STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DONALD J. TRUMP, *et al*, Plaintiffs, v. JOSEPH R. BIDEN, *et al.* Defendants.	Milwaukee County Case No. 20-CV-7092 Dane County Case No. 20-CV-2514

CORRECTED OPPOSITION OF DEFENDANTS JOSEPH R. BIDEN AND KAMALA D. HARRIS TO PLAINTIFFS' MOTION FOR JUDGMENT ON NOTICE OF APPEAL AND COMPLAINT

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[1] The only change from Doc. 88 in this "corrected" brief is the inclusion of a Table of Contents and Table of Authorities.

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INTRODUCTION

In this challenge to the election recounts conducted by Milwaukee County and Dane County, Plaintiffs ask this Court to do what no court in the history of our county has ever done—throw out the votes of more than 200,000 voters and reverse the outcome of a state's presidential election. One would expect a request so extraordinary to be supported by evidence of massive election failure involving systemic voting fraud, statewide voting machine malfunctions, or some other catastrophic event that caused hundreds of thousands of votes to be cast illegally or recorded inaccurately. But plaintiffs have nothing of the sort. Instead, they ask this Court to disenfranchise more than 200,000 Wisconsinites who simply voted in accordance with the procedures established by the Wisconsin Election Commission ("WEC")—procedures that have, for the most part, been in place for years and under which President Trump himself was elected in 2016. It is hard to imagine a more damaging subversion of our democracy than throwing out the votes of these Wisconsinites who have done nothing wrong and who cast their votes exactly as required by state law and as instructed by election officials.

The obvious constitutional infirmity of disenfranchising hundreds of thousands of innocent voters is no doubt enough for this Court to conclude that the relief Plaintiffs seek must be rejected. But, in addition, the Court has the benefit of pronouncements from the Wisconsin Supreme Court issued just last week in cases involving substantially the same issues and request for relief presented here. Responding to the same request by different plaintiffs to disenfranchise hundreds of thousands of voters on essentially the same grounds offered here, Justice Hagedorn warned: "This is a dangerous path we are being asked to tread. The loss of public trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable." *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930-OA (Dec. 4, 2020) (Hagedorn, J.,

concurring). Observing that more than "the winner of Wisconsin's electoral votes is implicated in this case," Justice Hagedorn emphasized further that "[a]t stake, in some measure, is faith in our system of free and fair elections, a feature central to the enduring strength of our constitutional republic." *Id.* The same is true in this case.[2]

Indeed, President-elect Biden and Vice President-elect Harris won the 2020 national popular vote by over seven million votes and are projected to win the Electoral College vote by a tally of 306-232. Their initial winning margin in Wisconsin was 20,427 votes out of 3.2 million cast, which *increased* to 20,682 after Dane and Milwaukee Counties conducted exhaustive recounts at President Trump's request. DPFOF[3] ¶¶ 2, 14. Biden and Harris are therefore entitled as a matter of law to Wisconsin's ten electoral votes, *see* Wis. Stat. §§ 5.10, 5.64(1)(em), 7.70(5)(b), 8.18; any other result would risk "incalculable" damage to the "public trust in our constitutional order." *Wis. Voters Alliance v. Wis. Comm'n*, No. 2020AP1930-OA (Hagedorn, J., concurring). This is particularly so given that Plaintiffs are not seeking to invalidate voters in Wisconsin's other 70 counties who followed the very same practices Plaintiffs challenge here but are instead weaponizing the recount process by targeting large numbers of ballots in only Dane and Milwaukee—the two most urban, nonwhite, and Democratic counties in the State.

Plaintiffs' action should be denied for many reasons. *First,* Plaintiffs' claims rest on challenges to the lawfulness of longstanding WEC guidance documents that were relied upon by

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[2] *See also Trump v. Evers*, No. 2020AP1971-OA (Dec. 3, 2020) ("The remedy Petitioners seek may be out of reach for a number of reasons.") (C.J. Roggensack, dissenting); *Mueller v. Jacobs*, No. 2020AP1958-OA (Dec. 3, 2020).

[3] "DPFOF" refers to Defendants' Joint Proposed Findings of Fact and Conclusions of Law, filed herewith.

local election officials and voters throughout the State. But an election recount proceeding is not the proper forum for challenging guidance issued by a Wisconsin agency. Instead, Wis. Stat. § 227.40(1) provides "the exclusive means of judicial review of the validity of a…guidance document" issued by a state agency like the WEC. *See* Argument, Parts A-C, *infra*.

Second, Plaintiffs could have challenged the disputed practices much earlier, before several million Wisconsin voters relied on them in the November 2020 election. Whether labeled as laches, estoppel, unclean hands, or simply the exercise of sound equitable discretion, this Court should not grant such drastic relief when a petitioner has slept on his rights. *See, e.g.*, *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 10, 393 Wis. 2d 629, 948 N.W.2d 877; *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 11, 393 Wis. 2d 308, 946 N.W.2d 101. *See* Argument, Parts D and E, *infra*.

Third, Plaintiffs' claim that 170,400 voters in Dane and Milwaukee Counties failed to submit written applications for absentee ballots when they voted early and in-person is flatly contradicted by the evidence. All of these voters—including Plaintiffs' own counsel—completed an election form developed by the WEC more than 10 years ago, Form EL-122, prior to receiving their absentee ballots. That form is specifically titled as an application—"**Official Absentee Ballot Application/Certification**"—and has been used as an application for an absentee ballot *in every Wisconsin election held since 2010*. *See* Argument, Part F, *infra*.

Fourth, Plaintiffs' claim that the absentee ballots of more than 4,000 voters in Dane and Milwaukee should be discarded because election clerks added missing pieces of witness addresses to absentee envelopes ignores the WEC's written instruction to municipal clerks that they "**must** take corrective actions in an attempt to remedy a witness address error." This guidance has been

in place for four years and has been applied in Wisconsin's past 11 elections. The evidence in the recount proceedings established that the Dane and Milwaukee clerks used reliable, public sources to complete missing witness information. There is no evidence that any of the added address information was incorrect or that any of the voters with these envelopes were not qualified, legal voters. *See* Argument, Part G, *infra*.

Fifth, Plaintiffs' attempt to throw out the votes of more than 28,000 voters in Milwaukee and Dane who claimed "indefinitely confined" status during this ongoing, once-in-a-century pandemic is nothing short of baffling. Again, these voters simply followed the WEC's guidance, which provides in relevant part that each voter should determine for themselves whether they are "indefinitely confined because of age, physical illness or infirmity," and thus 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). The WEC's guidance emphasizes that, "[d]uring 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." Ex. 5 (emphasis added). The Wisconsin Supreme Court approved this WEC guidance in *Jefferson v. Dane Cnty.*, No 2020AP557-OA (Mar. 31, 2020), and it should be no surprise to Plaintiffs that with the well-chronicled severity of the COVID-19 pandemic in Wisconsin, thousands of Wisconsin voters determined that they met these criteria. That is hardly a basis for throwing away their votes. *See* Argument, Part H, *infra*.

Sixth, sticking with their theme of trying to punish the innocent, law-abiding voter, Plaintiffs argue for the disenfranchisement of more than 17,000 voters who hand-delivered their secure, sealed absentee ballots to election officials at the City of Madison's "Democracy in the Park" events on two days in late September and early October. Plaintiffs claim, wrongly, that this

voting initiative in public parks, which was fully sanctioned by Madison election officials, was "illegal" but, as explained below, Wisconsin law allows municipalities to establish off-site places for voters to deliver absentee ballots. DPFOF ¶¶ 9, 81. *See* Argument, Part I, *infra*.

Finally, the extraordinary relief Plaintiffs request—selectively discarding the votes of more than 200,000 Dane and Milwaukee voters for exercising their franchise in precisely the same way as voters in 70 other counties whose votes would count—would plainly violate the Equal Protection Clause and the rights of those voters under the First and Fourteenth Amendments of the U.S. Constitution. *See* Argument, Part J, *infra*.

