Although Judge Ranjan opined our Election Code does not impose a signature-comparison requirement for absentee and mail-in ballots and applications, and Secretary Boockvar's directive to all Pennsylvania county boards of elections on this precise issue is consistent with that holding, *see id.*, slip op. at 95-106, Secretary Boockvar observes "the district court's decision, while timely and persuasive, is not authoritative." *See* Petitioner's Post-Submission Communication, dated October 11, 2020, at 2. In any event, the district court decision is surely subject to appeal. Secretary Boockvar thus continues to seek from this Court "an authoritative ruling of state law binding on all state election officials and courts." *Id.* Accordingly, although I note my disapproval of the precise manner in which the case was presented for our review, I am persuaded by the Secretary's assertion that "[o]nly this Court can render the ultimate determination concerning Pennsylvania [*4] law." *Id.* I reiterate that parties pursuing an exercise of this Court's jurisdiction under our extraordinary King's Bench powers should present a clear case or controversy and seek more than a purely advisory opinion. As I believe these conditions are met here, I join the Court's decision to grant the application to consider the merits of the important and unresolved legal question presented.

Dissent by: BAER

Dissent**DISSENTING STATEMENT****JUSTICE BAER**

I dissent from the Court's order granting the Secretary of the Commonwealth, Kathy Boockvar's ("Secretary") application for King's Bench review to resolve the issue of whether, pursuant to the *Election Code of Pennsylvania (Code), 25 P.S. §§ 2600-3591*, signature comparison is warranted by county boards of elections in relation to absentee and mail-in ballots. In my view, there is no case or controversy for this Court to address and the legal question presented has been resolved in a federal lawsuit, *see infra*, thus, our exercise of jurisdiction would provide nothing more than an advisory opinion.

As indicated, no action has ever been filed in a lower court and the Secretary's application names no respondents. In substance, the Secretary's request to this Court is essentially a letter [*5] asking us to interpret a provision of the Code. While I recognize that in theory this Court may accept a King's Bench petition with no pending action and no opposing parties, the operative question is whether it should. In my respectful view, under the circumstances of this matter, the answer is a resounding no.

The Secretary's primary concern in seeking this Court's review emanated from a federal lawsuit, *Donald J. Trump for President, Inc. v. Boockvar, No. 2:20-cv-00966-NR, 2020 U.S. Dist. LEXIS 188390 (W.D. Pa. 2020)*. The Secretary explained that the plaintiffs to the lawsuit argued that the Code authorizes and requires county boards of elections to set aside and challenge returned absentee and mail-in ballots that contain signatures that do not match a voter's signature in their permanent voter registration records. Because the Secretary took the contrary view of the Code, she had promulgated guidance indicating that "[t]he Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections." Department of State's September 11, 2020 *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* at 3. In seeking our King's Bench review, [*6] the Secretary indicates that she fears that without a resolution of this issue, certain county boards of elections might not follow her guidance and large numbers of ballots could be rejected on Election Day based on signature comparison, which could lead to disenfranchisement on an arbitrary and wholly subjective basis without advance warning to a voter or notice and an opportunity to be heard.

After the Secretary filed her application, the federal court resolved the pending lawsuit in the Secretary's favor and conclusively determined that the Code does not allow for

signature comparison of absentee and mail-in ballots. *Donald J. Trump for President, Inc., supra*, slip op. at 95-106. All of the county boards of elections were joined in that case and the federal court specifically indicated that the boards were obligated to follow the Secretary's guidance as the court's decision concluded that the Election Code does not warrant signature comparison with regard to absentee and mail-in ballots. *Id.* at 110-111 ("[T]o the extent there was uncertainty before, this decision informs the counties of the current state of the law as it relates to signature comparison. If any county still imposes a signature-comparison requirement in order to disallow ballots, it does [*7] so without support from the Secretary's guidance or the Election Code").

In my view, given that the Secretary did not provide the Court initially with a case regarding the question she asks us to address and that the federal court has resolved the controversy over interpretation of the Code in her favor, I see no basis for this Court to entertain further the Secretary's request for review. Accordingly, I would deny the application for King's Bench review.

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APPENDIX K

3 USCS § 2

§ 2. Failure to make choice on prescribed day

Whenever 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 USCS § 5

§ 5. Determination of controversy as to appointment of electors

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 USCS § 15

§ 15. Counting electoral votes in Congress

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title [3 USCS § 6] from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 [3 USCS § 5] of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what

electors have been appointed, as mentioned in section 5 of this title [3 USCS § 5], is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

28 USCS § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term “highest court of a State” includes the District of Columbia Court of Appeals.

Pa. Const. Art. VII, § 14

§ 14. Absentee voting.

(a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

(b) For purposes of this section, “municipality” means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.

25 P.S. § 2650

§ 2650. Watchers or attorneys at sessions of county board; candidates may be present

(a) Any party or political body or body of citizens which now is, or hereafter may be, entitled to have watchers at any registration, primary or election, shall also be entitled to appoint watchers who are qualified electors of the county or attorneys to represent such party or political body or body of citizens at any public session or sessions of the county board of elections, and at any computation and canvassing of returns of any primary or election and recount of ballots or recanvass of voting machines under the provisions of this act. Such watchers or attorneys may exercise the same rights as watchers at registration and polling places, but the number who may be present at any one time may be limited by the county board to not more than three for each party, political body or body of citizens.

(b) Every candidate shall be entitled to be present in person or by attorney in fact duly authorized, and to participate in any proceeding before any county board whenever any matters which may affect his candidacy are being heard, including any computation and canvassing of returns of any primary or election or recount of ballots or recanvass of voting machines affecting his candidacy.

(c) Any candidate, attorney or watcher present at any recount of ballots or recanvass of voting machines shall be entitled to examine the ballots, or the voting machine and to raise any objections regarding the same, which shall be decided by the county board, subject to appeal, in the manner provided by this act.

25 P.S. § 3146.1

§ 3146.1. Qualified absentee electors

The following persons shall be entitled to vote by an official absentee ballot in any primary or election held in this Commonwealth in the manner hereinafter provided:

- (a) Any qualified elector who is or who may be in the military service of the United States regardless of whether at the time of voting he is present in the election district of his residence or is within or without this Commonwealth and regardless of whether he is registered or enrolled; or
- (b) Any qualified elector who is a spouse or dependent residing with or accompanying a person in the military service of the United States if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or
- (c) Any qualified elector who is or who may be in the service of the Merchant Marine of the United States if at the time of voting he is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or
- (d) Any qualified elector who is a spouse or dependent residing with or accompanying a person who is in the service of the Merchant Marine of the United States if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or
- (e) Any qualified elector who is or who may be in a religious or welfare group officially attached to and serving with the armed forces if at the time of voting he is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

(f) Any qualified elector who is a spouse or dependent residing with or accompanying a person in a religious or welfare group officially attached to and serving with the armed forces if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

(g) Any qualified elector who expects to be or is outside the territorial limits of the several States of the United States and the District of Columbia because his duties, occupation or business require him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election or who is or who may be a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia, whether or not such elector is subject to civil-service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress, if at the time of voting he is absent from the municipality of his residence: Provided, however, That said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

(h) Any qualified elector who is a spouse or dependent residing with or accompanying a person who expects to be or is outside the territorial limits of the several States of the United States and the District of Columbia because his duties, occupation or business require him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election or who is a spouse or dependent residing with or accompanying a person who is a civilian employee of the United States outside the territorial limits of the several States of the United States and the District of Columbia, whether or not such person is subject to civil-service laws and the Classification Act of 1949 and whether or not paid from funds appropriated by the Congress, if at the time of voting such spouse or dependent is absent from the municipality of his residence: Provided, however, That the said elector has been registered or enrolled according to law or is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting; or

(i) Any qualified war veteran elector who is bedridden or hospitalized due to illness or physical disability if he is absent from the municipality of his residence and unable to attend his polling place because of such illness or physical disability regardless of whether he is registered and enrolled; or

(j) Any qualified registered and enrolled elector who expects to be or is absent from the municipality of his residence because his duties, occupation or business require

him to be elsewhere during the entire period the polls are open for voting on the day of any primary or election; or

(k) Any qualified registered and enrolled elector who because of illness or physical disability is unable to attend his polling place or operate a voting machine and secure assistance by distinct and audible statement as required in section 1218 of this act;

(l) Any qualified registered and enrolled elector who is a spouse or dependent accompanying a person employed in the service of this Commonwealth or in the service of the Federal Government within the territorial limits of the several States of the United States and the District of Columbia in the event the duties, profession or occupation of such person require him to be absent from the municipality of his residence; or

(m) Any qualified elector who is a county employe who cannot vote due to duties on election day relating to the conduct of the election; or

(n) Any qualified elector who will not attend a polling place because of the observance of a religious holiday:

Provided, however, That the words “qualified absentee elector” shall in nowise be construed to include persons confined in a penal institution or a mental institution nor shall it in anywise be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition set forth in section 102(t) of this act.

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§ 3146.2. Applications for official absentee ballots

(a) Any qualified elector defined in preceding section 1301, subsections (a) to (h), inclusive, may apply at any time before any primary or election for any official absentee ballot in person, on any form supplied by the Federal Government, or on any official county board of election form addressed to the Secretary of the Commonwealth of Pennsylvania or the county board of election of the county in which his voting residence is located.

(b) An application for a qualified elector under subsection (a) shall contain the following information: Home residence at the time of entrance into actual military service or Federal employment, length of time a citizen, length of residence in Pennsylvania, date of birth, length of time a resident of voting district, voting district if known, party choice in case of primary, name and, for a military elector, his stateside military address, FPO or APO number and serial number. Any elector other than a military elector shall in addition specify the nature of his employment, the address to which ballot is to be sent, relationship where necessary, and such other information as may be determined and prescribed by the Secretary of the Commonwealth. When such application is received by the Secretary of the Commonwealth it shall be forwarded to the proper county board of election.

(b.1) An application for a qualified elector other than under subsection (a) shall contain the following information: Date of birth, length of time a resident of voting district, voting district if known, party choice in case of primary and name. The elector shall in addition specify the nature of his or her employment, the address to which ballot is to be sent, relationship where necessary, and other information as may be determined and prescribed by the Secretary of the Commonwealth. When the application is received by the Secretary of the Commonwealth it shall be forwarded to the proper county board of election.

(c) A qualified absentee military or overseas elector, as defined by the Uniformed and Overseas Citizens Absentee Voting Act (*Public Law 99-410, 100 Stat. 924*), may submit his application for an official absentee ballot by electronic transmission method. The electronic transmission method shall not be acceptable for the official absentee ballot. As used in this subsection, “electronic transmission method” means any technology that can transmit a document or an image of a document via electronic or electromechanical means, including, but not limited to, facsimile method. An elector entitled to submit an application for an official absentee ballot under a method authorized under 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters) may submit an application using a method authorized under 25 Pa.C.S. Ch. 35, in addition to the methods authorized in this article.

(d) The application of any qualified elector, as defined in preceding section 1301, subsections (a) to (h), inclusive, for an official absentee ballot in any primary or election shall be signed by the applicant, except that for electors under section 1301(a), an adult member of the applicant’s immediate family may sign the application on the elector’s behalf.

(e) Any qualified bedridden or hospitalized veteran absent from the municipality of his residence and unable to attend his polling place because of such illness or physical disability, regardless of whether he is registered or enrolled, may apply at any time before any primary or election for an official absentee ballot on any official county board of election form addressed to the Secretary of the Commonwealth of Pennsylvania or the county board of elections of the county in which his voting residence is located.

The application shall contain the following information: Residence at the time of becoming bedridden or hospitalized, length of time a citizen, length of residence in Pennsylvania, date of birth, length of time a resident in voting district, voting district if known, party choice in case of primary, name and address of present residence or hospital at which hospitalized. When such application is received by the Secretary of the Commonwealth, it shall be forwarded to the proper county board of elections.

The application for an official absentee ballot for any primary or election shall be made on information supplied over the signature of the bedridden or hospitalized veteran as required in the preceding subsection. Any qualified registered elector, including a spouse or dependent referred to in subsection (l) of section 1301, who expects to be or is absent from the municipality of his residence because his duties, occupation or business require him to be elsewhere on the

day of any primary or election and any qualified registered elector who is unable to attend his polling place on the day of any primary or election because of illness or physical disability and any qualified registered bedridden or hospitalized veteran in the county of residence, or in the case of a county employe who cannot vote due to duties on election day relating to the conduct of the election, or in the case of a person who will not attend a polling place because of the observance of a religious holiday, may apply to the county board of elections of the county in which his voting residence is located for an Official Absentee Ballot. Such application shall be made upon an official application form supplied by the county board of elections. Such official application form shall be determined and prescribed by the Secretary of the Commonwealth of Pennsylvania.

(1) The application of any qualified registered elector, including spouse or dependent referred to in subsection (1) of section 1301, who expects to be or is absent from the municipality of his residence because his duties, occupation or business require him to be elsewhere on the day of any primary or election, or in the case of a county employe who cannot vote due to duties on election day relating to the conduct of the election, or in the case of a person who will not attend a polling place because of the observance of a religious holiday, shall be signed by the applicant and shall include the surname and given name or names of the applicant, proof of identification, his occupation, date of birth, length of time a resident in voting district, voting district if known, place of residence, post office address to which ballot is to be mailed, the reason for his absence, and such other information as shall make clear to the county board of elections the applicant's right to an official absentee ballot.

(2) The application of any qualified registered elector who is unable to attend his polling place on the day of any primary or election because of illness or physical disability and the application of any qualified registered bedridden or hospitalized veteran in the county of residence shall be signed by the applicant and shall include surname and given name or names of the applicant, proof of identification, his occupation, date of birth, residence at the time of becoming bedridden or hospitalized, length of time a resident in voting district, voting district if known, place of residence, post office address to which ballot is to be mailed, and such other information as shall make clear to the county board of elections the applicant's right to an official ballot. In addition, the application of such electors shall include a declaration stating the nature of their disability or illness, and the name, office address and office telephone number of their attending physician: Provided, however, That in the event any elector entitled to an absentee ballot under this subsection be unable to sign his application because of illness or physical disability, he shall be excused from signing upon making a statement which shall be witnessed by one adult person in substantially the following form: I hereby state that I am unable to sign my application for an absentee ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or have received assistance in making my mark in lieu of my signature.

.....(Date)(Mark)
.....(Complete Address of Witness)(Signature of Witness)

(e.1) Any qualified registered elector who is unable because of illness or physical disability to attend his polling place on the day of any primary or election or operate a voting machine and state distinctly and audibly that he is unable to do so as required by section 1218 of this act may at any time request, with the certification by his attending physician that he is permanently disabled and physically unable to attend the polls or operate a voting machine and make the distinct and audible statement required by section 1218 appended to the application hereinbefore required, to be placed on a permanently disabled absentee ballot list file. An absentee ballot application shall be mailed to every such person otherwise eligible to receive one, by the first Monday in February each year, or within forty-eight hours of receipt of the request, whichever is later, so long as he does not lose his voting rights by failure to vote as otherwise required by this act. Such person shall not be required to file a physician's certificate of disability with each application as required in subsection (e) of this section. Should any such person lose his disability he shall inform the county board of elections of the county of his residence. An absentee ballot application mailed to an elector under this section, which is completed and timely returned by the elector, shall serve as an application for any and all primary, general or special elections to be held in the remainder of that calendar year and for all special elections to be held before the third Monday in February of the succeeding year. The transfer of a qualified registered elector on a permanently disabled absentee ballot list from one county to another county shall only be permitted upon the request of the qualified registered elector.

(e.2) Notwithstanding the other provisions of this act any qualified elector who expects to be or is absent from the municipality of his residence because his duties, occupation or business require him to be elsewhere on the day of any election or a county employe who cannot vote due to duties on election day relating to the conduct of the election or a person who will not attend a polling place because of the observance of a religious holiday may make an application for an absentee ballot by mail by sending a letter to the county board of elections in the county in which his voting residence is located. The letter shall be signed by the applicant and contain his name, place of residence and proof of identification.

