IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN

Plaintiff,

v. **CASE NO. 20-cv-1771**

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARLC L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

PLAINTIFF'S CONSOLIDATED RESPONSES TO DEFENDANTS' MOTIONS TO DISMISS AND REPLIES TO RESPONSES OF DEFENDANTS AND *AMICI* IN OPPOSITION TO MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF AND MEMORANDUM IN SUPPORT THEREOF

COMES NOW Plaintiff, Michael Feehan, by and through undersigned counsel, and files this Consolidated[1] Response, and Memorandum of Law In Support Thereof, to Defendants Motions to Dismiss Plaintiff's December 3, 2020 Amended Complaint ("Amended Complaint"), ECF No. 9, and Defendants Responses to Plaintiffs' December 3, 2020 Emergency Motion for Declaratory, Emergency and Permanent Injunctive Relief ("TRO Motion"). ECF No. 10.

[1] The Court granted Plaintiff's request to file separate Replies to Defendants. In light of the multiple Motions to Dismiss, Responses and submissions of Amici, most of which are duplicative and repetitive, and given the time constraints, Plaintiff believes it is more efficient to submit a single consolidated response and reply.

INTRODUCTION

Plaintiff seeks to preserve election integrity in Wisconsin by requesting that this Court order Defendants to rescind or reverse their certification of the 2020 General Election, which included hundreds of thousands of illegal, ineligible, fraudulent and fictitious votes that Defendant Governor Evers and the members of the Wisconsin Elections Commission ("WEC") knowingly facilitated and permitted to be cast, through intentionally weakening, or disregarding altogether, the Wisconsin Election Code's many safeguards against absentee ballot voter fraud, for the purpose of ensuring the election of Joe Biden as President.

Defendants, along with Wisconsin state courts, have refused to initiate an investigation into other glaring "irregularities" strongly indicative of brazen election fraud, such as the nearly simultaneous halt in vote counting in Milwaukee and Madison (as well as in five other swing states) in the early morning of November 4 when President Trump had significant lead, followed by the addition of over 140,000 votes for Biden when counting resumed a couple of hours later, giving Biden the narrow lead that he has now. Defendants now seek to run out the clock to cover-up the evidence of their complicity in the stolen election of 2020. In doing so, it is Defendants, not Plaintiff, that would disenfranchise millions of Wisconsin voters who cast lawful ballots and thereby overturned the results of the 2020 General Election.

Plaintiff has provided ample evidence of constitutional election fraud as set forth by the Seventh Circuit in *Kasper v. Bd. of Election Com'rs of the City of Chicago*, 814 F.2d 332, 343 (7th Cir. 1987) ("section 1983 is implicated only when there is willful conduct which undermines the organic process by which candidates are elected"):

- Third parties, whether foreign actors, local officials and/or Defendant WEC, corrupted election results.

- Defendants' knowing refusal to rescind certification and delivery of corrupted results to the Electoral College will deny Plaintiff equal protection.

- Plaintiff is entitled to injunctive relief to prevent defendants from delivering corrupted results the deny him due process and equal protection, and the ability to cast his vote in the Electoral College on December 14, 2020 for President Trump..

This case therefore turns on the question whether Plaintiff can carry his burden of proof that the results are corrupt. Tellingly, Defendants have not propounded *any* declarations or affidavits contesting Plaintiff's extensive sworn testimony and documentary evidence.

STATEMENT OF FACTS

In *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922 (Fed. Cir. 2012), the Court upheld the district court's entry of a preliminary injunction based on defendant's failure to offer any evidence controverting the plaintiff's sworn testimony and documentary evidence.

> Based on the record before the district court, this court sees no error in the district court's finding that Celsis would suffer irreparable harm absent a preliminary injunction. . . . .
>
> Celsis offered testimony from its expert Mark Peterson on irreparable harm. In contrast, LTC did not offer expert testimony in rebuttal. This court sees no error in the district court's reliance on Celsis' unrebutted expert testimony. To substantiate its claims, Celsis presented fact and expert testimony as well as specific financial records.