In the sections of this brief that follow, Defendants set forth the findings of the recounts, demonstrate why those findings (including that the recounts uncovered zero evidence of fraud) support the Boards' determinations, identify the fatal flaws in Plaintiffs' positions, and demonstrate why this Court cannot grant Plaintiffs' request to reverse the outcome of the election.[4]

STANDARD OF REVIEW

Wis. Stat. § 9.01(8) sets forth the standards to guide this Court's review, which is narrow and limited. At the outset, subsection (a) establishes a presumption in favor of the Boards of Canvassers' determinations: "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."

The Court reviews 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); Wis. Stat. § 9.01(8)(d). If a determination by one

[4] To the extent this statutory proceeding is viewed to fall within the Milwaukee County local rules regarding dispositive motions, Defendants request leave to file an over-size brief, in order to fully address all issues presented by this unique proceeding.

of the Boards depends on a finding of fact, the Court may not substitute its judgment for that of the Board as to the weight of the evidence supporting the fact. Wis. Stat. § 9.01(8)(d). Most important, there is a strong presumption against disenfranchising Wisconsin voters: to disenfranchise even a single voter, much less several hundred thousand, a challenger must "demonstrate[] beyond a reasonable doubt that the person does not qualify as an elector or is not properly registered." *Logerquist v. Bd. of Canvassers for Town of Nasewaupee*, 150 Wis. 2d 907, 917, 442 N.W.2d 551, 556 (Ct. App. 1989). This presumption applies with particular force where, as here, voters did not knowingly do anything wrong and the demand that they be disenfranchised rests on the claim that election officials improperly interpreted or implemented the law. *See, e.g.*, *Ollmann v. Kowalewski*, 238 Wis. 574, 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."); *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.").[5]

[5] As described below, the WEC and local election officials acted entirely consistently with Wisconsin law. But, even if that were not the case, the reliance of voters on the pronouncements and actions of election officials cannot serve as a basis for disenfranchisement. *See State v. Barnett*, 195 N.W. 707, 712 (Wis. 1923) ("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 upon him."); *State ex rel. Oaks v. Brown*, 249 N.W. 50, 53 (1933) ("When the matter has been allowed to proceed to that point, the will of the electors is to be given effect, even though there may have been informalities or in some respect a failure to comply with the statute."); *Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir. 1978) (noting voters had "follow[ed] the instructions of the officials charged with running the election"); *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, (2d Cir. 2005) (noting defendants "at least

Wisconsin courts also 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 Cnty. Bd. of Canvassers*, 2001 WI App 20, ¶¶ 10-11, 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").

BACKGROUND AND FACTUAL FINDINGS

A. PROCEDURAL HISTORY AND BACKGROUND

On November 18, 2020, Plaintiffs filed a Recount Petition with the Wisconsin Elections Commission ("WEC"). Despite alleging that "mistakes and fraud were committed throughout the state of Wisconsin," the petition sought recounts in just two of Wisconsin's 72 counties—Milwaukee and Dane Counties. DPFOF ¶ 3. The recount process lasted from November 20 to November 29. During the recount and on this appeal, the Trump Campaign seeks to disenfranchise no fewer than 221,323 voters in the two counties. *Id.* ¶ 7. But, if the Campaign's arguments for

arguably [] misled voters into not filing new absentee-ballot applications by issuing" unsolicited ballots to voters); *Ne. Ohio Coalition for Homeless v. Husted*, 696 F.3d 580, 595 (6th Cir. 2012) ("*NOCH*") (explaining pollworker error induces voters to submit invalid ballots, and that allowing state to reject ballots at issue would "require[] voters to have a greater knowledge of their precinct, precinct ballot, and polling place than poll workers"); *Roe v. Ala. ex rel. Evans*, 43 F.3d 574, 581-82 (11th Cir. 1995) (explaining that "had the candidates and citizens of Alabama known" that the witness requirement at issue would not be enforced, "campaign strategies would have taken this into account and [voters] who did not vote would have voted absentee"); *see also Gallagher v. N.Y. St. Bd. of Elections*, --- F. Supp. 3d ---, 2020 WL 4496849, at *17-18 (S.D.N.Y. Aug. 3, 2020) (ruling ballots lacking postmarks, through no fault of the voter, could not be rejected because those voters "accept[ed] the state's offer to vote by absentee ballot and follow[ed] the state's instructions"); *cf. Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970) ("Until such time the Board makes public its new determination, it is constitutionally prohibited from imposing that rule on unsuspecting persons.").

disenfranchisement of these voters were extended to all 72 counties, as would be required under the Equal Protection Clause, no fewer than 700,000 Wisconsin voters would be disenfranchised. *Id*. In the words of Wisconsin Supreme Court Justice Hagedorn last Friday in a related case seeking essentially the same relief, Plaintiffs were (and still are) effectively seeking to "invalidate the entire Presidential election in Wisconsin by declaring it 'null'—yes, the whole thing," a result that "would appear to be unprecedented in American history." *Wis. Voters All. v. Wis. Elections Comm'n*, No. 2020AP1930-OA, at 2 (Dec. 4, 2020) (Hagedorn, J., concurring). In Dane and Milwaukee Counties, the Trump Campaign sought to disqualify votes in the categories listed below and with the following results:

First, the Trump Campaign claimed that in-person absentee voters did not submit written applications, even though the 170,400 in-person absentee voters they challenged applied to vote using a combined application/envelope issued by the WEC titled "**Official Absentee Ballot Application/Certification**" before receiving their ballot. DPFOF ¶¶ 4, 21. In rejecting this challenge, the Milwaukee Board of Canvassers determined that multiple forms of absentee ballot applications may be used by voters and that there was no validity to the claim that this form—which has been in use for more than a decade, has the word "application" stated on it, and must be completed by the voter—is not "an application" or is otherwise improper. 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. On this basis, the Milwaukee Board rejected the claim that the 170,400 absentee ballots cast with this application and envelope should be discarded and not counted. DPFOF ¶ 8.

The Dane Board similarly voted not to exclude or draw down any absentee ballots on the basis that they "do not have an attached or identifiable application." *Id*.

Second, Plaintiffs argued that municipal clerks acted unlawfully by adding missing information to absentee ballot envelopes related to witness addresses (such as state or zip code) of more than 4,000 voters, as has been the practice in Wisconsin's past 11 elections, including the 2016 presidential election. *Id*. ¶¶ 4, 41. The Milwaukee Board rejected this challenge, concluding that the addition by clerks of missing witness address information is consistent with the WEC's guidance and with Wisconsin Statute § 6.87(6)(d). *Id*. ¶ 8. The Dane Board also declined to "exclude envelopes that had a witness address added by the clerk." *Id*.

Third, Plaintiffs objected the all ballots cast by voters in just Dane and Milwaukee Counties —more than 28,000 voters—who claimed "indefinitely confined" status in making a request for an absentee ballot, despite the months-old WEC guidance on this issue that, as described above, the Wisconsin Supreme Court approved in *Jefferson v. Dane Cnty.*, No 2020AP557-OA (Mar. 31, 2020). DPFOF ¶¶ 4, 58. The Milwaukee Board 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." *Id*. ¶ 8. The Board thus rejected the Trump Campaign's challenge based upon the "indefinitely confined" status of voters. *Id*. On the same grounds, the Dane Board also rejected this challenge. *Id*.

Finally, while not raised in their Petition, Plaintiffs in the Dane County recount sought to

disenfranchise more than 17,000 voters who cast their absentee ballots during the City of Madison's Democracy in the Park program, during which voters delivered their sealed, secured absentee ballots to election officials. *Id.* ¶¶ 5, 9. The Dane Board rejected this challenge, finding the events were the equivalent of a human drop box and valid under the statute, and that voters had reasonably relied on the city-sponsored event to exercise their franchise. DPFOF ¶ 9.