(f) The county chairman of each political party or the head of each political body shall designate one representative from his respective political party or body for each public institution. The representatives so appointed shall, at the same time on a date fixed by the county board of election visit every public institution situate in the county for the purpose of obtaining the names and addresses of public institution residents who desire to receive applications for absentee ballots and to act as an election board as provided in subsection (g) of this section. The list of names and addresses thus obtained shall then be submitted by said representatives to the board which shall furnish applications individually to those appearing in the written request. If the chairman or head of a political party or body fails to appoint a representative within fifteen days from written notice from the county board of election, the county board of election shall appoint a representative from the political party or body.

(g) The county board of election shall appoint teams of three members for each public institution that shall go to the public institutions and hold the election on the first Friday prior to election day. Each member of the board shall appoint one member on every team. After the votes are cast, the teams shall collect the ballots and return them to the county board of election where they shall be placed unopened in a secure, safe and sealed container in the custody of the board until they shall be distributed to the respective absentee voters' election district as provided in section 1308 of this act where they shall be counted with the other absentee ballots, if any.

(h) The county board of election shall number, in chronological order, the applications for an official absentee ballot, which number shall likewise appear on the official absentee ballot for the qualified elector. The numbers shall appear legibly and in a conspicuous place but before the ballots are distributed the number on the ballot shall be torn off by the county board of election. This number information shall be appropriately inserted and become a part of the Registered Absentee Voters File and the Military, Veterans and Emergency Civilian Absentee Voters File provided in section 1302.3 of this act.

(i)

(1) Application for official absentee ballots shall be on physical and electronic forms prescribed by the Secretary of the Commonwealth. The application shall state that an elector who applies for an absentee ballot pursuant to section 1301 shall not be eligible to vote at a polling place on election day unless the elector brings the elector's absentee ballot to the elector's polling place, remits the ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and signs a statement subject to the penalties of [18 Pa.C.S. § 4904](#) (relating to unsworn falsification to authorities) to the same effect. Such physical application forms shall be made freely available to the public at county board of elections, municipal buildings and at such other locations designated by the secretary. Such electronic application forms shall be made freely available to the public through publicly accessible means. No written application or personal request shall be necessary to receive or access the application forms. Copies and records of all completed physical and electronic applications for official absentee ballots shall be retained by the county board of elections.

(2) Nothing in this act shall prohibit a private organization or individual from printing blank voter applications for absentee ballots or shall prohibit the use of such applications by another individual, provided the form, content and paper quality have been approved by the Secretary of the Commonwealth.

(j) Notwithstanding the provisions of this section requiring proof of identification, a qualified absentee elector shall not be required to provide proof of identification if the elector is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (Public Law 99-410, 100 Stat. 924) or by an alternative ballot under the Voting Accessibility for the Elderly and Handicapped Act (Public Law 98-435, 98 Stat. 1678).

(k) The Secretary of the Commonwealth may develop an electronic system through which all qualified electors may apply for an absentee ballot and request permanent absentee voter status under subsection (e.1), provided the system is

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able to capture a digitized or electronic signature of the applicant. A county board of elections shall treat any application or request received through the electronic system as if the application or request had been submitted on a paper form or any other format used by the county.

25 P.S. § 3146.6

§ 3146.6. Voting by absentee electors

(a) Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

(1) (Deleted by amendment).

(2) Any elector, spouse of the elector or dependent of the elector, qualified in accordance with the provisions of section 1301, subsections (e), (f), (g) and (h) to vote by absentee ballot as herein provided, shall be required to include on the form of declaration a supporting declaration in form prescribed by the Secretary of the Commonwealth, to be signed by the head of the department or chief of division or bureau in which the elector is employed, setting forth the identity of the elector, spouse of the elector or dependent of the elector.

(3) Any elector who has filed his application in accordance with section 1302 subsection (e) (2), and is unable to sign his declaration because of illness or physical disability, shall be excused from signing upon making a declaration which shall be witnessed by one adult person in substantially the following form: I hereby declare that I am unable to sign my declaration for voting my absentee ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

(Date)

(Mark)

(Complete Address of Witness)

(Signature of Witness)

(b)

(1) Any elector who receives and votes an absentee ballot pursuant to section 1301 shall not be eligible to vote at a polling place on election day. The district register at

each polling place shall clearly identify electors who have received and voted absentee ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted an absentee ballot to vote at the polling place.

(2) An elector who requests an absentee ballot and who is not shown on the district register as having voted the ballot may vote by provisional ballot under section 1210(a.4)(1).

(3) Notwithstanding paragraph (2), an elector who requests an absentee ballot and who is not shown on the district register as having voted the ballot may vote at the polling place if the elector remits the ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and the elector signs a statement subject to the penalties under 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot and the envelope containing the declaration of the elector to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

(Date)

(Signature of Elector)..... (Address of Elector)

(Local Judge of Elections)

(c) Except as provided under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot), a completed absentee ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

25 P.S. § 3146.8

§ 3146.8. Canvassing of official absentee ballots and mail-in ballots

(a) The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections. An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).

(b) Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.

(b.1)(Deleted by amendment).

(c) Deleted by 1968, Dec. 11, P.L. 1183, No. 375, § 8.

(d) Whenever it shall appear by due proof that any absentee elector or mail-in elector who has returned his ballot in accordance with the provisions of this act has died prior to the opening of the polls on the day of the primary or election, the ballot of such deceased elector shall be rejected by the canvassers but the counting of the ballot of an absentee elector or a mail-in elector thus deceased shall not of itself invalidate any nomination or election.

(e) (Deleted by amendment).

(f) Any person challenging an application for an absentee ballot, an absentee ballot, an application for a mail-in ballot or a mail-in ballot for any of the reasons provided in this act shall deposit the sum of ten dollars (\$10.00) in cash with the county board, which sum shall only be refunded if the challenge is sustained or if the challenge is withdrawn within five (5) days after the primary or election. If the challenge is dismissed by any lawful order then the deposit shall be forfeited. The county board shall deposit all deposit money in the general fund of the county.

Notice of the requirements of subsection (b) of section 1306 shall be printed on the envelope for the absentee ballot or mail-in ballot.

(g)

(1)

(i) An absentee ballot cast by any absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).

(ii) An absentee ballot cast by any absentee elector as defined in section 1301(i), (j), (k), (l), (m) and (n), an absentee ballot under section 1302(a.3) or a mail-in ballot cast by a mail-in elector shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

(1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours' notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

(2) The county board of elections shall meet no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not included in the pre-canvass meeting. The meeting under this paragraph shall continue until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed. The county board of elections shall not record or publish any votes reflected on the ballots prior to the close of the polls. The canvass process shall continue through the eighth day following the election for valid military-overseas ballots timely received under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot). A county board of elections shall provide at least forty-eight hours' notice of a canvass meeting by publicly posting a notice on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are canvassed.

(3) When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered

Absentee and Mail-in Voters File,” the absentee voters’ list and/or the “Military Veterans and Emergency Civilians Absentee Voters File” verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

(4) All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district as follows:

(i) The county board shall open the envelope of every unchallenged absentee elector and mail-in elector in such manner as not to destroy the declaration executed thereon.

(ii) If any of the envelopes on which are printed, stamped or endorsed the words “Official Election Ballot” contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii) The county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.

(iv) Following the close of the polls, the county board shall record and publish the votes reflected on the ballots.

(5) Ballots received whose applications have been challenged and ballots which have been challenged shall be placed unopened in a secure, safe and sealed container in the custody of the county board until it shall fix a time and place for a formal hearing of all such challenges, and notice shall be given where possible to all absentee electors and mail-in electors thus challenged and to every individual who made a challenge. The time for the hearing shall not be later than seven (7) days after the deadline for all challenges to be filed. On the day fixed for said hearing, the county board shall proceed without delay to hear said challenges, and, in hearing the testimony, the county board shall not be bound by the Pennsylvania Rules of Evidence. The testimony presented shall be stenographically recorded and made part of the record of the hearing.

(6) The decision of the county board in upholding or dismissing any challenge may be reviewed by the court of common pleas of the county upon a petition filed by any person aggrieved by the decision of the county board. The appeal shall be taken, within two (2) days after the decision was made, whether the decision was reduced to writing or not, to the court of common pleas setting forth the objections to the county board’s decision and praying for an order reversing the decision.

(7) Pending the final determination of all appeals, the county board shall suspend any action in canvassing and computing all challenged ballots received under this subsection irrespective of whether or not appeal was taken from the county board’s

decision. Upon completion of the computation of the returns of the county, the votes cast upon the challenged official absentee ballots that have been finally determined to be valid shall be added to the other votes cast within the county.

(h) For those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified:

(1) (Deleted by amendment).

(2) If the proof of identification is received and verified prior to the sixth calendar day following the election, then the county board of elections shall canvass the absentee ballots and mail-in ballots under this subsection in accordance with subsection (g)(2).

(3) If an elector fails to provide proof of identification that can be verified by the county board of elections by the sixth calendar day following the election, then the absentee ballot or mail-in ballot shall not be counted.

(i) Notwithstanding the provisions of this section, a qualified absentee elector shall not be required to provide proof of identification if the elector is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (Public Law 99-410, 100 Stat. 924) or by an alternative ballot under the Voting Accessibility for the Elderly and Handicapped Act (Public Law 98-435, 98 Stat. 1678).

25 P.S. § 3150.11

§ 3150.11. Qualified mail-in electors

(a) General rule. A qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article.

(1) [Repealed by amendment]

(2) [Repealed by amendment]

(b) Construction. The term “qualified mail-in elector” shall not be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition in section 102(t).

25 P.S. § 3150.16

§ 3150.16. Voting by mail-in electors

(a) General rule. At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

(a.1) Signature. Any elector who is unable to sign the declaration because of illness or physical disability, shall be excused from signing upon making a declaration which shall be witnessed by one adult person in substantially the following form:

I hereby declare that I am unable to sign my declaration for voting my mail-in ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

(Mark)

(Date)

(Complete Address of Witness)

(Signature of Witness)

(b) Eligibility.

(1) Any elector who receives and votes a mail-in ballot under section 1301-D shall not be eligible to vote at a polling place on election day. The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place.

(2) An elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot under section 1210(a.4)(1).

(3) Notwithstanding paragraph (2), an elector who requests a mail-in ballot and who is not shown on the district register as having voted the ballot may vote at the polling place if the elector remits the ballot and the envelope containing the declaration of the

elector to the judge of elections to be spoiled and the elector signs a statement subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) which shall be in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

(Date)

(Signature of Elector)..... (Address of Elector)

(Local Judge of Elections)

(c) Deadline. Except as provided under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot), a completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

APPENDIX L

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

IN RE: CANVASS OF ABSENTEE AND/OR	:	No. 676 MAL 2020
MAIL-IN BALLOTS OF NOVEMBER 3, 2020	:	
GENERAL ELECTION	:	
	:	
	:	
	:	
PETITION OF: DONALD J. TRUMP FOR	:	
PRESIDENT, INC.	:	

ORDER

PER CURIAM

AND NOW, this 8th day of December, 2020 the Emergency Petition for Allowance of Appeal is **DENIED**.

APPENDIX M

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL DIVISION

IN RE: CANVASS OF ABSENTEE AND/OR	:	
MAIL-IN BALLOTS OF NOVEMBER 3, 2020	:	No. 20-05786-35
GENERAL ELECTION	:	
	:	
PETITION OF DONALD J. TRUMP FOR	:	
PRESIDENT, <i>ET AL.</i>	:	

MEMORANDUM AND ORDER

I. Introduction

The above captioned matter is before the Bucks County Court of Common Pleas pursuant to §§ 3146.8 and 3157(a) of the Pennsylvania Election Code. 25 P.S. §§ 3146.8, 3157(a). Petitioners are asking the Court to reverse the Decision of the Bucks County Board of Elections relevant to certain ballots which were received by the Board of Election as part of the General Election which took place November 3, 2020. The Petitioners are Petitioner Donald J. Trump for President, Inc.¹; Petitioner Republican National Committee²; Petitioner

¹ Petitioner Donald J. Trump for President, Inc. is the principle committee for the reelection campaign of Donald J. Trump, the forty-fifth President of the United States of America. Petitioner Donald J. Trump for President, Inc. is bringing this action for itself and on behalf of its candidate President Trump.

² Petitioner Republican National Committee is the national political committee that leads the Republican Party of the United States. It works to elect Republican candidates to State and Federal Offices throughout the United States, including the Commonwealth of Pennsylvania. Petitioner Republican National Committee is bringing this action for itself and on behalf of the Republican Party, all of its members, all registered Republican voters, and all nominated Republican candidates in the November 3, 2020 General Election in Pennsylvania.

N.B. It is the responsibility of
all parties to notify all interested
parties of the content of this
order/action

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Heidelbaugh for Attorney General, Inc.³; and Petitioner Garrity for PA⁴. This matter has also been improperly captioned as "Donald J. Trump for President, Inc., et al. vs. Bucks County Board of Elections". The Respondent is the Bucks County Board of Elections⁵ (hereinafter referred to as "Board"). Parties also include the Democratic National Committee⁶, the Bucks County Democratic Committee⁷, and the Pennsylvania House Democratic Campaign Committee⁸; these parties were permitted to intervene without objection.

³ Petitioner Heidelbaugh for Attorney General, Inc. is the principal committee for the election campaign of Heather Heidelbaugh for the office of Attorney General of Pennsylvania. Heidelbaugh is the Republican candidate for the office of Attorney General of Pennsylvania in the November 3, 2020 General Election. Petitioner Heidelbaugh for Attorney General, Inc. is bringing this action for itself and on behalf of its candidate.

⁴ Petitioner Garrity for PA is the principle committee for the election campaign of Stacy L. Garrity for the Office of Treasurer of Pennsylvania. Stacy L. Garrity is the Republican candidate for the office of the Treasurer of Pennsylvania in the Election of November 3, 2020. Petitioner Garrity for PA is bringing this action for itself and on behalf of its candidate.

⁵ Respondent Bucks County Board of Elections is responsible for overseeing the conduct of elections in Bucks County, including the administration of the pre-canvass and canvass sessions of the Board during which absentee and mail-in ballots were opened, reviewed, and counted, as required by the Election Code.

⁶ The Democratic National Committee is a national committee dedicated to electing local, state, and national candidates of the Democratic Party to public office throughout the United States, including Pennsylvania. The Democratic National Committee has members who submitted absentee and mail-in ballots in the November 3, 2020 General Election.

⁷ The Bucks County Democratic Committee is a local committee with a mission of electing qualified members of the Democratic Party to local office at all levels of government. The Bucks County Democratic Committee has members and constituents across Bucks County who submitted absentee and mail-in ballots in Bucks County in the November 3, 2020 General Election.

⁸ The Pennsylvania House Democratic Campaign Committee is a state committee dedicated to electing local members of the Democratic Party to the Pennsylvania House of Representatives. The Pennsylvania House Democratic Campaign Committee has members and constituents who submitted absentee and mail-in ballots in Bucks County in the November 3, 2020 General Election.

In this appeal, Petitioners argue⁹ that the Board violated State Law when it failed to reject certain specific ballots, and over objection, accepted the ballots as valid votes of Bucks County citizens. The Respondent, as part of its statutory duties, sorted through and reviewed approximately 165,000 total absentee and mail-in ballots. In this process, the Respondent Board deemed a total of 918 ballots to be legally insufficient, and therefore, those specific ballots were not canvassed; in other words, the ballots were rejected. These ballots were not rejected because there was a finding that the person submitting the ballot was not authorized to vote, but rather because of some deficiency required by the Election Code, such as a lack of signature or a lack of privacy envelope.