Id. 930–31.[2]

The following facts are unrebutted by any countervailing evidence.

WEC uses the same Dominion Voting Systems Corporation ("Dominion") election software and hardware designed by Smartmatic Corporation (Sequoia in the United States). Amd. Cplt. ECF

[2] In its opposition to Plaintiff's request for Evidentiary Hearing, WEC complained that Plaintiff has "sandbagged," and will likely make a variant of that same complaint in response to Plaintiff's position that the Court may determine Plaintiff's TRO/PI Motion on the unrebutted record before the Court. Plaintiff's evidence submitted in this case is substantially similar to that submitted in parallel actions in other jurisdictions referenced by Defendants because the same three voting technology companies that control voting in those jurisdictions (along with 90% of the US market) also control substantial voting operations in Wisconsin.

Plaintiff's proof was filed with his Complaint December 1. Further, Counsel for Defendants and Intervenor/Amicus Democratic National Committee have also appeared in those other actions and have been well aware of Plaintiff's proof for weeks.

9 (hereafter, "Amd. Cplt."), Pars. 6 - 8. Dominion and Smartmatic were founded and employed to conduct computerized ballot-stuffing and vote manipulation. The Smartmatic software ensured that ensured Venezuelan dictator Hugo Chavez never lost an election. Exhs. 1 and 8 (member Chavez's security detail and a 25-year member of the Supreme Electoral Council, which oversees all Venezuela elections.)[3]

Smartmatic software design adopted by Dominion for Wisconsin's elections provides the ability to hide vote manipulation votes from any audit. It allows an unauthorized user to add, modify, or remove log entries, causing the machine to log election events that do not reflect actual voting tabulation. Amd. Cplt. 9 – 10. Exh. 14.

For those reasons, the Texas Board of Elections rejected Dominion software and denied certification of the 2020 election results. Amd. Cplt. Pars. 10, n. 1, 12. (Exhs.17, 9, 11)

Texas has today filed with the United States Supreme Court its Motion for Leave to File Bill of Complaint. Exh. 2 to this Response/Reply The Motion includes allegations oof fraud and vote manipulation specific to Wisconsin. Id., pars. 106 – 124.

According to Princeton Professor of Computer Science and Election Security Expert Dr. Andrew Appel, he wrote a similar program that would enable someone to "hack a voting machine [with] 7 minutes alone with a screwdriver." Amd. Cplt. Par. 13. (Exh. 10).

The WEC itself issued patently unlawful "guidance" to county and municipal clerks not to reject "indefinitely confined" absentee voters for whom they had "reliable information" that the voters were not confined, and to fill in missing absentee ballot certification information themselves on envelope and at the polls. Amd. Cplt. Pars. 14, 37 – 45). (WEC May 13, 2020 Guidance Memorandum.)

[3] All Exhibit references are to the Amended Complaint.

The Dominion software was accessed by agents acting on behalf of China and Iran in order to monitor and manipulate elections, including the most recent US general election in 2020. Amd. Cplt. Par. 16 (Exh. 12, former military electronic intelligence analyst).

Many Wisconsin jurisdictions also used the Elections Systems & Software Election Management System, which is similarly compromised. Exh. 17, Pars. 7 – 11.

The WEC certified the Election results on November 30, 2020, showing a difference of 20,565 votes in favor of former Vice-President Joe Biden over President Trump. Amd. Cplt. Par. 35.[4]

Additional errors included voters receiving ballots who didn't request them and returned ballots that went missing. Dr. Briggs concluded that those errors affected almost 97,000 ballots in the state of Wisconsin, with tens of thousands of unrequested ballots being wrongfully, returned ballots not being counted, and others lost or destroyed. Amd.Cplt. Pars. 46 – 51.