After a failed Petition for Original Action Pursuant to Wis. Stat. § 809.70, Plaintiffs are before this Court challenging these same four broad categories of absentee ballots and requesting the exclusion of more than 200,000 ballots from the final Presidential election results. As described, Plaintiff's challenge targets the two most urban, nonwhite, and Democratic counties in the State, leaving untouched the million-plus voters in 70 other counties who cast their absentee ballots in the same way as their fellow citizens in Dane and Milwaukee Counties.

In the section that follows, we describe each of these challenges in more detail and summarize the substantial evidence supporting the decisions by the Dane and Milwaukee Boards to reject them.

B. RECOUNT RECORD AND FINDINGS

1. Absentee Ballot Applications

Plaintiff argues that municipal clerks in Dane and Milwaukee counties acted in contravention of the law requiring that an absentee ballot be issued after receiving "a written application therefor from a qualified elector of the municipality." Wis. Stat. § 6.86(1)(ar). By using and accepting Form EL-122 as an application for an absentee ballot, however, the clerks in these counties were acting in accordance with the practice of election officials throughout the state that has been in place for more than 10 years.

Evidence presented to the Dane and Milwaukee Boards established the history of how Form EL-122 came to be used as a lawful application for an absentee ballot. That form and its predecessor, Form GAB-122, originated from "inefficiencies experienced with in-person absentee voting" in the November 2008 presidential election. DPFOF ¶ 23. One option to improve the in-person absentee voting process was to create a "streamline[d]" application process—rather than separate, "redundant" paperwork, a single multistep application/certification whereby "The clerk instructs the voter to complete and sign the certificate before issuing the ballot.". *Id*. ¶ 24. Def. App. 106-107. The form has been used as a written application for in-person absentee voters since May 10, 2010. *Id*. ¶ 26; Def. App. 105.

Consistent with statewide practice, municipalities in Dane County and Milwaukee County use form EL-122 for in-person absentee voting. *Id*. ¶ 27. In Milwaukee County, when a voter requests an absentee ballot in person, the voter identifies herself to the clerk, who then enters the request for the ballot into the WisVote system directly. *Id*. ¶ 29. This generates "a record of application." *Id*. The system then generates a label for that envelope. *Id*. The voter then shows the labeled envelope to an official, before receiving a ballot. *Id*. The voter completes the ballot and signs a certification on the envelope, which a clerk witnesses. *Id*. The vote is not cast until the day of the election. *Id*.

The Dane Board determined that 61,193 electors cast absentee ballots in person in Dane County. *Id*. ¶ 31 Each in person absentee voter completed an EL-122, which the Board concluded

is legally sufficient to satisfy Wis. Stats. Section 6.86(1)(ar) and 9.01(1)(b)(2). *Id.*[6] The Milwaukee Board determined the total number of voters who voted absentee in person in Milwaukee County was 108,947. *Id.* ¶ 32. No allegation was made, and no facts suggest, that a single vote was cast in either county by an ineligible voter who applied via Form EL-122 or that any fraud occurred related to the use of Form EL-122 in either county. *Id.* ¶¶ 34-35.

No one has ever objected to these practices or to Form EL-122. *Id.* ¶ 33. Until now. Plaintiffs now argue that the **Official Absentee Ballot Application/Certification** form is not sufficient to comply with the "written application" requirement of Wis. Stat. § 6.86(1)(a). They explicitly challenge *all* early in-person absentee ballots cast in Dane and Milwaukee Counties using the WEC's "Official Absentee Ballot Application/Certification" envelopes, unless the voters completed a separate, stand-alone application.

Despite this, Plaintiffs do not seek to disenfranchise all voters statewide who obtained their ballots through these WEC-prescribed means. They target their objections to these longstanding statewide practices only at Dane and Milwaukee Counties, seeking to weaponize recount law by applying one set of rules to voters in two counties and the opposite set of rules to voters in the other 70 counties. Moreover, Plaintiffs offer no excuse for not challenging these long-standing practices *before* the election rather than waiting until they had lost.

[6] Wis. Stats. Section 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." Wis. Stats. Section 9.01(1)(b)(2) states: "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."

2. Provision of Witness Addresses

An absentee voter must complete her 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. 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).

Since October 2016, the WEC has instructed all Wisconsin 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. DPFOF ¶ 38. This guidance was approved by the Wisconsin Department of Justice, under the leadership of Republican Attorney General, Bradley Schimel, and unanimously approved by the WEC's commissioners. The WEC has repeated these instructions in multiple guidance documents over the past four years. *Id.* ¶ 39 (guidance in current WEC Election Administration Manual that clerks "may add a missing witness address using whatever means are available," and "should initial next to the added witness address"). Since being adopted by WEC four years ago, the guidance has governed in *eleven* statewide races since then, including the 2016 presidential election and recount (DPFOF ¶ 40); has been relied upon by local election officials and voters throughout the State (*id.*); and has never been challenged through Chapter 227 judicial review or otherwise (*id.*). Indeed, in 2016 Candidate Donald Trump won a recount in which thousands of ballots were completed in this manner. No objections were raised. *Id.* ¶ 41.

This challenge, which was referred to as the "red ink" challenge during the recounts due to the Trump Campaign's objection to any envelope with red ink or different colored ink on it, is not

limited to a binary set of envelopes with and without any address information. Instead, in most cases, clerks corrected partial addresses, such as by adding a witness's city, zip code, or state. *Id.* ¶ 44. In the recounts, the Trump Campaign objected to ballots with envelopes that were fully witnessed, signed by a witness, and contained a witness' street address, but where a clerk filled in the city, state, or zip code. *Id.*

In completing witness addresses, the City of Milwaukee "do[es]n't make guesses" if there are multiple persons registered with the name of a witness. They contact the voter or mail the ballot back to them. *Id.* ¶ 45. It is "very common" that an envelope will have a street address but not be "fill[ed] out completely." *Id.* ¶ 46. In addition, some envelopes may have red ink on them that differs from the color of the rest of the envelope, but election officials did not provide the red ink (i.e., the envelope likely was received from the voter, who used red ink or whose witness used red ink). (Milwaukee 11/21/20 226:1-12). The Trump Campaign objected to these ballots solely on the basis of red ink. *Id.* 13-16. Other ballots may have different colored ink but are "clearly the same unique pen [sic] as the voter and the same writing." (Dane 11/21/20 268:11-20). The Trump Campaign includes these envelopes in their omnibus objection, despite that no finding was made by either Board that every envelope with red ink on it necessarily was corrected by an election official.

Plaintiffs now complain that clerks in Dane and Milwaukee Counties added witness addresses in accordance with the WEC's instructions and seek to exclude those ballots from the final count. But even if this agency guidance were wrong (it was not), the reliance was not just in Milwaukee County—clerks throughout the State relied in good faith on the WEC's instructions to

cure missing witness addresses. DPFOF ¶ 40. And Plaintiffs do not explain why they did not challenge this longstanding guidance *before* the election, whether under chapter 227 or otherwise.

3. Indefinitely Confined Voters

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). After the pandemic hit Wisconsin in March and the Evers Administration issued a "Safer-at-Home Order" on March 24, some county clerks advised voters that they could claim to be "indefinitely confined" pursuant to the order for purposes of voting absentee in the April 7 spring election. Both the WEC and the Supreme Court disagreed with that broad and unqualified reading. Instead, the WEC issued, and the Supreme Court endorsed, much narrower guidance that left the decision to individual voters subject to certain guidelines.

The WEC's March 29, 2020 guidance, which remains in effect, provides in pertinent 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.
>
> 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.

DPFOF ¶ 52. 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.

Id. ¶ 53 (emphasis added).

Consistent with Wisconsin's decades-long legislative policy of taking voters at their word concerning indefinite confinement, the Commission's guidance emphasizes the importance of avoiding any "proof" requirements. *Id*. ¶ 54. "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." *Id*.[7]

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 Cnty.*, No 2020AP557-OA (Mar. 31, 2020). In so holding, the Court effectively sustained the WEC's guidance for the term "indefinitely confined" as quoted above, at least pending a final decision in *Jefferson*.