The actual vote offered on any of those rejected ballots is unknown. Whether or not a specific vote on any of those ballots would be for or against any of the Petitioner candidates, or their opponents is unknown. There are 2,177 ballots are at issue in this case being challenged by the Petitioners.

This decision will be abbreviated because of time constraints caused by the need for a prompt resolution of the issues presented to allow for certification of votes. Should an appeal be filed the Court reserves the right to supplement this Memorandum with additional facts and law¹⁰.

⁹ On the day of the hearing, Petitioners were solely represented by Britain R. Henry, Esquire. Other attorneys had entered their appearance and represent all the Petitioners for purposes of the record. Attorney Henry confirmed that he had the authority to speak for all Petitioners, but that he was proceeding primarily on behalf of Petitioner Donald J. Trump for President, Inc.

¹⁰ While drafting this Memorandum and Order, the Court has learned that the Supreme Court of Pennsylvania has Exercised Extraordinary Jurisdiction over the some of the Commonwealth Courts cases with respect to Election Code issues similar to the ones at issue herein. In Order to expedite the completion of this Memorandum and Order, this

After careful deliberation and study of the relevant statutory and appellate case law, the undersigned is confident that the final decision is correct. However, the electorate and the various county boards of elections would benefit from clear precise legislation on the subjects presented in this appeal. It must be noted that the parties specifically stipulated in their comprehensive stipulation of facts that there exists no evidence of any fraud, misconduct, or any impropriety with respect to the challenged ballots. There is nothing in the record and nothing alleged that would lead to the conclusion that any of the challenged ballots were submitted by someone not qualified or entitled to vote in this election. At no time did Petitioners present evidence or argument to the contrary. The challenges are all to form rather than substance but premised on specific statutory language which Petitioners argue supported the issues presented. There is insufficient time for this Court to construct a comprehensive response to all issues raised but hopefully this decision will provide an explanation for the Court's reasoning.

II. Undisputed factual record

Upon assignment of this case the undersigned issued scheduling orders including an order that the parties meet prior to the date of the hearing on this matter to craft a stipulation of undisputed facts. Counsel for the parties did an excellent job crafting 47 paragraphs of stipulated facts. The stipulation was

Decision will not cite all of the legal authority reviewed and considered and which supports each and every conclusion. The Intervenors in this case, and the Respondent, submitted ample legal authority for their positions, and this Court will presume that all Appellate Judges reviewing this Decision will be familiar with the body of Election Law which defines and establishes broad principles of law, which for purposes of Petitioners' Appeal have not been challenged by any party, but which would normally be cited for completeness as a matter of course.

presented to the court during the on the record conference held the morning of the hearing. Stipulated Facts, Ct. Ex. 1. The hearing was held in the afternoon of November 17th, 2020. The stipulation of facts also included exhibits. During both the conference and the hearing, counsel were frequently questioned whether everyone agreed to something stated by an attorney or the Court. The record has not been transcribed and is not available to the Court at this time, and for that reason, there will be no references to a transcript. However, the Court is confident that the facts stated herein were agreed to by all parties on the record.

On November 7th, 2020 during the course of the canvass meeting of mail-in and absentee ballots, and in the presence of interested authorized representatives of the various candidates, the Respondent Board met to determine whether declarations on the envelopes of certain ballots were "sufficient" pursuant to the mandate of 25 P.S. § 3146.8(g)(3). 3,095 specific ballots had been identified and placed in different categories based on a possible deficiency of the ballot. The physical ballots were separated from the other ballots and secured along with all ballots of the same category. The Board made findings and decisions with respect to ten different categories of ballots, accepting some categories for canvassing and excluding others, as reflected in the Board's written decision made part of the record. The meeting and vote were conducted in the presence of authorized representatives of both Republican and Democratic candidates and parties. No one objected to or challenged the segregation of ballots into the designated categories. No one has appealed the

Board's decision to exclude 918 ballots for various reasons set forth in its written Decision. The only appeal has been from the Board's decision to not exclude certain ballots.

The parties' stipulation of facts identified the six categories which were challenged by Petitioners. During the hearing, counsel for Petitioner withdrew the challenge of category 6 and reduced the challenge of category 4. As a result, the following are the categories at issue for this decision:

- Category 1: 1196 ballots with no date or a partial date handwritten on the outer envelope;
- Category 2: 644 ballots with no handwritten name or address on the outer envelope;
- Category 3: 86 ballots with a partial written address on the outer envelope;
- Category 4: 182 ballots with a mismatched address on the outer envelope; and
- Category 5: 69 ballots with "unsealed" privacy envelopes.

The ballots in category 1 were deemed to be sufficient by the Respondent Board, and as a result they were canvassed. During oral argument the Court inquired whether it would be possible to segregate that category of ballots into two separate groups, one being ballots with no date and the other being ballots with a partial date. The Respondent Board has explained that the ballots were canvassed and cannot be retrieved as two separate groups. This Court believes

that the category as identified should have been segregated into two separate groups, however that was not done. All the ballots in this category are mingled together and a decision on those ballots must now accept this fact. Should this Court or an appellate court conclude that the absence of any date would invalidate a ballot but that a partial date would preserve the ballot the Court would be faced with the fact that invalidating the entire category would disenfranchise voters that had properly submitted their ballot. No record has been created to determine the exact number of ballots with no date versus ballots with a partial date. This Court concluded that to order a further review would be a futile exercise under the circumstances and now accepts the factual situation for what it is.

III. Discussion

Petitioners' Appeal as pled is limited to the argument that the Board's Decision to validate (and not reject) each of the ballots which have been categorized into five separate distinct groups was an "error of law." Petitioners have pled, in their challenge, that each category of ballots represents a violation of a specific provision of the Election Code citing §§ 3146.6(a) and 3150.16(a).

Although all provisions of the Election Code should be strictly enforced, the ultimate goal as confirmed by case law is to enfranchise voters, not to disenfranchise them. In re Wieskerger, 290 A.2d 108, 109 (Pa. 1972). The Court "cannot ignore the clear mandates of the Election Code." In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d 1223, 1231 (Pa. 2004)

[hereinafter "Appeal of Pierce"]. But, the Court must be flexible in favor of the right to vote. Wieskerger, 290 A.2d at 109; Appeal of Pierce, 843 A.2d at 1231.

In an attempt to balance those two overriding principles, the Pennsylvania Supreme Court has ruled that certain provisions of the Election Code are mandatory, and some are directory. Specifically, the Pennsylvania Supreme Court has identified and explained principles of law which control the argument set forth by the litigants herein, which provides guidance and clear direction to this Court. Ballots should not be disqualified based upon failure to follow directory provisions of the law. Shambach v. Bickhart, 845 A.2d 793, 803 (Pa. 2004) (holding that although the Election Code provides that an elector may cast a write-in vote for any person not printed on the ballot, a write-in vote for a candidate whose name in fact appears on the ballot is not invalid where there is no evidence of fraud and the voter's intent is clear); Wieskerger, 290 A.2d at 109 (holding that the elector's failure to mark the ballot with the statutorily enumerated ink color does not render the ballot invalid unless there is a clear showing that the ink was used for the purpose of making the ballot identifiable or otherwise indicating fraud). There is an important difference between mandatory and directory provisions of law: failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved, whereas mandatory provisions must be followed.

Applying the law to the facts of this case, this Court is mindful of the following facts which are set forth in the parties' stipulation of facts. Petitioners do not

allege that there is any evidence of fraud, misconduct, impropriety, or any undue influence committed with respect to the challenged ballots. There is no suggestion, evidence, or allegation that the electors who cast the ballots at issue were ineligible to vote in this election. There is no suggestion, evidence, or allegation that the challenged ballots were cast by someone other than the elector whose signature was on the outer envelope. No mail-in or absentee ballots were mailed out to electors before October 7th, 2020. The ballots which are the subject of this challenge were timely received by the Respondent Board before 8:00 PM on Election Day, November 3rd, 2020.

Petitioners raise challenges under Section 3146.6 and 3150.16 of the Election Code. These provisions are nearly identical, but one is applicable to absentee ballots while the other is applicable to mail-in ballots. Section 3146.6(a) provides for voting by absentee electors:

Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a). Section 3150.16(a) provides for voting by mail-in electors:

At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3150.16(a).

Pursuant to these provisions of the Election Code, Petitioners challenge ballots that were set aside for specific review in the following categories¹¹:

1. No date or partial date,
2. No printed name or address,
3. Partial address,

¹¹ There has been no challenge to the Board's Decision to set aside and not count ballots in the following categories:

- a. 110 ballots that failed to include a signature, which the Board ruled rendered the ballot "insufficient" and therefore it was not canvassed;
- b. 12 ballots where the elector's printed name did not match the name on the label located on the envelope;
- c. 2 ballots which came from the same household where the voters appeared to have inadvertently signed one another's declarations;
- d. 708 ballots which were not placed in a secrecy envelope thereby rendering them to be "naked"; and
- e. 21 ballots which contained secrecy envelopes with writing that revealed the elector's identity.

See Written Decision of Board.

4. Mismatched address, and
5. Unsealed privacy envelopes.

The relevant portion of the Election Code set forth above uses mandatory language which provides that electors "shall" take certain steps when submitting an absentee or mail-in ballot. Importantly, "the elector **shall** . . . fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed 'Official Election Ballot.'" 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). And, "[t]he elector **shall** then fill out, *date* and *sign* the declaration printed on such envelope." Id. (emphasis added). Although not relevant to this decision, there is additional mandatory language in this provision of the Election Code: "[t]his envelope **shall** then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector"; "[s]uch envelope **shall** then be *securely sealed*"; and "the elector **shall** send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election." Id. (emphasis added).

Mandatory language is used throughout the Election Code. "Pennsylvania's Election Code, no less than any other, is steeped with requirements phrased in the imperative, not only in terms of the technical requirements for ballot completion, but also in terms of the overall conduct of elections." Bickhart, 845 A.2d at 806 (Saylor, C.J., concurring). Because of the excessive use of imperative language in the Election Code, the Supreme Court has distinguished between provisions that

are directory and those that are mandatory. "It would be unreasonable to assume that the General Assembly thus intended that, unless each and every such requirement [using imperative language] is strictly adhered to by those conducting the elections, election results must be deemed void." Id. If the provisions are read as directory, although "they are intended to be obeyed, and will be enforced if raised before or during an election, [they] do not require invalidation of the election or disenfranchisement of electors where discovered in the election aftermath." Id. at n.2.

Respondent and Intervenors argued that even when imperative language such as "shall" is used in the statute, it is not necessarily mandatory language; it can, in fact, be used in directory provisions. Respondent and Intervenors argued that looking to the consequence of non-compliance with the provision determined whether the provision was mandatory or directory; the inquiry did not end with the plain language of the Election Code.

In support of this argument, Respondent and Intervenors relied on the Pennsylvania Supreme Court's opinion in Boockvar, where the inquiry was to determine whether the Election Code allowed a board to void ballots that were not within a secrecy envelope. Pa. Democratic Party v. Boockvar, No. 133 MM 2020, 2020 Pa. LEXIS 4872, at *57 (Pa. 2020 Sept. 17, 2020). "In determining the propriety of naked ballots, we must ascertain the General Assembly's intention by examining the statutory text of the secrecy envelope provision to determine whether it is mandatory or directory, as that will govern the consequences for non-

compliance." 2020 Pa. LEXIS 4872, at *66. The Court ruled that "the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved." Id. (quoting JPay, Inc. v. Dep't of Corrs. & Governor's Off. of Admin., 89 A.3d 756, 763 (Pa. Cmwlth. 2014)). The Court distinguished the statutory provision at issue from those involved in cases where imperative language was found to be directory. Specifically, it distinguished Bickhart and Wieskerger. Id. at *68-69. In both of those cases, the Court found that ballots with "minor irregularities" should only be stricken when there is a compelling reason to do so. In Bickhart, the Court counted a ballot where a candidate who was already named on the ballot was written in by the elector. Bickhart, 845 A.2d at 803. In Wieskerger, the Court counted a ballot that was completed in the wrong color ink. Wieskerger, 290 A.2d at 109. "Marking a ballot in voting is a matter not of precision engineering but of an unmistakable registration of the voter's will in substantial conformity to statutory requirement." Id. (quoting Reading Election Recount Case, 188 A.2d 254, 256 (Pa. 1963)).

In contrast, in Appeal of Pierce, where the provision at issue was the "in-person" delivery requirement, the Pennsylvania Supreme Court found this provision "unambiguously provided that 'the elector shall send [the absentee ballot] by mail, postage [prepaid], except where franked, or deliver it in person to [said county] board of election.'" Boockvar, 2020 Pa. LEXIS 4872, at *70. The Court "was unpersuaded by the argument that the language was directory and

declined the invitation to interpret 'shall' as anything less than mandatory." Id. "The word 'shall' carries an imperative or mandatory meaning." Appeal of Pierce, 843 A.2d at 1231. In Appeal of Pierce, the Supreme Court distinguished Wieskerger based on the fact that it was "decided before the enactment of the Statutory Construction Act, which dictates that legislative intent is to be considered only when a statute is ambiguous." Id. The Pennsylvania Supreme Court stated that to construe the provision at issue, which utilized the word "shall," as "merely directory would render its limitation meaningless and, ultimately, absurd." Id. at 1232. The Court stated that "precedent is clear: we cannot simply ignore substantive provisions of the Election Code." Id. at 1234. "[S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot must therefore be observed." Id.

Being mindful of the Pennsylvania Supreme Court's recent rulings, interpreting the current Election Code, this Court finds the following with respect to each category:

1. Category 1: 1196 Ballots With No Date or a Partial Date Handwritten on the Outer Envelope

As mentioned, when setting aside ballots because of deficiencies in the completion of the declaration, the Board combined those ballots which had a partial date with those that had no date into one category. This category commingles what this Court considers two separate categories: ballots with no dates and ballots with partial dates. There are an undefined number of ballots with

absolutely no date whatsoever and an undefined number of ballots that were dated in some fashion, but where the date was considered to be partial. This Court would, with little hesitation, accept the argument that a deficiency (i.e., a partial date) on an envelope would not invalidate that ballot. The totality of the circumstances confirms that the ballot was signed on a date that qualified the ballot because the parties stipulated in their stipulation of facts at ¶ 44 that "challenged ballots were completed and received between October 7th and November 3rd, 2020." Therefore, these ballots would meet the requirement that the elector "shall fill out, date and sign the declaration" as stated in Sections 3146.6 and 3150.16 of the Election Code. See 25 P.S. §§ 3146.6(a), 3150.16(a). Within this subcategory, the elector would have complied with the law's mandate that "[t]he elector **shall** then fill out, *date and sign* the declaration printed on such envelope." *Id.* (emphasis added).

With respect to a subcategory of ballots which were completely undated, this Court finds that the question before the Court is much more complicated. Respondent and Intervenors passionately argue that the mandate to "date" is directory only and the totality of the evidence proves that the ballots were signed on a date consistent with the law. This Court agrees with the conclusion that the totality of the evidence, stipulated to by the parties, proves that the ballots were signed on some date appropriate to the Election Law; however, the only specific guidance available to this Court, on this subject, is found in In re Nov. 3, 2020, Gen. Election, No. 149 MM 2020, 2020 Pa. LEXIS 5560, at *36 (Pa. Oct. 23, 2020), where

the Pennsylvania Supreme Court specifically ruled on the Board's duty to determine the sufficiency of the Declaration on the envelope. The Pennsylvania Supreme Court has provided this Court, and all Board of Elections, with this mandate:

Both sections [3146.6(a) and 3150.16(a)] require that the elector "fill out, date and sign the declaration." Thus, in determining whether the declaration is "sufficient" for a mail-in or absentee ballot at canvassing, **the county board is required to ascertain whether the declaration on the return envelope has been filled out, dated, and signed.** This is the extent of the board's obligation in this regard. In assessing a declaration's sufficiency, there is nothing in this language which allows or compels a county board to compare signatures. Accordingly, we decline to read a signature comparison requirement into the plain and unambiguous language of the Election Code, as Intervenor's urge us to do, inasmuch as the General Assembly has chosen not to include such a requirement at canvassing.

2020 Pa. LEXIS 5560, at *36 (emphasis added).

Intervenor's and Respondent argued to this Court that the language of the Pennsylvania Supreme Court was dicta as it relates to the words "dated and signed". Ultimately, an Appellate Court may rule that the language was merely dicta; however, the undersigned feels constrained to follow the clear language of the Pennsylvania Supreme Court's Decision with respect to this issue. A studied review of election law has demonstrated to the undersigned that many sections of the Election Law which were ultimately concluded to be directory rather than mandatory despite the use of the word "shall", went through a gauntlet of judicial opinions with varying views up until the question was resolved by the Pennsylvania

Supreme Court. See Appeal of Pierce, 843 A.2d 1223 (Pa. 2003); Bickhart, 845 A.2d 793 (Pa. 2004).

In reflecting on this issue, the undersigned cannot help but see the irony in the fact that the absence of a signature invalidates the ballot. Respondent refused to Canvass ballots that had not been signed. However, if someone put an obviously false signature on the ballot, the ballot would have been most probably counted because the Court has also ruled that nothing in the language of the Statute compelled a County Board to compare the signature; whereas if someone put a date on the envelope which demonstrated that the vote was made at an improper time, that fact would be readily apparent to the Board when Canvassing and it would result in a ballot being set aside. During oral argument, the Court pointed out that virtually all-important documents are dated when signed. If these two subcategories of ballots had not been co-mingled, and if it were possible to segregate those ballots which had no date at all, this Court would have reflected on the issue further, searched for additional legal authority, but most probably would have ruled that an undated ballot is not sufficient based on the existing law set by the Pennsylvania Supreme Court's ruling in In re Nov. 3, 2020 Gen. Election. However, the ballots were co-mingled and therefore there is no practical way to discard those un-dated ballots without disenfranchising electors whose ballots (partially dated) this Court would conclude are valid.

The act of co-mingling those ballots was done in the presence of both Republican and Democratic representatives. All candidates had the right to

have a representative present when the Board issued its ruling. The representatives present were specifically named in the Stipulated Findings of Fact. Pursuant to this Court's Scheduling Order, those representatives received a copy of Petitioners' Petition and notice of the hearing. Only one of the named representatives participated in the hearing. The undersigned noted, on the record, that he was personally familiar with the lawyers who were acting as representatives and knew them to be bright, articulate people, not shy or reluctant to speak out. Those lawyer/representatives all knew how to contact the Bucks County Court of Common Pleas, and therefore, any or all of them could have insisted on subcategorizing this category of ballots before they were co-mingled.

This issue identified by the undersigned has effectively created a waiver issue for these ballots. This Court specifically finds with respect to these specific ballots that it would be unfair and improper to disenfranchise the undefined number of electors who issued a proper ballot, simply because their ballot was co-mingled with what the undersigned would have felt compelled under current law to deem "insufficient".

Upon review of this issue by an Appellate Court, this Court urges consideration to the issue of co-mingling and this Court's ruling that the issue has been waived. The issue of co-mingling was before the Pennsylvania Supreme Court in Appeal of Pierce, and is noted at footnote 16. See Appeal of Pierce, 843 A.2d at 250, n.16

There, the Court declined to rule on the validity of a co-mingled ballot because the issue was not preserved.

2. Categories 2-4: 644 Ballots With No Handwritten Name or Address on the Outer Envelope, 86 Ballots With a Partial Written Address on the Outer Envelope, and 182 Ballots With a Mismatched Address on the Outer Envelope

The 644 ballots with no handwritten name or address on the outer envelope, the 86 ballots with a partial written address on the outer envelope, and the 182 ballots with a mismatched address on the outer envelope should be counted as these errors are ministerial, technical errors. Failure of the elector to complete this information is not an error of law. Although the provision in question requires an elector to "fill out" the declaration, there is no requirement that filling out the declaration needs to include handwriting the elector's name and address. Even following a strict construction of the Election Code language, as urged by Petitioners, these "errors" (failure to adequately complete information on the outer envelope) are not mandated by the statute. Rather, these errors are "minor irregularities," which should not invalidate ballots. As with the Supreme Court's decision in Bickhart and Wieskerger, the minor irregularity of a lack of a complete handwritten name or address is not necessary to prevent fraud, and there would be no other significant interest undermined by allowing these ballots to be counted.

3. Category 5: 69 Ballots With "Unsealed" Privacy Envelopes

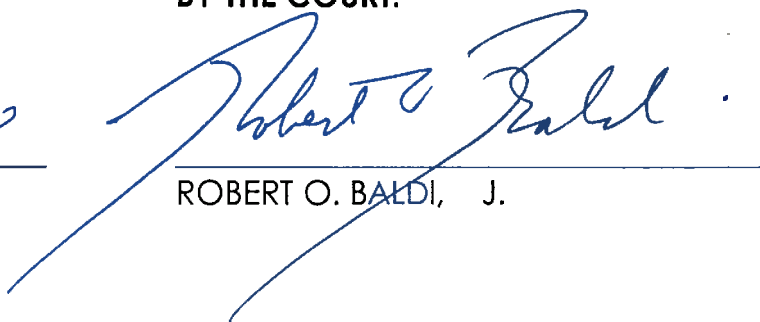
The ballots at issue in this category are not "naked ballots," which would be invalid pursuant to the Supreme Court's decision in Boockvar. 2020 Pa. LEXIS 4872, at *73. Rather, these ballots were enclosed within their respective privacy envelopes; however, those envelopes were not sealed at the time of canvassing. There is no factual evidence that supports a conclusion that the envelopes had not been sealed by the elector prior to that time. In the stipulation of facts at ¶ 46, the parties stipulated "[w]ith respect to Category 5 (69 ballots in "unsealed" privacy envelopes), Defendant could not determine whether the privacy envelopes were initially sealed by the elector but later became unsealed." Therefore, this Court finds there is no evidence that the electors failed to "securely seal [the ballot] in the [privacy] envelope," as required by the Election Code. The elector was provided the envelope by the government. If the glue on the envelope failed that would be the responsibility of the government. There is insufficient evidence to determine whether the specific language of the mandated law was violated. This Court finds it would be an injustice to disenfranchise these voters when it cannot be shown that the ballots in question were not "securely sealed" in the privacy envelope prior to the canvassing of those ballots, and for all of the reasons stated previously, there has been no suggestion or evidence that the absence of a sealed inner envelope in anyway jeopardized the privacy of the ballot.

IV. Conclusion

For the reasons set forth herein above, the objections to the ballots of Petitioner Donald J. Trump for President, Inc., et al. are all OVERRULED, the requests for relief made therein are DENIED and the Appeal is DISMISSED.

BY THE COURT:

11/19/20
DATE


ROBERT O. BALDI, J.

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL DIVISION

IN RE: CANVASS OF ABSENTEE AND/OR :
MAIL-IN BALLOTS OF NOVEMBER 3, 2020 : No. 20-05786-35
GENERAL ELECTION :
ELECTION :
:
:
PETITION OF DONALD J. TRUMP FOR :
PRESIDENT, et al. :

ORDER

AND NOW, this 19th day of November, 2020, upon consideration of (1) the Petition for Review of Decision by the Bucks County Board of Elections filed on behalf of Petitioners Donald J. Trump for President, Inc., Republican National Committee, Heidelbaugh for Attorney General, Inc., and Garrity for PA; (2) the responses in opposition thereto filed by Respondent Bucks County Board of Elections, Intervenor Democratic National Committee, and Intervenor Pennsylvania House Democratic Campaign Committee and Bucks County Democratic Committee; and (3) the evidence presented including all stipulations and admissions by counsel as well as the arguments of counsel during the on the record prehearing conference and the hearing on November 17th, 2020, for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** and **DECREED** that said Petition for Review is **DENIED**. The Bucks County Board of Elections is **ORDERED** consistent with the Memorandum to count the ballots which are the subject of the Petition:

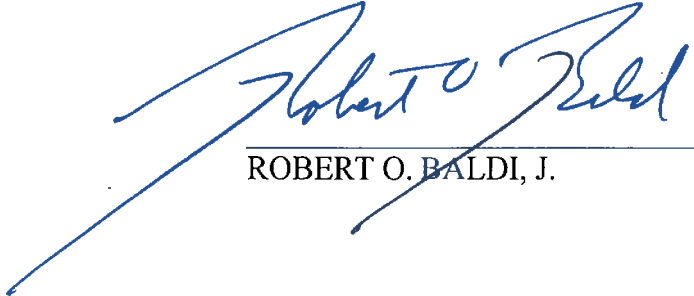
1. 1,196 ballots with no date or a partial date handwritten on the outer envelope;
2. 644 ballots with no handwritten name or address on the outer envelope;
3. 86 ballots with a partial written address on the outer envelope;

N.B. It is the responsibility of
all parties to notify all interested
parties of the content of this
order/action

TROUPIS 0010268

4. 182 ballots with a mismatched address on the outer envelope; and
5. 69 ballots with “unsealed” privacy envelopes.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Robert O. Baldi". The signature is written in a cursive, flowing style with a long horizontal stroke extending to the left.

ROBERT O. BALDI, J.

11/19/20

APPENDIX N

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

DONALD J. TRUMP FOR PRESIDENT, INC.,	:	
et al.,	:	
<i>Plaintiffs/ Petitioners</i>	:	NO. 2020-18680
	:	
v.	:	
	:	
MONTGOMERY COUNTY BOARD OF	:	
ELECTIONS,	:	
<i>Defendant/ Respondent</i>	:	
	:	
DEMOCRATIC NATIONAL COMMITTEE,	:	
et al.,	:	
<i>Intervenor</i>	:	

HAAZ, J.

November 13, 2020

MEMORANDUM AND ORDER

I. INTRODUCTION

Petitioners, Donald J. Trump for President, Inc., et al., filed a Petition for Review of Decision by the Montgomery County Board of Elections (the “Board”) on November 5, 2020 seeking to invalidate about six hundred (600) absentee and mail-in ballots cast by voters in the November 3, 2020 General Election. Petitioners seek review of the Board’s decision to overrule Petitioners’ objections to count these ballots. Petitioners allege these challenged ballots were cast in violation of 25 P.S. §§ 3146.6(a) and 3150.16(a) because the electors failed to fill out their address immediately below their signed declaration on the outer envelope of the absentee and mail-in ballots. A telephone conference was held on November 6, 2020 where the parties agreed to submit stipulated facts. The Democratic National Convention (“DNC”) and the Montgomery County Democratic Committee moved to intervene in the action. Petitioners and Respondent did not object and these motions were granted by the court.

II. STIPULATED FACTS

The parties stipulated to the following facts:

1. Electors of the Commonwealth of Pennsylvania may choose to cast their vote in any primary or election by absentee or by mail-in ballot.
2. In both instances, the elector who desires to cast a vote either by absentee ballot or mail-in ballot must request such a ballot from the county board of elections, in this case, Respondent.
3. Upon application to, and approval of that application by Respondent, the elector is provided balloting materials that include: 1) instructions as to how the elector is to complete and return the ballot; 2) the ballot; 3) an inner secrecy envelope into which the ballot is to be placed; and 4) an outer envelope into which the secrecy envelope containing the ballot is to be placed and returned to Respondent.
4. When the balloting materials are sent to the elector by Respondent, pre-printed on the reverse side of the outer envelope is a voter's declaration.
5. Underneath the voter's declaration is a place for the voter to sign, date, and print their name and address.
6. Also pre-printed on the same side of the outer envelope as the voter's declaration is a unique nine-digit bar code that links the outer envelope to the voter's registration file contained in the Statewide Uniform Registry of Electors ("SURE") system. Also, in most cases, the elector's name and address is pre-printed on that side of the envelope.¹
7. On the front side of the outer envelope is preprinted the Respondent's address where the ballot is to be sent as well as a place in the upper left-hand corner where the elector may indicate his or her return address by writing it thereon or affixing a label.

¹ Footnote 1 of the parties' stipulation states as follows:

Of the 592 ballots at issue, 509 of those ballots have the voter's address pre-printed on the outer envelope to the right of the voter's declaration. This was done by the Board when it sent the ballot materials to the elector who had requested them. Of these 509 "pre-printed address" ballots, 266 voters also affixed their address in the space provided for return addresses on the front of the envelope. So, for 266 of these ballots, the voter's address actually appears twice. For the remaining 83 ballots, the pre-printed address was blacked-out in order to facilitate the delivery of the ballot materials by the USPS. In 47 of these "blacked-out ballots," the voter wrote their address on the space provided for a return address on the front of the outer envelope. 36 out of 592 ballots have an outer envelope with no easily discernable voter address. However, all 592 ballots contain the bar code that links each one to the SURE system and the specific voter's information – including address – is visible when scanned.

8. The Board has received 592 absentee and mail-in ballots where electors have signed the voter's declaration and provided a date, but have not printed their complete address in the space provided below the Declaration on the outer envelope.
9. Respondent has segregated and not opened nor counted these 592 ballots.
10. When Respondent brought the existence of this group of unopened ballots to the attention of Petitioners' counsel, an objection was verbally lodged.
11. Respondent has verbally overruled that objection and intends to open and count these ballots subject to a ruling of this honorable Court.
12. A true and correct copy of the instructions to absentee and mail-in electors contained in the ballot packages is attached hereto as Exhibit "A."
13. True and correct copies of examples of unopened absentee and mail-in ballots (front and back) that are part of, and indicative of, the 592 ballots at issue before this Court are attached as Exhibits "B" through "E" respectively.²

Stipulated Facts, filed 11/9/20.

Respondent and Intervenor filed responses in opposition to the Petition on November 9, 2020. The court heard oral argument on November 10, 2020. Petitioners stated they were not claiming any voter fraud, undue or improper influence regarding the challenged ballots at issue. N.T. 11/10/20, at 11.

The parties stipulated that all of the 592 ballots at issue are signed and dated. All of the outer declaration envelopes contain the electors' signatures directly below the Voter's Declaration which states as follows:

I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my

² Exhibits A through E are appended hereto.

balloting materials, to be voided, to the judge of elections at my polling place.

Exhibits B-E, Stipulated Facts, filed 11/9/20. Beneath the elector's declaration and signature are areas for the elector to indicate the date they voted, their printed name and address.

Petitioners claim the Board violated the requirements of 25 P.S. §§ 3146.6(a) and 3150.16(a) by canvassing and counting absentee and mail-in ballots where the outer declaration envelope has not been properly "filled out" with the elector's address. The Board maintains the above provisions do not require the elector to provide their address and the outer envelopes comply with the above statutory requirements.³

III. DISCUSSION

The five statutory provisions of the Election Code at issue do not specifically require the absentee or mail-in elector to provide their address below the declaration on the outer envelope. 25 P.S. §§ 3146.6(a) and 3150.16(a) govern voting by absentee and mail-in electors. Sections 3146.4. and 3150.14(b) address the form of the declaration on the outer envelope. Section 3146.8(g) addresses the county board's obligations related to canvassing.

25 P.S. § 3146.6(a) states the following regarding absentee ballots:

(a) Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail,

³ Both the Board and Intervenor, DNC, have argued that the 2020 amendments to the Election Code have eliminated time-of-canvassing challenges entirely from § 3146.8(g)(3). The court is not addressing the merits of this argument.

postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added). The same requirements are set forth with respect to mail-in ballots. *See* 25 P.S. § 3150.16(a) (“The elector shall then fill out, date and sign the declaration printed on such envelope.”).