Neither the WEC nor the Wisconsin Supreme Court provided further guidance before the November 3 election. The Court heard oral argument in *Jefferson* on September 29; a decision is pending. The Court elected not to decide the case prior to the election by expediting briefing and

[7] The relevant portion of what is now numbered Section 6.86(2)(a) has been unchanged since 1985, when the Legislature eliminated a formal affidavit requirement for those claiming to be "indefinitely confined" and allowed voters to self-certify. *See* WIS. STAT. § 6.86(2) (1985). For the past 35 years, the Legislature has trusted voters to self-certify their condition.

argument. The WEC guidance (as endorsed by the Wisconsin Supreme Court) thus remained in effect through the election, and voters throughout the State relied upon it.

Neither the Dane Board nor the Milwaukee Board determined how many voters cast ballots while indefinitely confined that had not previously submitted an ID within the past year. No facts were presented during either recount that any voter 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." DPFOF ¶ 63.

The Trump Campaign did not ask for a factual determination as to the indefinitely confined status of these persons; nor did it seek to have their ballots specifically challenged. Accordingly, no finding was requested or made, on the basis of any evidence, that any voter falsely certified they were "indefinitely confined."

4. Democracy in the Park

On two Saturdays preceding the November 3 election (September 26 and October 3), the City of Madison held "Democracy in the Park" events in 206 Madison parks. DPFOF ¶ 68. The City Clerk for the City of Madison designed the Democracy in the Park event "to comply with all applicable election laws." 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." *Id.*; Def. App. 209.

At each of these events, municipal election workers assisted voters in the return and collection of their absentee ballots. *Id*. ¶ 69-72. No absentee ballot applications were accepted or distributed at Democracy in the Park. *Id*. ¶ 69. At the event, sworn city election inspectors collected sealed and properly witnessed absentee ballots. *Id*. ¶ 70. City election inspectors served as witnesses for absentee electors only if the elector brought an unsealed, blank ballot with them. *Id.* ¶ 70. The Madison City Attorney emphasized these points in a letter to counsel for the Legislature:

> 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 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 tamper-evident 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. 187. And in fact, no absentee ballots were requested or issued at these events. DPFOF ¶ 69.

Both major parties were invited to observe the entire process. 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]." Voters relied on the legality of dropping their absentee ballots at the Democracy in the Park event. *See, e.g.*, Def. App. 93 (Aff. 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")). A total of 17,271 completed absentee ballots were deposited in the staffed drop boxes during the Democracy in the Parks events. DPFOF ¶ 78. No allegations were made, and the Dane County Board did not find, that a single vote cast at Democracy in the Park was cast by an ineligible

voter or that there was any fraud associated with any ballot cast at any Democracy in the Park event.

ARGUMENT

A. UNDER WISCONSIN LAW, A PLAINTIFF CANNOT WAIT UNTIL AFTER AN ELECTION TO CHALLENGE ELECTION-RELATED PROCEDURES ESTABLISHED LONG BEFORE THE ELECTION.

Post-election challenges under § 9.01 are limited in scope. This Court is not to wade into any alleged procedural irregularities underlying the election process itself. *Clapp v. Joint Sch. Dist. No. 1*, 21 Wis. 2d 473, 478, 124 N.W.2d 678 (1963) ("Fraud, illegality, defects, mistakes, and irregularities going to the groundwork of the referendum [at issue] and its validity as an election are not within the effective scope of [§ 9.01]"). In other words, once an election occurs, § 9.01 does not allow a plaintiff to disenfranchise voters by challenging pre-election rules and guidance documents. The judiciary's role in a § 9.01 proceeding is instead confined to making sure that the voters, clerks and boards of canvassers followed the rules in place at the time of the election:

> The remedy [in § 9.01] covers *only* those matters which are of such a character that the board of canvassers can correct …. 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. It has long been held the duties of the board of canvassers are primarily ministerial in nature and not judicial.

Clapp, 21 Wis. 2d at 478; *see also Atty. Gen. ex rel. Basford v. Barstow*, 4 Wis. 567 (1855) ("These canvasses are in the main ministerial. There is hardly an act of government so purely ministerial as this.").

Here, because the clerks' and Boards' decisions to count the challenged ballots complied with WEC procedures laid out in pre-existing agency guidance documents, and this Court cannot retroactively overturn that guidance, Plaintiffs' entire action must be dismissed.

B. THE CLERKS, BOARDS OF CANVASSERS, AND HUNDREDS OF THOUSANDS OF CHALLENGED VOTERS WERE NOT ACTING FRAUDULENTLY OR ILLEGALLY; THEY WERE FOLLOWING WEC ELECTION PROCEDURES THAT WERE ESTABLISHED WELL BEFORE THE ELECTION.

WEC is an agency of the executive branch. *See State ex rel. Zignego v. Wis. Elections Comm'n*, 2020 WI App 17, 391 Wis. 2d 441, 941 N.W.2d 284, (finding same). Among other duties, WEC oversees the clerks and boards of canvassers and administers Wisconsin's election laws. Wis. Stat. § 5.05(1). Wisconsin's 1,922 municipal clerks rely on WEC's guidance in carrying out their legal duties.

Here, *every single* vote that the Plaintiffs challenge was cast in compliance with pre-set election procedures described in WEC guidance documents:

- WEC's Recount Manual (November 2020), Election Administration Manual (dated Sep. 2020), and absentee certificate envelope (Form EL-122) (in use since 2010) all provided that the absentee certificate envelope itself constituted the voter's written absentee ballot application. DPFOF ¶¶ 16, 22 *see* n. 8, infra.

- WEC's Election Administration Manual instructed local election officials that "[c]lerks may add a missing witness address using whatever means are available" (and the manual has included this instruction since at least 2016). *Id*. at ¶ 16.

- WEC's March 29, 2020 guidance (which the Wisconsin Supreme Court endorsed on March 31) 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." *Id*.; *see* pp. 26, supra.

- Finally, WEC's "Absentee Ballot Drop Box Information" guidance dated August 19, 2020 expressly recommended "outdoor" "staffed" ballot drop boxes like those used in the Democracy in the Parks events held in Madison and Milwaukee. *Id*.

This Court's review under § 9.01 is limited to whether the voters, clerks and board of canvassers complied with these procedures. They did. Accordingly, all of Plaintiffs' claims must fail.

C. PLAINTIFFS CANNOT CHALLENGE THE LEGALITY OF ANY OF WEC'S GUIDANCE DOCUMENTS IN THIS § 9.01 PROCEEDING.

Plaintiffs can only challenge a procedure contained in a WEC guidance document pursuant to Wis. Stat. § 227.40, and they can only obtain prospective relief.

WEC is a state agency that is subject to chapter 227. *See id.* § 227.01(1) (an "agency" subject to chapter 227 "means a board, commission, committee, department or officer in the state government," with limited exceptions not relevant here).

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, 744 (1989); *see State v. Town of Linn*, 205 Wis. 2d 426, 449, 556 N.W.2d 394 (Ct. App. 1996).

Moreover, the definition of "guidance document" in Wis. Stat. § 227.01(3m) is quite broad:

> [A "guidance document" is] 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, including the current or proposed operating procedure of the agency.
>
> 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 affected.

WEC's written pronouncements about what constitutes a valid application for an absentee ballot, how local election officials can cure missing witness addresses, when voters may claim to be "indefinitely confined," and whether staffed ballot boxes are allowed at public parks all fit

comfortably within chapter 227's "guidance document" definition. They are official communications, issued by WEC, advising local election officials, the boards of canvassers, and voters how WEC interprets and applies various statutory provisions. *Id.* § 227.01(3m)(a). Therefore, Plaintiffs can only challenge these procedures in a § 227.40 declaratory judgement proceeding.

And, even then, only be one remedy would be available: a *prospective* "declaratory judgment as to the validity of the … guidance document." Wis. Stat. § 227.40(1). Section 227.40 does not countenance retroactive punishment of those who relied in good faith on procedures laid out in agency guidance documents.

D. PLAINTIFFS' CHALLENGES ARE TOO LATE; IF THEY WANTED TO CHALLENGE WEC ELECTION PROCEDURES, THEY WERE REQUIRED TO HAVE DONE SO IN A § 227.40 ACTION BROUGHT *BEFORE THE ELECTION*.