Sections 3146.4 and 3150.14(b), regarding absentee and mail-in ballots respectively, both delegate the form of the declaration to the Secretary of the Commonwealth. For absentee ballots, Section 3146.4 states as follows:

. . . On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector, and the name and address of the county board of election of the proper county. The larger envelope shall also contain information indicating the local election district of the absentee voter. Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors qualifications, together with a statement that such elector has not already voted in such primary or election . . .
25 P.S. § 3146.4.

For mail-in ballots, the statute provides:

(b) Form of declaration and envelope.-- The form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain, among other things, a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election.
25 P.S. § 3150.14(b).

These two provisions, specific to the content of the voter declaration, do not require the elector’s address to be included in the declaration or for the elector to write it in.

The pre-canvassing or canvassing of ballots is processed as follows:

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information

thereon with that contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters' list and/or the “Military Veterans and Emergency Civilians Absentee Voters File,” whichever is applicable. If the county board has verified the proof of identification as required under this act and **is satisfied that the declaration is sufficient** and the information contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters' list and/or the “Military Veterans and Emergency Civilians Absentee Voters File” verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3) (emphasis added).

The court agrees with the Board’s interpretation of § 3146.6(a) and 3150.16(a). The statutory provisions provide that “[t]he elector shall then fill out, date and sign the declaration printed on such envelope.” 25 P.S. §§ 3146.6(a), 3150.16(a). The Legislature did not include a requirement that the elector include their address on the outer envelope. By contrast, in sections 3146.6(a)(3) and 3150.16(a.1), the Legislature explicitly imposed the requirement of a “Complete Address of Witness” when an elector is unable to sign the declaration due to illness or physical disability.⁴ Sections 3146.6(a) and 3150.16(a) do not include an explicit requirement to include the address of the elector as is clearly stated and required in subsequent subsections of the same statute. “It is a well established principle of statutory interpretation that we ‘may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.’” *In*

⁴ By comparison, 25 P.S. § 3150.16(a.1) states as follows:

(a.1) Signature.—Any elector who is unable to sign the declaration because of illness or physical disability, shall be excused from signing upon making a declaration which shall be witnessed by one adult person in substantially the following form:

I hereby declare that I am unable to sign my declaration for voting my mail-in ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

(Mark)

(Date)

(Complete Address of Witness)

(Signature of Witness)

re November 3, 2020 General Election, No. 149 MM 2020, 2020 WL 6252803, at *14 (Pa. Oct. 23, 2020) (citing *Sivick v. State Ethics Commission*, No. 62 MAP 2019, 2020 WL 5823822, at *10 (Pa. Oct. 1, 2020)) (holding, *inter alia*, that the Election Code does not require signature comparison).

The instructions by the Board accompanying each absentee or mail-in ballot do not inform the voter that their address is required or that its omission will invalidate their ballot. The instructions state “Be sure that you **sign** and **date** your [return] envelope.” Exhibit A, Stipulated Facts, filed 11/9/20 (emphasis in original). Underneath that instruction, it is stated “***Please Note: Your ballot cannot be counted without a signature on the return envelope.***” *Ibid*. The instructions do not state that a ballot will be not be counted without an address on the outer declaration envelope. Additionally, the checkbox reminder on the top of the outer envelope only asks the elector if they have signed the declaration in their own handwriting and if they have put their ballot inside the secrecy envelope and placed it in the outer envelope. It would be patently improper and unfair to invalidate a ballot where a voter reasonably relies upon lawful voting instructions by their election board.⁵ *In re Recount of Ballots Cast in General Election on November 6, 1973*, 325 A.2d 303, 308-309 (Pa. 1974) (“[T]he invalidation of a ballot where the voter has complied with all instructions communicated to him and in the absence of any evidence of improper influence having been exerted, invalidation would necessarily amount to an unreasonable encroachment upon the franchise and the legislative enactment should not be interpreted to require such a result.”) (holding that votes must be counted where electors failed to remove, as explicitly required by the Election Code, a perforated corner containing identifying information where “[t]here was no direction on

⁵ The court is aware that “erroneous guidance from the Department or county boards of elections cannot nullify the express provisions of the Election Code.” *In re Scroggin*, 237 A.3d 1006, 1021 (Pa. Sept. 17, 2020). However, the court finds that requiring an elector to “fill out” their address on the outer envelope is not expressly stated in the Election Code. The Board’s instructions to voters is consistent with the requirements of the Election Code.

the face of the ballot instructing the voter of the need to remove that particular portion before casting the ballot”).

Petitioners urge the court to construe “fill out” in Sections 3146.6(a) and 3150.16(a) to mean “fill out your address in order for your vote to be counted.” The Election Code does not explicitly state as such and the court will not add language to the statute imposing a voting condition which the Legislature did not specifically include. Even if one assumes, *arguendo*, that the address requirement may be required, 556 of 592 challenged ballots include the electors’ addresses on the outer declaration envelopes (266 of which contain both the electors’ pre-printed addresses and hand-written/typed mailing labels on the return addresses of the outer envelope, 243 of which contain the electors’ pre-printed addresses, and 47 of which contain the electors’ hand-written/typed mailing labels on the return addresses of the outer envelope). The remaining 36 ballots contain a bar code which links the outer envelope to the voter’s registration file contained in the Statewide Uniform Registry of Electors system (validating their addresses) provided to state election officials earlier in 2020.⁶ By signing and dating the declaration, the elector has declared they are “qualified to vote the enclosed ballot.”⁷

⁶ In order to vote by absentee or mail-in ballot, an elector must submit an application where he or she must attest to their address at least annually or for each election. *See* 25 P.S. § 3150.12(g)(1) (“A mail-in ballot application mailed to an elector under this section [permanent mail-in voting list], which is completed and timely returned by the elector, shall serve as an application for any and all primary, general or special elections to be held in the remainder of that calendar year and for all special elections to be held before the third Monday in February of the succeeding year.”); 25 P.S. § 1350.12(b)(1)(ii) (requiring an application for mail-in ballot to contain the length of time the elector has been a resident of the voting district); 25 P.S. § 3146.2(e.1); 25 P.S. § 3146.2(b). There is no similar requirement for an in-person voter. While an in-person voter could vote at the polls without having submitted their address for many years, a mail-in or absentee elector can only receive a ballot if they have provided an address and attested to its accuracy as set forth above.

⁷ 25 P.S. § 2811 – Qualifications of Electors – states that every citizen of the Commonwealth at least eighteen years of age, if properly registered, shall be entitled to vote if the elector possesses the following qualifications:

- (1) He or she shall have been a citizen of the United States at least one month.
- (2) He or she shall have resided in the State ninety days immediately preceding the election.

Voters should not be disenfranchised by reasonably relying upon voting instructions provided by election officials which are consistent with the Election Code. There is a “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *9 (citing *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)). “[A]lthough election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote.” *Ibid.* “[B]allots containing mere minor irregularities should only be stricken for compelling reasons.” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004). The Supreme Court has recognized that “marking a ballot in voting is not a matter of precision engineering but of an unmistakable registration of the voter’s will in substantial conformity to the statutory requirements.” *Id.* at 799 (citing *Appeal of Gallagher*, 41 A.2d 630, 632-33 (Pa. 1945)).

Petitioners’ concerns about a voter’s address are legitimate. A voter’s address is a core qualification to vote. It is true that 36 of the outer envelopes in this case do not contain any written or pre-printed indicia of the voter’s address. This omission should not, and will not, disqualify a declared, qualified voter from participating in this election – particularly where the bar code confirms the recently declared address of the mail-in voter with the state registry and where no claim of fraud or improper influence is alleged.

IV. CONCLUSION

The Election Code does not require a voter to provide their address on the declaration envelope. The Montgomery County Board of Elections properly was satisfied, in accordance with section 3146.8(g)(3), that the voters’ declarations are “sufficient.” The court finds that the Board

(3) He or she shall have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within thirty days preceding the election.

properly overruled Petitioners' objections to all 592 challenged ballots. These ballots must be counted.

Accordingly, based upon all of the foregoing, the court denies Plaintiffs' petition for review and will enter the accompanying order.

BY THE COURT:



RICHARD P. HAAZ, J.

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

DONALD J. TRUMP FOR PRESIDENT, INC., :
et al., :
Plaintiffs/ Petitioners : NO. 2020-18680
v. :
MONTGOMERY COUNTY BOARD OF :
ELECTIONS, :
Defendant/ Respondent :
DEMOCRATIC NATIONAL COMMITTEE, et al. :
Intervenor :

ORDER

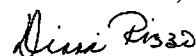
AND NOW, this 13th day of November, 2020, upon consideration of the Petition for Review of Decision by the Montgomery County Board of Elections filed on behalf of Petitioners Donald J. Trump for President, Inc., Republican National Committee, Heidelbaugh for Attorney General, Inc., Garrity for PA, and Daniel J. Wissert, and the responses in opposition thereto filed by Respondent Montgomery County Board of Elections, Intervenor Democratic National Committee, *Amici Curiae* on behalf of the NAACP-Pennsylvania State Conference, Common Cause Pennsylvania, League of Women Voters of Pennsylvania, and the Black Political Empowerment Project, it is hereby **ORDERED and DECREED** that said Petition for Review is **DENIED**. The Montgomery County Board of Elections is **ORDERED** to count the 592 ballots which are the subject of the petition.

BY THE COURT:



RICHARD P. HAAZ, J.

This Memorandum and Order has been e-filed on 11/13/20.
Copies sent via Prothonotary to the parties of record.
Michael Kehs, Esq., Andrea Grace, Esq., Michael Jorgensen, Court Administration, Civil Division



Secretary

EXHIBIT A



Vote by mail is easy and secure!

Return your ballot in a sealed envelope.

Place your ballot in the envelope, seal the envelope, and place the envelope in the mail. For more information, visit www.elections.ca or call 1-800-387-6842. For more information, visit www.elections.ca or call 1-800-387-6842.

For more information, visit www.elections.ca or call 1-800-387-6842. For more information, visit www.elections.ca or call 1-800-387-6842.

THANK YOU FOR VOTING!



THANK YOU FOR VOTING!

Thank you for voting. Your ballot is secure and your vote is counted. For more information, visit www.elections.ca or call 1-800-387-6842.



PACK AND SEAL YOUR BALLOT FOR MAILING OR DROP-OFF

1. Place your ballot in the Official Election Ballot envelope and seal the envelope. Do not use any other envelope or envelope.

2. Place the Official Election Ballot envelope in the Official Election Ballot envelope and seal the envelope.

For more information, visit www.elections.ca or call 1-800-387-6842. For more information, visit www.elections.ca or call 1-800-387-6842.



SIGN AND DATE THE RETURN ENVELOPE

1. Fill in the Voter's Declaration on the return envelope.
2. Be sure that you have signed and dated the envelope.

For more information, visit www.elections.ca or call 1-800-387-6842. For more information, visit www.elections.ca or call 1-800-387-6842.



RETURN

1. Place your ballot in the envelope.

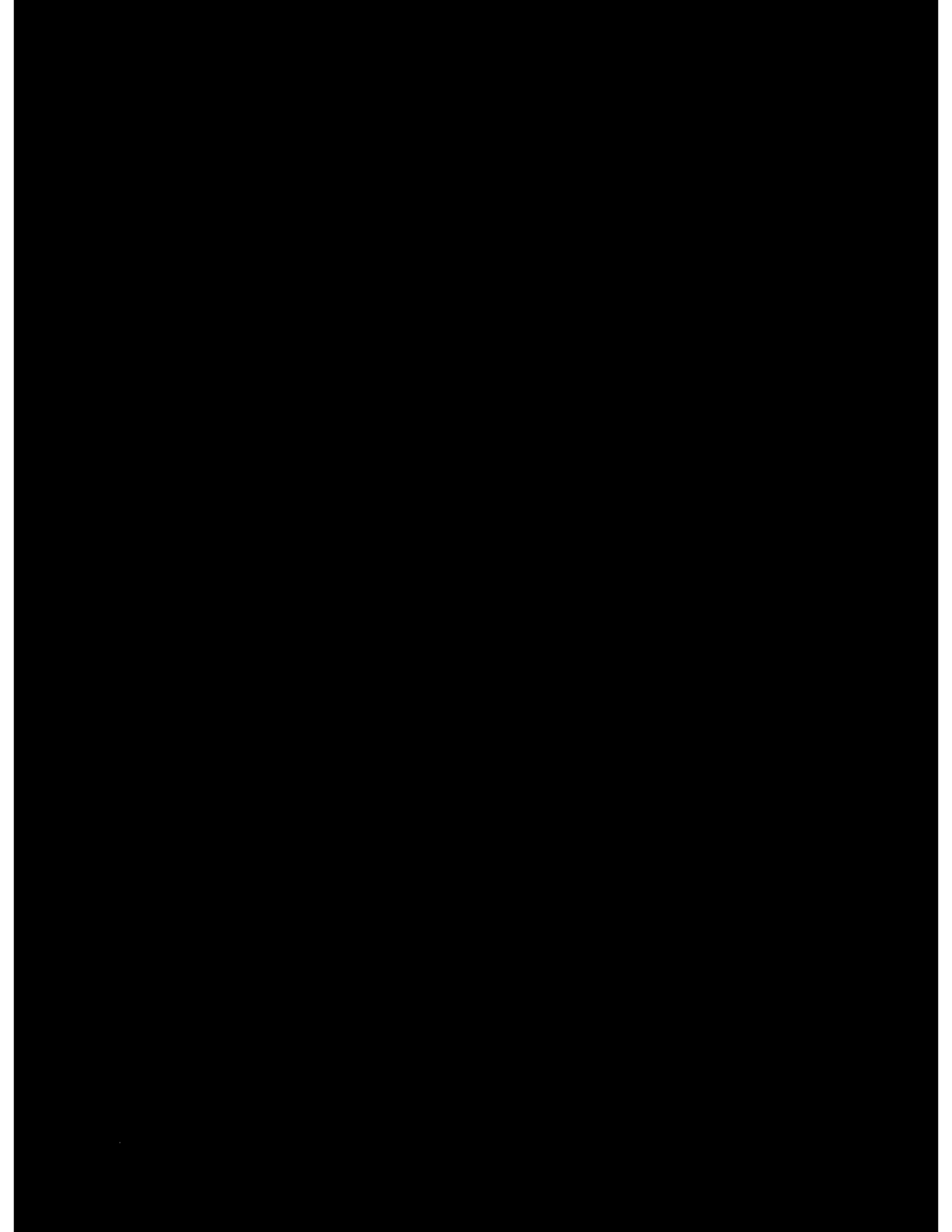
2. Place the envelope in the mail. Do not use any other envelope or envelope.

For more information, visit www.elections.ca or call 1-800-387-6842. For more information, visit www.elections.ca or call 1-800-387-6842.

For more information, visit www.elections.ca or call 1-800-387-6842. For more information, visit www.elections.ca or call 1-800-387-6842.

Your ballot and the return envelope are sealed and returned to the election officials. For more information, visit www.elections.ca or call 1-800-387-6842.

EXHIBIT B



THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY
5800 S. UNIVERSITY AVENUE
CHICAGO, ILLINOIS 60637
TEL: 773/936-3234
FAX: 773/936-3234
WWW: www.chem.uchicago.edu

EXHIBIT C

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1. The first part of the document is a letter from the author to the editor, dated 10/10/1998. The letter discusses the author's interest in the journal and the topic of the article.

2. The second part of the document is the author's response to the editor's letter, dated 11/10/1998. The author expresses their appreciation for the editor's interest and provides further details about the article.

3. The third part of the document is the author's response to the editor's letter, dated 12/10/1998. The author discusses the article's content and the author's expectations for the journal.

4. The fourth part of the document is the author's response to the editor's letter, dated 1/11/1999. The author discusses the article's content and the author's expectations for the journal.

5. The fifth part of the document is the author's response to the editor's letter, dated 2/11/1999. The author discusses the article's content and the author's expectations for the journal.

6. The sixth part of the document is the author's response to the editor's letter, dated 3/11/1999. The author discusses the article's content and the author's expectations for the journal.

7. The seventh part of the document is the author's response to the editor's letter, dated 4/11/1999. The author discusses the article's content and the author's expectations for the journal.

8. The eighth part of the document is the author's response to the editor's letter, dated 5/11/1999. The author discusses the article's content and the author's expectations for the journal.

9. The ninth part of the document is the author's response to the editor's letter, dated 6/11/1999. The author discusses the article's content and the author's expectations for the journal.

10. The tenth part of the document is the author's response to the editor's letter, dated 7/11/1999. The author discusses the article's content and the author's expectations for the journal.

11. The eleventh part of the document is the author's response to the editor's letter, dated 8/11/1999. The author discusses the article's content and the author's expectations for the journal.

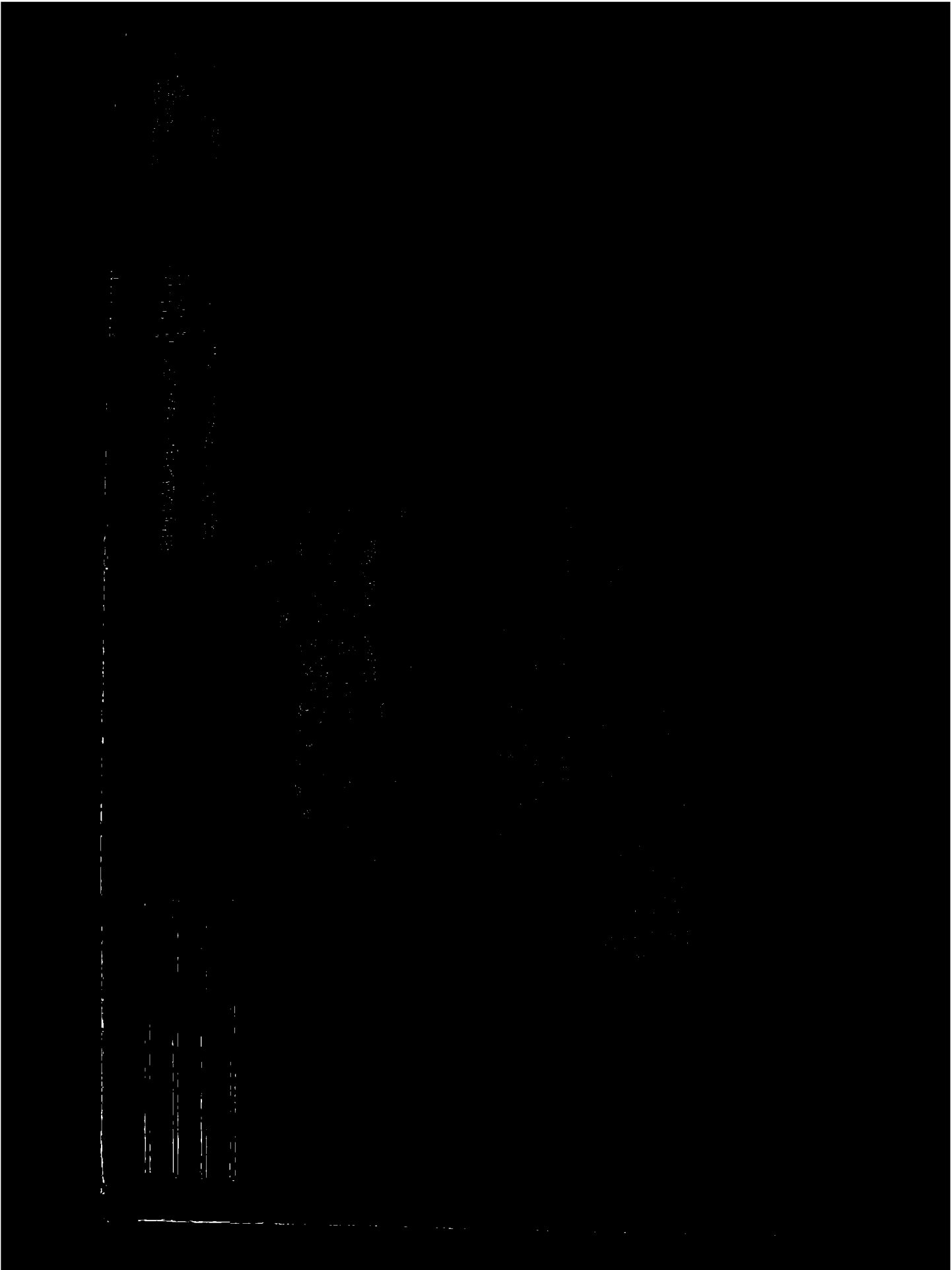
12. The twelfth part of the document is the author's response to the editor's letter, dated 9/11/1999. The author discusses the article's content and the author's expectations for the journal.

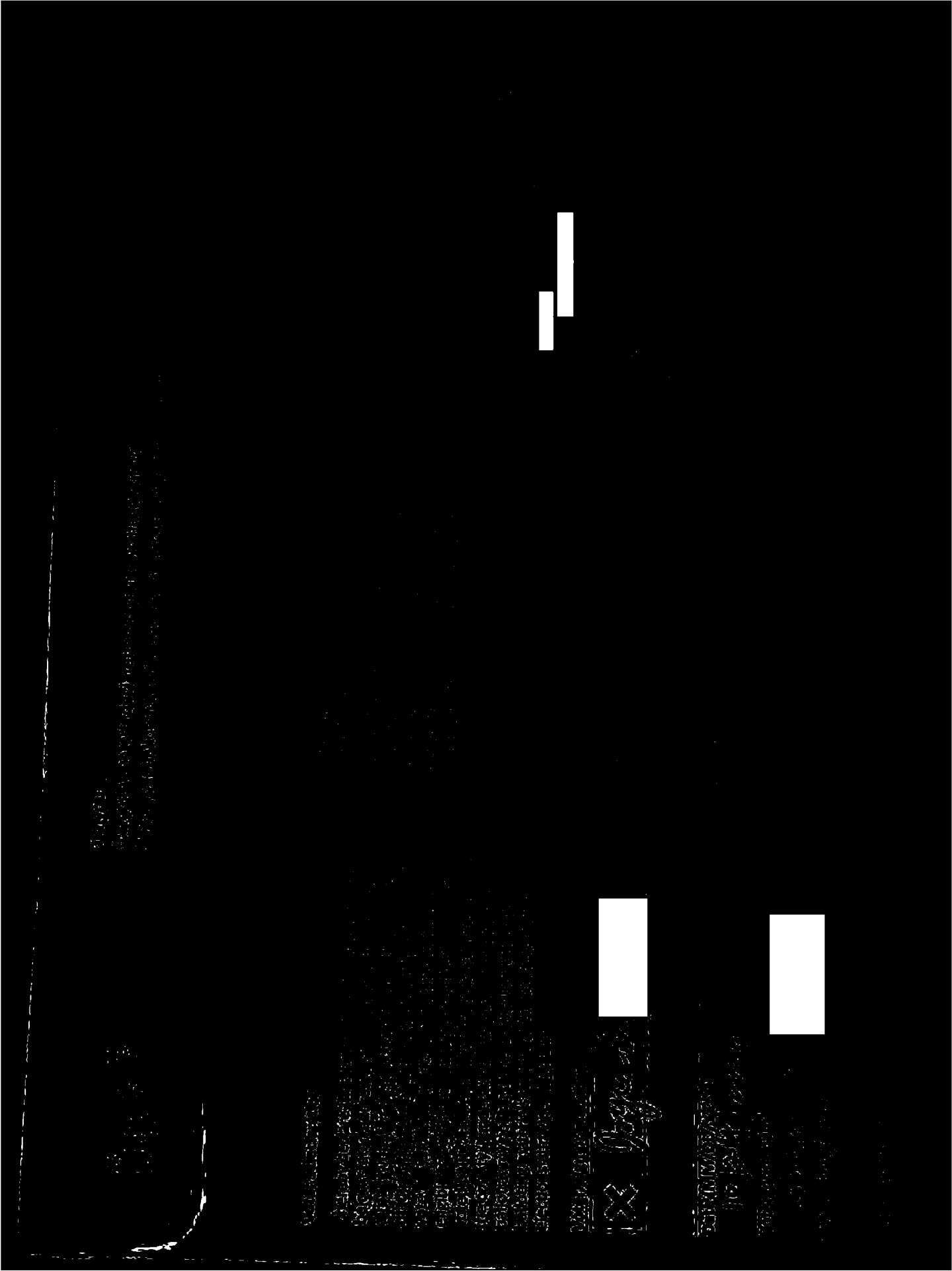
13. The thirteenth part of the document is the author's response to the editor's letter, dated 10/11/1999. The author discusses the article's content and the author's expectations for the journal.

14. The fourteenth part of the document is the author's response to the editor's letter, dated 11/11/1999. The author discusses the article's content and the author's expectations for the journal.

15. The fifteenth part of the document is the author's response to the editor's letter, dated 12/11/1999. The author discusses the article's content and the author's expectations for the journal.

EXHIBIT E





2/28/24, 10:48 AM

SUBJECT: RE: PA lawsuit - Wisconsin parallel

FROM: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>

TO: Judge Troupis <[REDACTED]@gmail.com>

CC: George Burnett <[REDACTED]@lcojlaw.com>, Kenneth Chesebro <[REDACTED]@msn.com>

DATE: 12/21/2020 18:58

ATTACHMENTS (20201221-185806-0000888): ["image001.png"](#)

Ok. I'm around.

Joe

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com



From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Monday, December 21, 2020 6:49 PM
To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>
Cc: George Burnett <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Fwd: PA lawsuit - Wisconsin parallel

Joe,

See below.

I have called Reince and Justin to see what's really going on. Reince heard the President may want to talk.

I briefed George within the last 45 minutes.

Ken Chesebro and I also spoke and I told him if we file anything he will need to write it.

Today was the first day I was able to buy even one present for Karen, aaargh.

Jim

Sent from my iPhone

Begin forwarded message:

From: Judge Troupis <[REDACTED]@gmail.com>
Date: December 21, 2020 at 6:38:41 PM CST
To: George Burnett <[REDACTED]@lcojlaw.com>
Subject: Fwd: PA lawsuit - Wisconsin parallel

Here it is

Jim

Sent from my iPhone

Begin forwarded message:

From: Bruce Marks <[REDACTED]@mslegal.com>
Date: December 21, 2020 at 5:01:10 PM CST
To: Boris Epshteyn <[REDACTED]@donaldtrump.com>, Jim Troupis <[REDACTED]@gmail.com>
Cc: "Eastman, John" <[REDACTED]@chapman.edu>
Subject: RE: PA lawsuit - Wisconsin parallel

Judge, can you call me? The Campaign wants us to work together with professor eastman to file an Article II cert petition from Wisconsin to scotus, thanks. [REDACTED]

From: Boris Epshteyn <[REDACTED]@donaldtrump.com>
Sent: Monday, December 21, 2020 5:44 PM
To: Bruce Marks <[REDACTED]@mslegal.com>; Jim Troupis <[REDACTED]@gmail.com>
Subject: PA lawsuit - Wisconsin parallel

Dear Judge Troupis,

Please meet Bruce Marks, our attorney in PA who spearheaded the SCOTUS filing yesterday.

Bruce - Judge Troupis is our leading attorney in Wisconsin.

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

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SUBJECT: Re: PA lawsuit - Wisconsin parallel
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: "Olson, Joseph L (13465)" <[REDACTED]@michaelbest.com>, Judge Troupis <[REDACTED]@gmail.com>
CC: George Burnett <[REDACTED]@lcojlaw.com>
DATE: 12/21/2020 19:19
ATTACHMENTS (20201221-191916-0000887): "[image001.png](#)"

To update Joe and George on what I told Jim:

I read the PA cert. petition yesterday and was impressed, particularly with the burden-shifting argument that once it's established that the # of ballots cast contrary to the Legislature's direction exceeds Biden's margin of "victory," the burden is on Biden to prove he would have won anyway.

As long as Eastman is okay with me adapting his stuff, and hopefully Joe and/or George can help on the state-law stuff, I'm willing to do a draft. I could start tomorrow late afternoon when I get back to Boston (at Miami Beach now). I think I'd need to have a rough draft by Wednesday evening, so we could file by Thursday, hopefully in the afternoon.

Eastman would presumably be on the brief, if he wanted, but Jim would have to be counsel of record and have ultimate control. I think Eastman will be okay with this given that I'm working with Jim, and Eastman signed onto a con law brief I wrote 4 years ago:

<https://www.scotusblog.com/wp-content/uploads/2016/06/15-981-CCJ.pdf>

No commitment should be made to file until we see how it looks, but given the solid PA cert. petition, I feel a non-frivolous WI cert. petition strengthens the President's position going into Jan. 6, especially if the AZ cert. petition is still pending — those 3 states would be enough in theory to deny Biden election.

Ken

Get [Outlook for iOS](#)

From: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>
Sent: Monday, December 21, 2020 7:58:06 PM
To: Judge Troupis <[REDACTED]@gmail.com>
Cc: George Burnett <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>
Subject: RE: PA lawsuit - Wisconsin parallel

Ok. I'm around.

Joe

Joseph L. Olson

Partner

T [REDACTED] | michaelbest.com



From: Judge Troupis <[REDACTED]@gmail.com>
Sent: Monday, December 21, 2020 6:49 PM
To: Olson, Joseph L (13465) <[REDACTED]@michaelbest.com>

TROUPIS 0010303

2/28/24, 10:49 AM

Cc: George Burnett <[REDACTED]@lcojlaw.com>; Kenneth Chesebro <[REDACTED]@msn.com>
Subject: Fwd: PA lawsuit - Wisconsin parallel

Joe,
See below.

I have called Reince and Justin to see what's really going on. Reince heard the President may want to talk. I briefed George within the last 45 minutes.

Ken Chesebro and I also spoke and I told him if we file anything he will need to write it. Today was the first day I was able to buy even one present for Karen, aaargh.

Jim

Sent from my iPhone

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To: George Burnett <[REDACTED]@lcojlaw.com>
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Here it is
Jim

Sent from my iPhone

Begin forwarded message:

From: Bruce Marks <[REDACTED]@mslegal.com>
Date: December 21, 2020 at 5:01:10 PM CST
To: Boris Epshteyn <[REDACTED]@donaldtrump.com>, Jim Troupis <[REDACTED]@gmail.com>
Cc: "Eastman, John" <[REDACTED]@chapman.edu>
Subject: RE: PA lawsuit - Wisconsin parallel

Judge, can you call me? The Campaign wants us to work together with professor eastman to file an Article II cert petition from Wisconsin to scotus, thanks. 215-939-0423.

From: Boris Epshteyn <[REDACTED]@donaldtrump.com>
Sent: Monday, December 21, 2020 5:44 PM
To: Bruce Marks <[REDACTED]@mslegal.com>; Jim Troupis <[REDACTED]@gmail.com>
Subject: PA lawsuit - Wisconsin parallel

Dear Judge Troupis,

Please meet Bruce Marks, our attorney in PA who spearheaded the SCOTUS filing yesterday.

Bruce - Judge Troupis is our leading attorney in Wisconsin.

Best,

TROUPIS 0010304

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

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SUBJECT: Indefinitely Confined - press push
FROM: Boris Epshteyn <[REDACTED]@donaldtrump.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
CC: Brian Schimming <[REDACTED]@yahoo.com>, George Burnett <[REDACTED]@lcojlaw.com>, Joe Olson <[REDACTED]@michaelbest.com>
DATE: 01/01/2021 14:25
ATTACHMENTS (20210101-142500-0002847): ["WI - Indefinitely Confined Voters Research.pdf"](#)

Gentlemen - Happy New Year!

Attached is a document regarding false Indefinitely Confined classifications developed by our team, led by Mike Roman.

Brian - would love to push this out to Wisconsin press. Do you have folks in mind who you think will be interested?

Thank you!