Voters should not be penalized for abiding by WEC guidance when voting. To rule otherwise would effectively neuter WEC's ability to give guidance to clerks, the boards, and the public about how it plans to implement Wisconsin's election laws. *See Serv. Emps. Int'l Union v. Vos*, 2020 WI 67, ¶ 105-106, 393 Wis. 2d 38, 104, 946 N.W.2d 35 ("[T]he creation and dissemination of guidance documents fall within the executive's core authority …. They contain the executive's interpretation of the laws, [and] his judgment about what the laws *require* him to do." (emphasis added)).

Not letting candidates challenge pre-set voting procedures after an election also makes sense. One would not want to encourage a candidate to wait until after an election to challenge WEC election guidance that the board of canvassers and clerks must follow and that voters rely upon when they vote.

Plaintiffs had a potentially available remedy before the election that they did not seek. That is no one's fault but their own. If Plaintiffs wanted to argue that the absentee ballot provisions in

the WEC guidance documents were illegal, they should have done so in a Wis. Stat. § 227.40 proceeding *brought before the election*. Now it is too late.

E. EQUITY BARS THE REQUESTED RELIEF.

Plaintiffs' requested relief should also be denied because Plaintiffs are barred from relief by the equitable doctrines of laches, unclean hands, and equitable estoppel.

1. Laches bars Plaintiffs' requested relief.

Plaintiffs are barred by laches from pursuing the relief they seek. "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. "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 (citations omitted), cert. denied sub nom. *Wis. ex rel. Wren v. Richardson*, 140 S. Ct. 2831 (2020).

Those principles are especially relevant in election-related matters, where diligence and promptness are required. As the Seventh Circuit explained in *Fulani v. Hogsett*, 917 F.2d 1028 (7th Cir. 1990), "[i]n the context of elections … any claim against a state electoral procedure must be expressed expeditiously." *Id.* at 1031. That is because, "[a]s time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made." *Id.*; *see also Clark v. Reddick*, 791 N.W.2d 292, 294-96 (Minn. 2010) (declining to hear ballot challenge when petitioner delayed filing until 15 days before absentee ballots were to be made available); *Knox v. Milwaukee Cnty. Bd. of Election Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984) (denying preliminary injunction where complaint was filed seven weeks before election). For that reason, the U.S. Supreme Court has for many years

"insisted that federal courts not change electoral rules close to an election date." *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641-42 (7th Cir. 2020) (citing, *inter alia*, *Purcell v. Gonzalez*, 549 U.S. 1 (2006)), *stay denied*, No. 20A66, 2020 WL 6275871 (Oct. 26, 2020).

Under Wisconsin law, 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. *See Brennan*, 2020 WI 69, ¶ 12. All three elements are satisfied here, barring Plaintiffs' claims.

a. Plaintiffs have unreasonably delayed in raising their challenge.

Plaintiffs ask this Court to invalidate thousands of ballots that were cast and counted in the 2020 presidential election—an election that concluded over a month ago. In the months and weeks leading up to the election, the State expended substantial resources in ensuring that it took place in a secure and lawful manner. Untold numbers of Wisconsinites devoted countless hours, at significant personal risk during a pandemic, to prepare for, hold, and tally the vote. And Wisconsin voters relied upon the election procedures in casting their ballots as directed by state officials. Now, Plaintiffs ask this Court to undo all of those efforts and abrogate the fundamental right to vote for all Wisconsinites by overthrowing rules and protocols that have been in effect for months or even years. Plaintiffs attempt to excuse their delay by alleging the issues raised were "undiscoverable before the Recount," as Plaintiffs could not have known if clerks would follow the WEC's guidance until election day. Pls. Mem. at 28. This argument is easily dismissed. As described below, the complained-of procedures have been used in multiple election cycles and

even in prior presidential elections.[8] Moreover, Plaintiffs acknowledge that the "Democracy in the Park" events were known to them—and that they believed them to be illegal at the time—yet they let the election proceed without challenge. This is the epitome of sleeping on one's rights.

For example, Plaintiffs challenge the Wisconsin procedure for curing issues with witness addresses. That procedure was endorsed by the WEC *four years ago*. After receiving unanimous bipartisan approval in 2016, the procedure went unchallenged by Plaintiffs, or anyone else, for *eleven* subsequent election cycles, including the 2016 presidential election in which Plaintiffs participated. This year, municipal election clerks continued their reliance on the WEC's guidance concerning the cure procedure. Plaintiffs had ample opportunity to object to the procedure before the State of Wisconsin and thousands of Wisconsinites expended enormous time and resources in reliance upon its application in the 2020 election. Instead, Plaintiffs waited to see the outcome of that election and, obviously unsatisfied, challenge the procedure now. This is a textbook example of unreasonable delay.

Plaintiffs similarly complain, based on guidance issued in Dane County in March 2020, that ballots cast by "indefinitely confined" voters were "illegal" and must be discarded. Here too, Plaintiffs were aware of any supposed issue well before the election, including as a result of litigation in this Court. On March 31, 2020—more than *seven months* before the general election—the Wisconsin Supreme Court granted temporary injunctive relief based on its conclusion that the

[8] Plaintiffs further argue that applying laches here would impose an "intolerable burden" on candidates to "monitor ever-shifting election procedures." Pls. Mem. at 29. Again, the challenged procedures were not "shifting" at all; they had been in place for years, And the "Democracy in the Park" events took place months before the election and were well known to Plaintiffs, who could have, challenged them, but did not.

Dane County guidance was in error and endorsed as adequate the WEC's clarifying guidance. The same guidance was in effect for this year's general election. Although the *Jefferson* litigation remains ongoing, Plaintiffs have never sought to intervene to address their purported concerns, instead waiting until the general election was over and their preferred candidate had lost. Once again, such delay is unreasonable.

Similarly, Plaintiffs argue that clerks violated Section 6.86(1)(ar) of the Wisconsin Statutes by allegedly failing to obtain a written application from voters prior to providing those voters with a ballot. But the practice of having an absentee ballot certificate envelope serve as a written application for voters who choose to vote early through the absentee process has been in place for at least ten years. Outlined in the WEC Election Administration Manual for Wisconsin Municipal Clerks,[9] the practice was employed in the general election not only this year, but also in multiple prior elections. Plaintiffs challenge it only now after waiting to see the result of the 2020 presidential election. This, again, constitutes unreasonable delay.

Finally, Plaintiffs challenge ballots "cast or received" at "Democracy in the Park" events in Madison. Yet that event was announced on or before August 31, 2020.[10] This announcement

[9] *See* WEC Election Administration Manual (Sept. 2020), at 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."), *available at* https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Election%20Administration%20Manual%20%282020-09%29.pdf.

[10] *See Democracy in the Park Event Planned for September 26 & October 3*, City of Madison (August 31, 2020), *available at* https://www.cityofmadison.com/news/democracy-in-the-park-event-planned-for-september-26-october-3.

provided Plaintiffs ample notice to challenge the event before its first session on September 26, 2020 or its second session on October 3, 2020, and long before the November 3, 2020 election.

b. Defendants did not know Plaintiffs would raise their claims here.

The second requirement for laches, that another party was unaware Plaintiffs would raise their claim, is also satisfied. *See Brennan*, 2020 WI 69, ¶ 18. Defendants had no way to anticipate Plaintiffs' misguided effort to disenfranchise hundreds of thousands of Wisconsinites, after the fact, based on participation in an election according to procedures of which Plaintiffs have been aware for years.

c. Plaintiffs' delay has prejudiced Defendants and other parties.

Also satisfied here is the final requirement of laches: prejudice. "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." *Brennan*, 2020 WI 69, ¶ 19 (quoting *Wren*, 2019 WI 110, ¶ 32). Plaintiffs' delay in asserting their groundless claims will be enormously prejudicial to Defendants and many thousands of Wisconsinites who relied upon the election practices Plaintiffs belatedly challenge.