Best,

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

Cell: [REDACTED]

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On Dec 29, 2020, at 5:19 PM, Judge Troupis <[REDACTED]@gmail.com> wrote:

Boris,
Brian Schimming is waiting to here about whether he can alert the Wisconsin press. Please let us know what we can say. It would be very helpful if we did not have them read about it from the national media--they have been good to us.
Thanks.
Jim Troupis

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WISCONSIN INDEFINITELY CONFINED VOTERS

The information presented here is based on a sample of approximately 300 names for which a social media page was able to be identified. Out of those, over 20% of the persons who claimed they were indefinitely confined posted photos and information which indicates they did not actually fit that classification, as defined by Wisconsin law.

It is safe to assume that 20% falsification is a very conservative number due to the fact that very few people have all of their information publicly available.

In evaluating evidence that a person was indeed indefinitely confined, only 2 of the 300 (.67%) could be confirmed.

Applying the conservative 20% provable falsification rate to the total number of Indefinitely Confined ballots cast in Wisconsin in 2020 - appx 215,000 - results in a determination that 43,000 votes were cast and counted that can potentially be proven as invalid via social media posts.

For reference, in 2016, the number of Indefinitely Confined ballots cast in Wisconsin was 400% less than 2020, at approximately 50,000.

WISCONSIN INDEFINITELY CONFINED VOTERS

- **Under Wisconsin state law, people can vote absentee without showing an ID if they say they are indefinitely confined because of age, disability or infirmity**
 - In a Dec. 14, 2020, article, the *Milwaukee Journal Sentinel* reported, “The state Supreme Court ruled Monday it is up to Wisconsinites to determine whether they face challenges that allow them to vote absentee without providing a copy of a photo ID.

“Under state law, people can vote absentee without showing an ID if they say they are indefinitely confined because of age, disability or infirmity.

“Two county clerks this spring contended voters could meet that status because of the coronavirus pandemic and a stay-at-home order issued by Democratic Gov. Tony Evers.

“The state Republican Party sued directly with the state Supreme Court and the justices quickly issued an initial order that said the advice from the county clerks was faulty. The clerks rescinded their advice.”¹
- **A Wisconsin Supreme Court majority decision stated if voters falsely claimed they were indefinitely confined “their ballots would not count”**
 - In a Dec. 14, 2020, article, the *Milwaukee Journal Sentinel* reported, “The majority decision stated if voters falsely claimed they were indefinitely confined ‘their ballots would not count.’ But the court did not give license to throw out large numbers of ballots without making determinations about the status of each individual voter, as Trump has sought in his separate lawsuit.”²

¹ Patrick Marley, “Wisconsin Supreme Court says individuals can determine for themselves whether they can avoid the voter ID law because of age or disability,” *Milwaukee Journal Sentinel*, Dec. 14, 2020

² Patrick Marley, “Wisconsin Supreme Court says individuals can determine for themselves whether they can avoid the voter ID law because of age or disability,” *Milwaukee Journal Sentinel*, Dec. 14, 2020

PUBLIC OFFICIALS

- **In September 2020, Democratic State Senator Patricia Schachtner said she and her husband Joe were “going to get out and enjoy all the wonderful natural resources that our state has to offer”**
 - Sept. 26, 2020, Facebook post, “It’s National Public Lands Day and Hunting & Fishing Day! So Joe and I are going to get out and enjoy all the wonderful natural resources that our state has to offer- I hope you will too!”³



- **In November 2020, Democratic State Assemblywoman Sheila Stubbs was re-elected to the Wisconsin General Assembly**
 - On Nov. 3, 2020, Sheila Stubbs wrote, “Thank you to my Family & Friends, Constituents of the 77th Assembly District, Supporters of Team Stubbs for re-electing me again to a 2 year term! I look forward to serving you for another 2 years!”⁴
- **On Oct. 31, 2020, Marina Dimitrijevic (Milwaukee City Alderwoman) met with Fred Gillich and his company Too Much Metal For One Hand**
 - On Oct. 31, 2020, Alderwoman Marina Dimitrijevic wrote, “Today I met the man behind the masks...the free masks provided by our City of Milwaukee Health Department via the MKE Cares legislation we adopted unanimously and I authored.

³ <https://www.facebook.com/Patty.Schachtner.WI/photos/a.903118543188209/1553179034848820/>

⁴ <https://www.facebook.com/sheliastubbsforassembly/>

“Fred Gillich and his company Too Much Metal For One Hand. make these awesome masks that you can pick up at your nearest Milwaukee Public Library for free!

“You get to protect people and represent the 414!”⁵

<https://city.milwaukee.gov/CommonCouncil/CouncilMembers/District14>

➤ **On Nov. 12, 2020, Marcelia Nicholson (Chairwoman of the Milwaukee County Board of Supervisors) signed the 2021 Milwaukee County budget**

- On Nov. 12, 2020, Marcelia Nicholson tweeted, “It was a pleasure to sign the 2021 Milwaukee County budget today with County Executive @DavidCrowleyWI and advance our racial equity goals while investing in essential services and our county employees. I look forward to our continued partnership.”⁶

➤ **Nicki Vander Meulen (Biden supporter and Emerge Wisconsin candidate) is a member of the Madison School Board and ran for Wisconsin Assembly in 2020**

- According to a July 28, 2020, press release from the Teaching Assistants’ Association, “The Teaching Assistants’ Association (TAA) has endorsed Nicki Vander Meulen in the race for Wisconsin Assembly District 76. While a few candidates in this race align with the TAA’s political platform, the TAA—as the labor union for graduate workers at UW– Madison—recognizes Nicki’s strong advocacy for public education and her vision for progressive change in the Wisconsin State Legislature.

“Nicki has comprehensive and concrete platforms on racial justice, labor rights, disability justice and public health, public education, and mass incarceration. Importantly, she understands how these issues are interconnected and approaches them as such. Nicki has also been deeply involved with community organizations and coalitional work. Since her election to the Madison Metropolitan School District (MMSD) Board of Education, Nicki has been fighting for police- free schools and for allocating more funding to marginalized communities, including students of color and disabled students. In 2018, Nicki was one of only two members of the MMSD Board to vote against the contract between the district and the Madison Police Department. Nicki has recently supported the teachers and staff of MMSD when they faced unilateral changes to their working policies, challenging MMSD administrators to negotiate in good faith with union representatives. Nicki started her own legal practice for juvenile defense and mental health cases, advocating for children and adults with unique needs—we trust Nicki to not only continue her advocacy for marginalized people, but to also build strong coalitions to push for progressive policies in Wisconsin.”⁷

⁵ <https://www.facebook.com/AlderwomanMarina/photos/a.101980518158515/190415119315054/>

⁶ <https://twitter.com/Marci4MKE/status/1326991191167143940>

⁷ Press Release, “TAA endorses Nicki Vander Meulen in race for Wisconsin Assembly District 76!” Teaching Assistants Association, July 28, 2020

- **Sharon Abston-Coleman is a member of the Milwaukee Department of Aging**
 - In a Sept. 28, 2020, article, Urban Milwaukee reported, “The County Executive’s Office informed the Commission on Aging Friday, September 25, 2020 of plans to demote the Milwaukee County Department on Aging (MCDA) to an organizational unit underneath the Department of Health and Human Services (DHHS).”⁸
 - According to the same article, ““I’m really concerned about will there even be a Department on Aging, making sure it’s free- standing and that it still exists and doesn’t get gobbled up somewhere,” expressed Vice Chair Sharon Abston-Coleman a couple weeks earlier during the June Executive Committee meeting.”⁹
 - <https://county.milwaukee.gov/files/county/department-on-aging/PDF/COASeniorCenterCommitteeInvitationletter.pdf>

- **In April 2020, Kate McGinnity (an Emerge Wisconsin candidate) was elected to the Dane County Board of Supervisors**
 - In an April 13, 2020, article, the *News & Independent* reported, “Kathleen “Kate” McGinnity of Cambridge has won the 37th District seat on the Dane County Board of Supervisors.

“With all wards reporting, McGinnity, a former public school special education teacher, received 2,683 votes, or 67 percent of the vote.”¹⁰

- **Katie Kohl, who lives at 552 Hickory Ct. Verona, WI 53593, is a Democrat and a member of the Verona City Council**
 - <https://www.ci.verona.wi.us/directory.aspx?EID=57>

- **Wendy Stallings, an Emerge Wisconsin candidate, is a member of the Sussex Village Board**
 - www.villagesussex.org/Home/Components/StaffDirectory/StaffDirectory/72/

- **In June 2020, Kori Ashley was appointed to the Milwaukee Circuit Court bench by Gov. Tony Evers**
 - In a June 9, 2020, article, the *Milwaukee Journal Sentinel* reported, “A young lawyer with experience helping poor Wisconsin residents navigate the legal system has been named a judge in Milwaukee County.

⁸ Richmond Izard, “Milwaukee County Reveals Strategy that Eliminates Department on Aging,” *Urban Milwaukee*, Sept. 28, 2020

⁹ Richmond Izard, “Milwaukee County Reveals Strategy that Eliminates Department on Aging,” *Urban Milwaukee*, Sept. 28, 2020

¹⁰ Karyn Saemann, “McGinnity wins Dane County Board District 37 seat,” *News & Independent*, April 13, 2020

“Kori Ashley, a staff attorney with Legal Action Wisconsin, was appointed to the Circuit Court bench by Gov. Tony Evers to fill the term of retiring Judge Dennis Cimpl, starting Sept. 11, and will face election in 2021.”¹¹

¹¹ Bruce Vielmetti, “Evers names young reformer to Milwaukee County Circuit Court,” Milwaukee Journal Sentinel, June 9, 2020

DEMOCRATIC LEADERSHIP

- **The following individuals appear on the Wisconsin Democratic Party's 2020 convention delegate list (wisdems.org/events-nav/2020-national-convention/2020widelegation/)**
 - Esther Lenchner (Delegate for Bernie Sanders)
 - Lynn Carey (Dem delegate for Biden; had double lung transplant five years ago)
 - Michael Childers (At-large alternate delegate for Biden)
 - Adam Brabender (Dem Platform Committee)

- **Judy Karofski is the former mayor of Middleton and lists herself as a pro-progressive community activist and Biden supporter; She was tagged in a Facebook post at the AC Hotel in Madison on Nov. 11, 2020**
 - <https://www.facebook.com/photo?fbid=10221317751826895&set=ecnf.661920277>
 - Twitter bio: "Pro-progressive community activist. @joeforwisconsin in a Boston accent. Writes abt #seniorhousing. Dog's lineage questionable. Kid won #SCOWIS! @judgekarofsky"¹²

- **Chris Rahlf is chairwoman of the Ozaukee County Democratic Party and was actively campaigning for Democrats in the 2020 election**
 - www.facebook.com/ChrisForWI/

- **Vic Ouimette is the chairman of the Iron County Democratic Party. It also appears that he is a town board supervisor in Mercer; His wife is also on the Indefinitely Confined list**
 - <https://wisdems.org/our-party/more/county-parties/>
 - <https://www.townofmercerc.com/government/town-supervisors-employees/>

- **Jim Zahn is the chairman of the Dodge County Democratic Party, and he was photographed (by his wife Michelle, who is also on the Indefinitely Confined list) working on his farm in August 2020**
 - <https://wisdems.org/our-party/more/county-parties/>
 - <https://www.facebook.com/michelle.zahn1/posts/3498267150205096>

¹² <https://twitter.com/karofsky?lang=en>

REGISTERED VOTERS

- **On Oct. 10, 2020, Samantha Troemel (Biden supporter) got married**
 - www.facebook.com/photo?fbid=664258401189316&set=a.181413812807113
- **On Oct. 12, 2020, Lori Martinelli posted a picture on Facebook of herself on vacation**
 - www.facebook.com/photo/?fbid=10164104648150034&set=ecnf.519050033
- **Karyn Abrego worked for NextGen against Trump, and was pictured outside in July 2020 on her Facebook page**
 - www.facebook.com/photo/?fbid=723599425066102&set=ecnf.100022481521885
- **On Nov. 7, 2020, Al Poliarco posted videos of Biden celebrations in Madison**
 - www.facebook.com/al.poliarco.5/videos/10218593677495056
- **On Oct. 24, 2020, Aliya Heber posted a picture on Facebook of herself in a cornfield**
 - www.facebook.com/photo?fbid=2763204310663112&set=a.1438797119770511
- **On Oct. 15, 2020, Leah Rose Ershler posted on Facebook about openings at her salon**
 - www.facebook.com/leahrose91/posts/10164606068330077
- **On Oct. 25, 2020, Tu Le posted on Facebook that she was having real estate showings of a home for sale**
 - <https://www.facebook.com/TuPlusFour/posts/2654133118234546>
- **On Aug. 28, 2020, Kimberlyl Poellmann posted pictures on Facebook of her trip to Pittsburgh**
 - <https://www.facebook.com/Kthom11/posts/10217362837615104>
- **On Aug. 19, 2020, John Berzinski posted a video on Facebook of his work as a bulldozer operator**
 - <https://www.facebook.com/johnnyrokit/videos/10214622762836576/>
- **On Oct. 21, 2020, Rachel Edge (Biden supporter) posted on Facebook that she hadn't been nervous about Covid, but had eight people on her bus without masks (works for City of Madison public transportation)**

- <https://www.facebook.com/rachel.edge.336/posts/794838297976915>
- **On Oct. 11, 2020, Karl Granberg checked into the Grand Geneva Resort & Spa**
 - <https://www.facebook.com/karl.granberg.9/posts/3450114448547760>
- **On Sept. 27, 2020, Shawn Grover posted pictures from his vacation in the UP**
 - <https://www.facebook.com/shawn.grover.7/posts/3961401090553378>
- **On Aug. 1, 2020, Chloe Bruland posted a picture of herself buying plants at a nursery**
 - <www.facebook.com/photo?fbid=10223685245264390&set=ecnf.1390060121>
- **On Sept. 8, 2020, Jessica Lawler posted a picture on Facebook of herself wearing a mask while holding two babies at the University of Wisconsin**
 - <www.facebook.com/photo?fbid=10158136014815589&set=a.10151179799090589>
- **On Sept. 5, 2020, Anna Vang posted a picture on Facebook of her family getting family pictures taken**
 - <www.facebook.com/photo?fbid=10157644590873546&set=pcb.10157644591543546>
- **On Sept. 20, 2020, Dana Borremans posted on Facebook that she could leave her house to pick up plants if anyone was willing to donate (apparent Biden voter)**
 - <www.facebook.com/dana.borremans1/posts/10224405384828776>
- **On Sept. 25, 2020, John Tabaska posted a picture at the University of Wisconsin**
 - <www.facebook.com/photo?fbid=10216208251634035&set=a.1242110307928>
- **On Aug. 9, 2020, Deeq Sabriye posted a picture of himself with his family at a park**
 - <www.facebook.com/photo?fbid=10158715958081944&set=a.461345221943>
- **On Oct. 10, 2020, Allen Jeannette (Biden supporter) posted on Facebook that he was eating at Shake Shack**
 - <www.facebook.com/photo?fbid=10164204689400246&set=a.10150826051470246>
- **In a Sept. 3, 2020, Facebook post, Heidi Quasius Batzner posted a picture of her camping**