By the time Plaintiffs filed this action, the election had been over for a full five weeks. More than 3.2 million Wisconsinites had voted in reliance on the very procedures that Plaintiffs now, having lost the election, insist were unlawful. To disenfranchise those voters as Plaintiffs demand would violate the constitutional rights of millions of Wisconsin voters. In *Brennan*, the Wisconsin Supreme Court denied a request to overturn a budget enactment on which Wisconsinites had relied. That enactment, the Court explained, gave rise to "**substantial reliance interests** on behalf of both public and private parties across the state." 2020 WI 69, ¶ 27 (emphasis added).

The Court declined to disturb such reliance interests based on claims not "brought in a timely manner." *Id*. ¶ 31. Plaintiffs' untimely challenges in this matter should similarly be rejected.

In the election context, courts routinely deny untimely requests for injunctive relief specifically because of the prejudice that doing so would cause. The conclusion that such claims are too late obtains even when the request is asserted *before* the election. *See, e.g.*, *Hawkins*, 2020 WI 75; *see also Democratic Nat'l Comm.*, 977 F.3d at 642; *Fulani*, 917 F.2d at 1031. Recently, in *Hawkins*, the Wisconsin Supreme Court considered a petition filed by members of the Green Party nearly three months *before* the 2020 general election. The Court concluded there was insufficient time to grant "any form of relief that would be feasible," and that granting relief would "completely upset[] the election," causing "confusion and disarray" and "undermin[ing] confidence in the general election results." *Id*. ¶¶ 9-10. Accordingly, the Court denied the petition. Overturning the results of an election after it has been held, as Plaintiffs demand, would create far more confusion, disarray, and loss of confidence in the results.

Numerous other courts have likewise denied extraordinary relief in election-related cases due to laches or similar considerations.[11] As one such court explained, "[a]s time passes, the state's

[11] *See, e.g.*, *Clark*, 791 N.W.2d at 294-296; *see also Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) ("[I]t would be inequitable to order preliminary relief in a suit filed so gratuitously late in the campaign season."); *Fulani*, 917 F.2d at 1031 (denying relief where plaintiffs' delay risked "interfer[ing] with the rights of other Indiana citizens, in particular the absentee voters"); *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (laches barred claims where candidate waited two weeks to file suit and preliminary election preparations were complete); *McCarthy v. Briscoe*, 539 F.2d 1353, 1354-1355 (5th Cir. 1976) (denying emergency injunctive relief where election would be disrupted by lawsuit filed in July seeking ballot access in November election); *Wood v. Raffensperger*, 1:20-cv-04651, Dkt. 54 (N.D. Ga. Nov. 20, 2020) (denying injunctive relief where plaintiff "could have, and should have, filed his constitutional challenge much sooner than he did, and certainly not two weeks *after* the General Election."); *Navarro v. Neal*, 904 F. Supp. 2d 812,

interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights." *Kay*, 621 F.2d at 813. That principle applies with even greater force here, where the election is not merely imminent, but over.

If Plaintiffs had desired an adjustment to Wisconsin's election procedures, it was incumbent upon them to demand such an adjustment, through litigation or otherwise, in time to avoid prejudicing Defendants, the WEC, municipal clerks, and Wisconsin voters who otherwise would conduct and participate in the election in good faith according to the existing procedures. Were this Court to grant Plaintiffs the relief they seek, the votes of over two hundred thousand Wisconsinites who voted in good faith according to established procedures would be discarded. That would be massively prejudicial to Defendants and thousands of others. The Court should not countenance such a result.

2. Plaintiffs are equitably estopped.

Plaintiffs also are equitably estopped from obtaining their requested relief. 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 Wis., Inc.*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997).

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816 (N.D. Ill. 2012) ("By waiting so long to bring this action, plaintiffs 'created a situation in which any remedial order would throw the state's preparations for the election into turmoil.'"), *aff'd*, 716 F.3d 425 (7th Cir. 2013); *State ex rel. Schwartz v. Brown*, 197 N.E.2d 801 (Ohio 1964) (dismissing mandamus complaint to place candidate on ballot after ballot form was certified).

The first and second elements of the equitable estoppel test are satisfied by Plaintiffs' inaction. *See Milas*, 214 Wis. 2d at 11. The third element is also satisfied because Plaintiffs' apparent acquiescence to the procedures they now challenge "induce[d] reasonable reliance," *id.* at 11, on the part of other Wisconsinites. Again, election officials undertook an enormous effort to facilitate a general election in which more than 3.2 million Wisconsinites cast ballots. In doing so, Defendants reasonably relied upon the notion that anyone wishing to raise concerns about Wisconsin's election procedures would do so *before* millions of voters cast their ballots. Likewise, Wisconsinites who voted in the election did so in reliance that, once all pre-election litigation had been resolved in the months and weeks leading up to the election, all parties could then proceed with voting under the rules as they stood.

The Wisconsin Supreme Court's decision in *Milas* is instructive. There, Ozaukee County and certain of its officials agreed to arbitrate a personnel matter with a discharged deputy sheriff, despite the expiration of a collective bargaining agreement requiring arbitration. 214 Wis. 2d at 12. "The County's full participation in the arbitration process implied a good faith effort to resolve the dispute through arbitration," and "[a]t no time during the arbitration proceeding … did the County object to the arbitrator's jurisdiction." *Id*. Instead, the County waited, objecting to the arbitrator's jurisdiction in circuit court only "17 months after the filing of the disciplinary charges, one year after commencement of the arbitration proceeding and three months after announcement of the arbitration award," and "after the arbitrator ruled against the County." *Id*. The Court held the County was "estopped in this case from challenging the validity of the arbitration award." *Id.* at 16.

Finally, the fourth element of the equitable estoppel test is satisfied here because numerous parties would suffer grievous prejudice if Plaintiffs were granted relief. Defendants, including the County Clerks and the WEC, would suffer prejudice in the form of countless hours of lost time and enormous outlays of wasted resources. The winning candidates would be deprived of the result they rightfully obtained. And many thousands of voters, having cast the ballots that Plaintiffs now seek to discard, would suffer disenfranchisement—a result that neither equity nor the federal and state constitutions can tolerate. *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 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)).

3. Plaintiffs' own unclean hands preclude relief.

Finally, Plaintiffs are barred from relief by their own unclean hands. "The principle that a plaintiff who asks affirmative relief must have clean hands before the court will entertain his plea is both ancient and universally accepted." *Timm v. Portage Cnty. Drainage Dist.*, 145 Wis. 2d 743, 753, 429 N.W.2d 512 (Ct. App. 1988). The doctrine bars injunctive relief when a petitioner's own misconduct has "'immediate and necessary relation to the equity that he seeks.'" *Henderson v. United States*, 135 S. Ct. 1780, 1783 n.1 (2015) (citation omitted). Conduct constituting "unclean hands" need not be unlawful; "any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean." *David Adler & Sons Co. v. Maglio*, 200 Wis. 153, 160, 228 N.W. 123 (1929) (citation omitted).

Plaintiffs today challenge the inclusion of four categories of Wisconsin ballots in the election results, each of which Plaintiffs could have raised long before the election. The practice

of having an absentee ballot certificate envelope serve as a written application for voters who choose to vote absentee has been in place for at least ten years. The WEC guidance for curing missing witness address information has been in place since 2016. The guidance on indefinite confinement has been in place since March. And the Democracy in the Park events took place over two months before this challenge. Plaintiffs thus have had ample opportunity to raise each of their purported challenges before the election.

Instead, Plaintiffs waited, knowing thousands of Wisconsinites would follow the procedures they now contend are unlawful. Then, when the outcome of the election did not satisfy Plaintiffs, they manufactured an "emergency" as a basis to demand extraordinary relief from this Court. Having chosen not to challenge Wisconsin's election procedures before the election, Plaintiffs cannot now be heard to demand relief from the outcome because those procedures were used. The "equity" they seek has an "immediate and necessary relation" to their own inaction, and they are not entitled to relief. *Henderson*, 135 S. Ct. at 1783 n.1.

F. A WRITTEN APPLICATION WAS MADE FOR ABSENTEE IN-PERSON VOTERS IN MILWAUKEE AND DANE COUNTIES.

Plaintiffs seek to disenfranchise tens of thousands of voters based on the allegation that municipal officials issued absentee ballots to early in-person voters without receiving a "written application" for an absentee ballot. This contention is beyond frivolous. As noted above, each in-person early voter applies for an absentee ballot by completing Form EL-122, entitled "Official Absentee Ballot Application/Certification" *before the voter receives an absentee ballot*. Wis. Stat. § 6.86(1)(a) specifies the various methods by which a voter can request an absentee ballot, including "[i]n person at the office of the municipal clerk or at an alternate site under s. 6,855, if applicable." The statute does not specify in what particular form the "written application" must

be made. Indeed, subsection (1)(a)6 states that it may be made by electronic mail or facsimile transmission.

The WEC Election Administration Manual provides that the "absentee certificate envelope doubles as an absentee request and certification when completed in person in the clerk's office." DPFOF ¶ 22. The process for in-person absentee voting, and the use of the absentee ballot envelope as the voter's written application for an absentee ballot, is in accord with Wis. Stat. § 6.86(1)(ar). Plaintiffs' broad and baseless attack on hundreds of thousands of Milwaukee and Dane County voters (and a near-half million other Wisconsin voters) fails before it starts, as every in-person early voter completed a written application as required by law.

G. THE WEC LAWFULLY INSTRUCTED ELECTION CLERKS TO CURE MISSING WITNESS ADDRESSES BASED ON RELIABLE INFORMATION.

WEC guidance, in place for more than four years and grounded in a reasonable interpretation of the Wisconsin Election Code, permits (and in some instances even requires) the practice of curing missing witness addresses based on reliable information. Since 2016, including in the 2016 general election, the WEC has required clerks to "take corrective action in an attempt to remedy a witness address error. DPFOF ¶ 38. Election officials were instructed to inform voters of the potential deficiency only when it was clear it could not be corrected by the officials themselves. *Id*. The WEC required those same measures in the 2020 General Election. *See* App. 43-46*id*. ¶ 39. The WEC's guidance is grounded in a reasonable interpretation of the Election Code, which states that a clerk "may" return an absentee ballot with an improperly completed certificate or no certificate, but does not suggest that a clerk may not instead remedy a witness address issue herself. Wis. Stat. § 6.87(9).

In fact, the evidence in the recount confirmed the reasonableness of the process used to add the missing information (most often simply forgetting to include the municipality). 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 ballots associated with envelopes containing added witness address information are improper or in violation of Wisconsin law. Thus, there is no authority for the rule Plaintiffs now seek to impose.

H. THE WEC LAWFULLY INSTRUCTED CLERKS NOT TO INVALIDATE BALLOTS OF VOTERS SELF-IDENTIFYING AS INDEFINITELY CONFINED.

The "indefinitely confined" exemption in Wis. Stat. § 6.82(2)(a) is not new. The substantive provision allowing absentee voting for "indefinitely confined" electors has been in place for more than forty years, and the relevant text of section 6.82(2)(a) has been unchanged since 1985. *See* Wis. Stat. § 6.86(2) (1985); 1985 Wisconsin Act 304.

As detailed above, on March 29, 2020, the WEC issued guidance on applying the "indefinitely confined" exemption during the pandemic. *See* App. 40-42; DPFOF ¶ 52. Just two days later, in considering a challenge to guidance provided by certain county election officials, this Court held that the WEC guidance "provide[d] the clarification on the purpose and proper use of 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 in place for the 2020 general election.

Heedless of this history, Plaintiffs seek to invalidate thousands of ballots cast by persons who, consistent with the WEC's guidance, self-identified as indefinitely confined.[12] That attempt must fail. Plaintiffs have identified no basis to invalidate votes cast in reliance on the guidance. Nor could they in light of the Supreme Court's conclusion that the guidance provided the required "clarification on the purpose and proper use of the indefinitely confined status."[13]

I. "DEMOCRACY IN THE PARK" WAS A VALID MEANS FOR THE CLERK TO RECEIVE ABSENTEE BALLOTS.

Plaintiffs argue that the "Democracy in the Park" events constituted early voting—known as "in-person absentee voting"—rather than the simple return of marked and sealed ballots to election officials. These are two distinct activities. From 2005 until late 2018, each municipality was restricted to a single site "from which electors of the municipality may request and vote absentee ballots." In-person absentee voting involves obtaining, marking, and returning an absentee ballot in a single visit to one site. Wis. Stat. § 6.855 prohibited a municipality from having more than a single such site. If the municipality had an "alternate absentee ballot site" within the meaning of Section 6.855, "no function related to voting and return of absentee ballots that is to be conducted at the alternative site may be conducted in the office of the municipal clerk or board of election commissioners." It was an either/or proposition—either a municipality could conduct

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[12] During the recount, one ward in Milwaukee reported 121 voters claiming indefinitely confined status. As noted on the record, there is a care facility in that ward. (Milwaukee 11/21/20 249:12-17). Plaintiffs would have this Court disenfranchise all of these voters.

[13] Even if Plaintiffs had presented any evidence that the "indefinite confinement" provision was misused by even a single voter, which they have not, their burden to obtain relief would be very high. This Court long ago held that "post-election inquiries into the elusive subject of a voter's state of mind" and similar "investigations" into whether a voter met specific absentee ballot requirements would "cause as much or more mischief than [they] would cure." *Schmidt v. City of West Bend Bd. of Canvassers*, 18 Wis.2d 316, 322, 118 N.W.2d 154 (1962).

in-person absentee voting at the clerk's office, or it could conduct such voting at an appropriate "alternative" site, but it could not do both. If the municipality chose an "alternative" site, that site had to be located as close as practicable to the clerk's office, and "no site may be designated that affords an advantage to any political party." This is the context of Section 6.855.

In 2016, the U.S. District Court for the Western District of Wisconsin held this so-called "one-location rule" violated the First and Fourteenth Amendments under an *Anderson-Burdick* analysis and also violated Section 2 of the Voting Rights Act. *See One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 931-35, 956 (W.D. Wis. 2016), *aff'd in part, vacated in part, rev'd in part, sub nom Luft v. Evers*, 936 F.3d 665 (2020). While that decision was on appeal, the Wisconsin Legislature amended Section 6.855 to provide that a municipality *"may* designate more than one alternative site"—thereby repealing the one-location rule. Wis. Stat. § 6.855(5). The Seventh Circuit held that this part of the appeal was moot since the statute had been amended to give plaintiffs what they sought—multiple early voting sites. *See Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020).

The Democracy in the Park "staffed drop boxes" did not function as in-person absentee voting sites. Voters could not obtain and vote ballots there, but only return absentee ballots they had previously received in the mail. Section 6.855 does not apply at all to this situation; the 206 "staffed drop boxes" were not "alternate absentee ballot sites" regulated under that provision. Instead, as discussed below, they were ballot return locations governed under Wis. Stat. § 6.87(4)(b)1. There was no early voting, rather just delivery of already requested and received absentee ballots.

Plaintiffs claim the "staffed drop boxes" used in the Democracy in the Park events did not constitute "deliver[y] in person, to the municipal clerk issuing the ballot" as required under Section 6.87(4)(b)1. The WEC, however, has interpreted this provision 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." Def. App. 70-72. As shown in the City Attorney's September 26 explanation, the "staffed drop boxes" that were used in the Democracy in the Parks events were functionally identical in all respects to the "staffed" and "unstaffed" drop boxes endorsed by the WEC. DPFOF ¶¶ 68-72; Def. App. 70-73. 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 Section 6.87(4)(b)1.

J. THE REQUESTED RELIEF OF SELECTIVELY DISENFRANCHISING VOTERS IN TWO COUNTIES FOR FOLLOWING STATEWIDE VOTING POLICIES WOULD VIOLATE CORE CONSTITUTIONAL PROTECTIONS.