- www.facebook.com/photo.php?fbid=10221850296758455&set=pb.1588992337.-2207520000..&type=3)
- **David Michlig got married in July, and wedding photos included one with the couple wearing masks**
 - www.facebook.com/photo?fbid=10157811863649086&set=a.429520664085
- **On Aug. 9, 2020, Ana Thill posted a picture on Facebook of her family on a hike celebrating a 50th wedding anniversary**
 - www.facebook.com/photo?fbid=10163836213290153&set=a.10151777534095153
- **In a Sept. 20, 2020, Facebook post, Penny Linnemanstons posted a “Happy Fall Y’all” picture in front of an apple orchard**
 - www.facebook.com/photo?fbid=3767352433294262&set=a.150810664948475
- **On Aug. 5, 2020, Ed and Mary Zywiec (both indefinitely confined voters) were tagged in a Facebook picture at a golf outing**
 - www.facebook.com/mary.zywiec/posts/10222847044021417
- **On Aug. 1, 2020, Jason Schroepfer posted a picture of his son’s little league team**
 - www.facebook.com/photo?fbid=10158528758804376&set=pcb.10158528763469376
- **On Aug. 23, 2020, Cynthia Yohnk posted pictures of her visit to Marshfield, WI**
 - <https://www.facebook.com/cynthia.yohnk/posts/3181704465216302>
- **On Oct. 18, 2020, Glenn Hametta posted a picture on Facebook of himself taking a 40-mile bike ride**
 - www.facebook.com/photo?fbid=10207546154608474&set=a.1174644942787
- **On Aug. 27, 2020, Charlie Defoe (apparent Biden supporter) posted on Facebook that he was at Walmart**
 - <https://www.facebook.com/cdefoe/posts/10221731972040563>
- **On Nov. 10, 2020, Kristina Wisenhunt posted a picture on Facebook saying she went to Target to buy matching coats for her, her daughter and their dog**
 - www.facebook.com/photo?fbid=10101454608107189&set=a.586867577209

- On July 26, 2020, Jonah Zamzow-Schmidt (Biden supporter) posted a video on Facebook of him confronting an individual spray painting over a BLM mural

- <https://www.facebook.com/jonah.zs/videos/2796730317226633>

- On Nov. 21, 2020, Holly Frishman-Frank posted a picture of herself playing pickleball

- <www.facebook.com/photo?fbid=3618523361540434&set=a.228852830507521>



- On Aug. 4, 2020, Stacy Harbaugh posted pictures of herself at the Settledown Tavern celebrating her 44th birthday

- <https://www.facebook.com/stacy.harbaugh/posts/10157865706617955>

- Brittany Custer had a baby on Oct. 7, 2020

- <https://www.facebook.com/bfrerks/posts/10217650020274304>

- On July 24, 2020, Tim Windisch posted a picture on Facebook of a park by his house

- <www.facebook.com/photo?fbid=3474928669186420&set=a.339100966102555>

- Aysjah Valentine has posted pictures of hair clients on her hair styling Facebook page throughout 2020

- <https://www.facebook.com/AVStylez/>

- Tammy Moothedan is the co-chair of the St. Croix Democratic Party and was a member of the St. Croix County board of Supervisors into 2020

- www.stcroixcountymocrats.org/tammy-moothedan

- <https://www.rivertowns.net/news/government-and-politics/4855473-Turnover-awaits-St.-Croix-County-Board-as-incumbents-opt-out-of-spring-election>

- **On Aug. 22, 2020, Sarah Molnar Nahrstadt posted a picture on Facebook of her in a car with her dog drinking from a Starbucks cup**
 - www.facebook.com/photo?fbid=10224368523023280&set=a.1156167146963

- **On Oct. 11, 2020, Mary Schlegel posted a picture on Facebook of a child walking outside by a lake**
 - www.facebook.com/photo?fbid=3628715940494505&set=a.392636814102450

- **On Oct. 1, 2020, Maria Bendixen posted a thank you note for a successful season at the M&M Stable and Arena**
 - www.facebook.com/maria.bendixen.5
 - www.facebook.com/MMstablearena/posts/1777589325730068

SUBJECT: Re: Indefinitely Confined - press push
FROM: Judge Troupis <[REDACTED]@gmail.com>
TO: Boris Epshteyn <[REDACTED]@donaldtrump.com>
CC: Brian Schimming <[REDACTED]@yahoo.com>, George Burnett <[REDACTED]@lcojlaw.com>, Joe Olson <[REDACTED]@michaelbest.com>
DATE: 01/01/2021 14:45

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DATE: 01/01/2021 22:44
ATTACHMENTS (20210101-224443-0002843): "[Elected official spreadsheet.xlsx](#)"

See the attached spreadsheet.

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TROUPIS 0010328

Cell: [REDACTED]

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Cell: [REDACTED]

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LastName	FirstName	MiddleName	Suffix	Voter Status	Voter Status Reason	Voter Type	Address	ZipCode	Jurisdiction County	Abs Application Date	Applicator	WARD NAN	Ballot Delivery Method	Date Ballot Returned
Abston-Coleman	Sharon			Active	Registered	Regular	2358 N 2ND ST, N	53212-322	CITY OF MI Milwaukee	3/26/2020	Online	City of Mil	Mail	9/26/2020
Schachtner	Patricia	N		Active	Registered	Regular	1064 210TH AVE,	54025-753	TOWN OF : St. Croix Co	6/28/2020	Online	Town of St	Mail	10/1/2020
Stubbs	Shelia	R		Active	Registered	Regular	4 WAUNONA WO	53713-179	CITY OF M/ Dane Coun	3/20/2020	Online	City of Mac	Mail	9/22/2020
Dimitrijevic	Marina			Active	Registered	Regular	2475 S SAINT CLA	53207-195	CITY OF MI Milwaukee	3/13/2020	Online	City of Mil	Mail	10/2/2020
Nicholson	Marcelia	N		Active	Registered	Regular	2341 N 46TH ST,	53210-291	CITY OF MI Milwaukee	4/1/2020	Online	City of Mil	Mail	10/28/2020
VANDERMEULEN	NICOLE	KRISTIN		Active	Registered	Regular	309 W WASHING	53703-359	CITY OF M/ Dane Coun	6/20/2020	Online	City of Mac	Mail	9/25/2020
McGinnity	Kathleen	T.		Active	Registered	Regular	310 E NORTH ST,	53523-870	VILLAGE OI Dane Coun	7/18/2020	Online	Village of C	Mail	9/28/2020
Kohl	Catherine	Anne		Active	Registered	Regular	552 HICKORY CT,	53593-161	CITY OF VE Dane Coun	3/18/2020	Online	City of Ver	Mail	10/13/2020
Stallings	Wendellyn	L		Active	Registered	Regular	N66W24173 CHA	53089-301	VILLAGE OI Waukesha	3/25/2020	Online	Village of S	Mail	10/23/2020
Ashley	Kori	L		Active	Registered	Regular	3002 N 70TH ST,	53210-122	CITY OF MI Milwaukee	3/17/2020	Online	City of Mil	Mail	10/8/2020

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DATE: 01/02/2021 18:45

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Judge and Brian - what are your thoughts on getting the info to press?

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Cell: [REDACTED]

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On Dec 29, 2020, at 5:19 PM, Judge Troupis
<[REDACTED]@gmail.com> wrote:

Boris,
Brian Schimming is waiting to here about whether he can alert the Wisconsin press. Please let us know what we can say. It would be very helpful if we did not have them read about it from the national media--they have been good to us.
Thanks.
Jim Troupis

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<WI - Indefinitely Confined Voters Research.pdf>

<Elected official spreadsheet.xlsx>

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Tuesday, Dec 08, 2020 14:45

Ken, Austin is in touch with With White House, Arizona and PA. They are interested. I am copying them so they can work directly with you and link to other States.

Tuesday, Dec 08, 2020 17:35

Austin Browning

Outstanding

Tuesday, Dec 08, 2020 17:37

Austin Browning

This is all great news. At least we know they know about it now.

Tuesday, Dec 08, 2020 17:42

Heard Rudy et al are pushing this and you spoke to Arizona. Congratulations

Wednesday, Dec 09, 2020 10:50

I am getting calls about joining on Amicus and such. If you approve after reviewing I suggest you and I join together. Thoughts?

Wednesday, Dec 09, 2020 10:51

That was to Ken

Wednesday, Dec 09, 2020 18:09

Ken Chesebro

Just talked to Greg Jacob, counsel to Pence. They don't have 2016 certificates bc they are in Biden's records. We should check National Archives or state secs of state. Or maybe contact the 2016 electors?

Wednesday, Dec 09, 2020 18:10

Ken Chesebro

We need to get lists of the 2020 electors from the campaign

Wednesday, Dec 09, 2020 18:12

Ken Chesebro

He also gave me a reality check on what is likely to happen under the Electoral Count Act. Let's discuss after Jim's Friday argument

Tuesday, Dec 08, 2020 17:35

Ken Chesebro

Hi, I talked to Jack W in Arizona, and emailed him info, including a draft of the footnote explaining that both electoral slates voting is not an odd thing

Tuesday, Dec 08, 2020 17:36

Ken Chesebro

He told me Rudy is really pushing this, and he was trying to understand exactly why

Tuesday, Dec 08, 2020 17:37

Ken Chesebro

He asked if I talked to Rudy; I said Jim did, and also Rudy apparently read the memo

Tuesday, Dec 08, 2020 17:38

Ken Chesebro

I got across that unless the Arizona Trump votes are sent to Congress on time, there's no real excuse to debate Arizona

Tuesday, Dec 08, 2020 17:39

Ken Chesebro

He also gets that Biden making the safe harbor doesn't prevent Congress from debating, or the Senate from voting as it wants, though the Electoral Count Act obviously is politically problematic

Tuesday, Dec 08, 2020 17:40

Ken Chesebro

I told him we might file in WI Supreme Court with that footnote by Saturday, which could help with messaging

Tuesday, Dec 08, 2020 17:42

Ken Chesebro

Feel free to pass this on to Rudy. It sounds like the states will do this if Rudy insists, especially if the President has specifically asked Rudy to make sure this happens. If any state is uncertain, maybe a call from the President would be worthwhile. Sounds like he's really hands on!

Sunday, Dec 13, 2020 12:27

Do you have an email to which I may send a draft of testimony? I have it done

Sunday, Dec 13, 2020 12:45

Ron Johnson

[REDACTED]@gmail.com

Sunday, Dec 13, 2020 12:46

Ron Johnson

That was quick. Thanks. We've got a fabulous witness from PA. State Rep Frank Ryan, CPA, vet, oversaw elections in Iraq, knows PA election problems inside and out.

Sunday, Dec 13, 2020 12:55

As they say, if you want a job done ask a busy person to do it. I suspect once we have a decision I will have very little time so thought it best for you to see my initial thoughts.

Sunday, Dec 13, 2020 18:34

Ron Johnson

Any decision yet, or indication of when one will be announced?

Sunday, Dec 13, 2020 19:37

No

Sunday, Dec 13, 2020 22:01

No ruling yet

Monday, Dec 14, 2020 09:26

Keep us posted on arrival time. We are waiting on a Wi
S Crt decision

Friday, Dec 11, 2020 16:13

We are back in Wisconsin Supreme Court—filed last hour.

Friday, Dec 11, 2020 16:15

Boris Epstyn

Ok! How you feel?

Friday, Dec 11, 2020 16:38

Good

Friday, Dec 11, 2020 16:50

Boris Epstyn

When is the hearing?

Friday, Dec 11, 2020 19:37

Noon tomorrow

Friday, Dec 11, 2020 19:53

Boris Epstyn

Got it!

Friday, Dec 11, 2020 22:29

Boris Epstyn

Let me know how it goes!

Monday, Dec 14, 2020 08:51

Boris Epstyn

Hey! Anything from the court?

Monday, Dec 14, 2020 09:13

Still waiting

Monday, Dec 14, 2020 09:14

Boris Epstyn

What do you think that means?

Monday, Dec 14, 2020 09:16

As Mayor Richard Daley said, "Dancin' in the Poll Booth" ...likely a split decision even among the Conservatives. But really unwise to predict.

Monday, Dec 14, 2020 11:07

Boris Epstyn

Lots of confusion out there - what's going on?

Monday, Dec 14, 2020 12:40

4-3 loss. Hagedorn went full liberal equity to say we
TROUPIS 0010341

should have brought suit before the election. Excellent 3 dissents.

Monday, Dec 14, 2020 12:40

Boris Epstyn

Ok - that's how I see it too

Monday, Dec 14, 2020 12:40

Boris Epstyn

Any impact from indefinitely confined decision?

Monday, Dec 14, 2020 12:41

Just that you can not use COVID as an excuse

Monday, Dec 14, 2020 12:42

Boris Epstyn

Can we go back and challenge votes on case by case basis?

Monday, Dec 14, 2020 12:44

Boris Epstyn

And as to second ruling, are you thinking we file cert?

Monday, Dec 14, 2020 12:52

No we can not go back to challenge. Analyzing cert question, not yet certain on that. Leaning against for now.

Monday, Dec 14, 2020 12:53

Boris Epstyn

Ok. I am meeting with Reince at 2

Monday, Dec 14, 2020 12:53

Boris Epstyn

3pm ET

Monday, Dec 14, 2020 12:53

Boris Epstyn

I think we do file cert - what's downside?

Monday, Dec 14, 2020 12:54

We need a legitimate case. I am not convinced we have it. We will look at it today.

Tuesday, Dec 15, 2020 11:05

Boris Epstyn

Morning! Whenever able - send an email around with your thoughts re SCOTUS?

Tuesday, Dec 15, 2020 12:18

Met this AM with Justin Clark. Please call him directly for an update. I am trying to prepare for testimony for tomorrow in Sen Johnson's committee about the election.

Tuesday, Dec 15, 2020 12:21

Boris Epstyn

Was just you and him?

Tuesday, Dec 15, 2020 12:55

No. Reince, Matt, Justin and our Wisconsin team

Thursday, Dec 17, 2020 12:05

Boris Epstyn

Hey! Do you have someone who could do a memo on the indefinitely confined numbers and what we know on example of people misusing me?

Thursday, Dec 17, 2020 15:25

You are looking for examples of misuse? We have an Affidavit with specific examples and others have come out as well.

Thursday, Dec 17, 2020 15:48

Boris Epstyn

Yes - could someone pull it all together in one memo/tracker?

Friday, Jan 01, 2021 15:34

Boris Epstyn

Happy New Year, Judge! Totally agree - we must be careful.

Copied Mike Roman on email, his team prepared the info.

Saturday, Jan 02, 2021 11:37

Boris Epstyn

Afternoon! Question per Mayor - how many total Absentee ballots without applications?

Saturday, Jan 02, 2021 12:59

I am out right now. I will get you exact number when I get back mid afternoon.

Saturday, Jan 02, 2021 12:59

Boris Epstyn

Thank you!

Saturday, Jan 02, 2021 15:26

170,140 Total.
108,947 in Milwaukee County. 61,193 in Dane County.

Saturday, Jan 02, 2021 15:58

Boris Epstyn

Could you send an email with that number and source to Mayor and me?

Saturday, Jan 02, 2021 16:10

Which email addresses should I use?

Saturday, Jan 02, 2021 16:11

Boris Epstyn

Shoot it to me at bepshteyn@donaldtrump.com and

Boris Epstyn

[REDACTED]@gmail.com

Saturday, Jan 02, 2021 16:12

Boris Epstyn

Please copy

[REDACTED]@giulianipartners.com

Saturday, Jan 02, 2021 16:36

Sent

Saturday, Jan 02, 2021 17:01

Boris Epstyn

Thank you!

Monday, Dec 14, 2020 16:48

Boris Epstyn

Judge Troupis - connecting with Mike Roman

Monday, Dec 14, 2020 16:48

Boris Epstyn

This is about the indefinitely confined voters.

Monday, Dec 14, 2020 16:55

Mike Roman

Judge - driving at the moment. spotty signal. Will text as soon I am stationary

Monday, Jan 04, 2021 22:22

Ok.
I'm riding with him in the car in GA

Monday, Jan 04, 2021 23:08

I am around tomorrow to talk if he would like.

Wednesday, Jan 06, 2021 11:00

Mike Roman

Connected with Sean

Wednesday, Jan 06, 2021 11:03

Great. Ron will he expecting something—I did not go into detail with him.

Wednesday, Jan 06, 2021 11:03

Mike Roman

I told Sean what is was

Thursday, Jan 07, 2021 09:17

Thanks Joe