The relief Plaintiffs seek—disenfranchising targeted groups of Wisconsin voters while letting similar voters in other parts of the state have their votes counted—would violate Wisconsinites' fundamental right to have their votes counted under both the U.S. and Wisconsin constitutions. *See Shipley*, 947 F.3d at 1061 (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)); *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 62 n.14, 357 Wis. 2d 469, 499, 851 N.W.2d 262, 277 ("Wisconsin's protection of the right to vote is even stronger [than the protections of federal law] because in addition to the equal protection and due process protections of Article I, Section 1 of the Wisconsin Constitution, the franchise for Wisconsin voters is expressly declared in Article III, Section 1 of the Wisconsin Constitution."); *Ollmann*, 300 N.W. at 185 ("Voting is a

constitutional right … and any statute that denies a qualified elector the right to vote is unconstitutional and void.").

1. Targeted disenfranchisement would violate Wisconsin voters' due process rights.

Plaintiffs propose that the Court invalidate thousands of ballots, all of which were cast by Wisconsin voters in good-faith reliance on election procedures instituted by the WEC and by local election officials. Invalidating these votes, where the voters committed no fraud and did nothing but follow elections officials' long-standing guidance, would be quintessentially unfair and would violate due process. *See Briscoe*, 435 F.2d at 1055.

Numerous cases have identified a procedural due process violation on similar facts. *See, e.g., Self Advocacy Solutions N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1054 (D.N.D. 2020) (plaintiffs were likely to succeed on procedural due process claim because signature-matching requirement failed "to provide affected voters with notice and an opportunity to cure a signature discrepancy before a ballot is rejected"); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222 (D.N.H. 2018) (granting summary judgment on procedural due process claim because signature-matching requirement was not accompanied by notice or opportunity to cure); *cf. PHH v. CFPB*, 839 F.3d 1, 48 (D.C. Cir. 2016) (Kavanaugh, J.) (explaining that the government may not "officially and expressly" tell citizens that they are "legally allowed to do something," only later to tell them "just kidding"), *rev'd on other grounds*, 881 F.3d 75 (2018) (*en banc*).

In addition, invalidating ballots after the election would be fundamentally unfair, infringing affected voters' right to substantive due process. *See, e.g., Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 637 (6th Cir. 2016) ("The Due Process Clause is implicated in exceptional cases where a state's voting system is fundamentally unfair." (internal quotation marks omitted));

Bennett v. Yoshina, 140 F.3d 1218, 1226 (9th Cir. 1998) ("[A]n election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair."); *Roe*, 43 F.3d at 580-81 ("If … the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated." (internal quotation marks omitted)); *Griffin*, 570 F.2d at 1077 (same). As in these cases, invalidating the ballots cast by thousands of Wisconsinites on Election Day, based solely upon Plaintiffs' flawed reinterpretation of the Election Code, would violate due process.

2. Post-hoc selective disenfranchisement would violate Wisconsin voters' First Amendment rights.

Invalidating thousands of Wisconsinites' votes based on Plaintiffs' post-election legal challenges would also violate the First Amendment rights of affected voters. The U.S. Supreme Court has recognized individuals' right "to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *see also Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (statute burdening voter's ability to participate in election "substantially abridged her ability to associate effectively with the party of her choice"). The Court has also held that "limiting the choices available to voters … impairs the voters' ability to express their political preferences." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

Here, granting the requested relief would result in Wisconsinites' votes being not only disfavored, but rendered void. Such relief would ignore those voters' choices, severely burdening their First Amendment rights without any compelling or even rational justification. *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (discussing the "right of qualified voters, regardless of their political persuasion, to cast their votes effectively"); *Dart v. Brown*, 717 F.2d 1491, 1504 (5th Cir. 1983) (noting First Amendment right "to cast a meaningful vote for a candidate of one's

choice"); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 180 (4th Cir. 1983) ("The Constitution protects the right of qualified citizens to vote and to have their votes counted as cast.").

The Eleventh Circuit's decision in *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312 (11th Cir. 2019), illustrates the problem with Plaintiffs' proposed remedy. *Lee* concerned a signature-matching requirement under which that created the possibility that "voters whose signatures were deemed a mismatch might not learn that their vote would not be counted until it was too late to do anything about it," and thus imposed imposing "at least a serious burden on the [First Amendment] right to vote." *Id.* at 1321. The court observed that "it is a basic truth that even one disenfranchised voter—let alone several thousand—is too many." *Id.*

Here, Plaintiffs seek disfranchisement of thousands of Wisconsin voters—a result far more concrete, severe, and intolerable than the result in *Lee*. The requested relief thus unduly burdens those voters' First Amendment rights.

3. Targeted disenfranchisement would violate Wisconsin voters' equal protection rights.

Finally, Plaintiffs' plan to selectively disenfranchise certain groups of Wisconsin voters in certain counties without any rational (let alone compelling) basis to do so would violate those voters' equal protection rights. *See* U.S. Const. amend. XIV, § 1; Wis. Const. art. I, § 1; *Bush v. Gore*, 531 U.S. 98, 104 (2000) (the "fundamental nature" of the right to vote means "equal weight accorded to each vote and the equal dignity owed to each voter"); *accord Shipley*, 947 F.3d at 1061 (citing *Burdick*, 504 U.S. at 433).

Because Wisconsin has chosen to empower its citizens to choose its presidential electors at the ballot box, *see* Wis. Stat. §§ 5.10, 8.25(1), the Equal Protection Clause forbids Wisconsin from,

"by later arbitrary and disparate treatment, valu[ing] one person's vote over that of another." *Bush*, 531 U.S. at 104-05; *see also Harper v. Va. 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.").

Here, among other things, Plaintiffs seek to discard ballots cast by voters in two counties while not challenging ballots cast by similarly situated voters, according to similar or identical procedures, in other counties. One can hardly imagine a starker example of "arbitrary and disparate treatment." *Bush*, 531 U.S. at 104; *see also GTE Sprint Comm'ns Corp. v. Wis. Bell, Inc.*, 155 Wis. 2d 184, 193, 454 N.W.2d 797 (1990) ("irrational or arbitrary classification[s]" violate equal protection); *Dells v. Kennedy*, 49 Wis. 555, 558 (1880) (law would be unconstitutional and "void" if it arbitrarily disfranchised voters). Plaintiffs have articulated no rational or non-arbitrary reason (let alone a "compelling" reason) to impose that disparate treatment—only Plaintiffs' own self-serving and lawless desire to render "void" an election that they lost.

CONCLUSION

The decisions of the Milwaukee Elections Commission and Dane County Board of Canvassers should be affirmed. Plaintiffs' attempt to attack Wisconsin's routine voting procedures, some of which have been in place for over a decade, has no place in a recount appeal under Wis. Stat. § 9.01. These are challenges that, if they had any merit, must be pursued under Chapter 227. But they have no merit. An "Official Absentee Ballot Application" is what it says it is, and the 650,000 Wisconsinites who used that written application for early in-person absentee voting properly applied for their absentee ballots. The municipal officials who corrected missing witness

address information were not, by following long-standing WEC guidance, throwing those ballots in the garbage. And the voters who handed their absentee ballots to the City of Madison Clerk during the Democracy in the Park events were doing just what Wis. Stat. § 6.87(4)b)1 requires—"delivering" the ballots, "in person, to the municipal clerk."

Plaintiffs do not claim and produced no evidence of fraud by any Wisconsin voter or any elections official. There was none. Joe Biden and Kamala Harris won Wisconsin fair and square. Re-counting the votes of two targeted counties only increased their margin of victory. This Court should deny Plaintiffs' attempts to disenfranchise hundreds of thousands of Dane and Milwaukee County voters who did nothing wrong.

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**Pro hac vice application submitted herewith.*

CERTIFICATION OF SERVICE

I certify that on this 9th day of December, 2020, I caused a copy of this response to be served upon all parties via e-mail.

Dated: December 9, 2020.

_____*Matthew W. O'Neill*_____
Matthew W. O'Neill