Statistical analysis of voting pattern anomalies demonstrated statistically significant outperformance of Dominion machines on behalf of Joe Biden by 181,440. Amd. Cplt. Pars. 52 – 58 (Exh. 4)

The State of Wisconsin, in many locations, used either Sequoia, a subsidiary of Dominion Systems, and or Dominion Systems, Democracy Suite 4.14-D first, and then included Dominion Systems Democracy Suite 5.0-S on or about January 27, 2017, which added a fundamental modification: "dial-up and wireless results transmission capabilities to the Image Cast Precinct and results transmission using the Democracy Suite EMS Results Transfer Manager module." (*See* Exh. 5, attached hereto, a copy of the Equipment for WI election systems).

[4] Available at https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf

Anomalous voting results occurred in voting jurisdictions throughout Wisconsin using software by Dominion and its subsidiary Sequoia, which included "dial-up and wireless results transmission capabilities." Amd.Cplt, Par. 60 - 62. Exh 5.

WEC continued using Dominion and Sequoia software despite numerous concerns expressed by federal and state agencies and courts throughout the country regarding multiple "acute security vulnerabilities." Amd.Cp.t, Par. 63 - 68. Exh. 7.

Dominion software has been compromised by actors in both China and Iran. Dominions systems are further vulnerable because hardware is manufactured by foreign companies with interests contrary to those of the United States. Amd. Cplt. 70-76 (Exh. 12).

Further, a Dominion

> ". . . algorithm looks to have been set to give Joe Biden a 52% win even with an initial 50K+ vote block allocation was provided initially as tallying began (as in case of Arizona too). In the am of November 4, 2020 the algorithm stopped working, therefore another "block allocation" to remedy the failure of the algorithm. This was done manually as ALL the SYSTEMS shut down NATIONWIDE to avoid detection."

Exh. 13, Par. 76 (emphasis original)

Dominion data feeds revealed "raw vote data coming directly that includes decimal places establishes selection by an algorithm, and not individual voter's choice. Otherwise, votes would be solely represented as whole numbers (votes cannot possibly be added up and have decimal places reported)." Amd. Cplt. Pars. 78 – 79, Exzh. 17. Statistical anomalies and impossibilities compel the conclusion that at least 119,430 must be disregarded. *Id.*

Smartmatic's inventors and key personnel are foreign nationals, and the Venezuelan official personally witnessed manipulation of petitions to prevent removal of President Chavez from office. Amd. Cplt. Pars. 80-81. (Exhs. 17 and 8).

In their October 30, 2020 advisory "Iranian Advanced Persistent Threat Actor Identified Obtained Voter Registration Data," both the FBIC and United States Cybersecurity and

Infrastructure Security Agency warned of Iranian influence in the 2020 election. Amd. Cplt. Par. 82, Exh. 18.

Dominion systems allow operators to "accept" or "discard" batches of votes on fed through tabulation machines, including through arbitrarily designating batches of ballots as "problem" batches. Amd. Cplt. Pars. 83 - 85.Exhs. 14 and 8.

Problems with Dominion systems have been widely reported and documented by individual citizens and expert academics. Amd Cplt. Pars. 86 - 89.

In particular, Democratic Senators Warren, Klobuchar, Wyden and Congressman Mark Pocan wrote to the hedge fund owners of voting systems about their concerns that trouble plagued companies owning voting systems were compromising on security and concentrating ownership in only three large companies - Election Systems & Software, Dominion Voting Systems, & Hart InterCivic – which collectively serve over 90% of all eligible voters in the U.S." Amd. Cplt. Par. 88. Exh. 16.

Of particular concern, Dominion's Security Director Eric Coomer, who invented critical dominion software, is a vehement, virulent and frequent opponent of President Trump who, besides intemperate and obscene attacks on the President, has posted videos how Dominion systems may be compromised and boasted publicly he was "f**ing sure" the President was "not going to win." . Amd. Cplt. Par. 88-99

Additional facts relevant to this Consolidated Response and Reply are set forth in the December 3, 2020 Amended Complaint, ECF No. 9, filed in the above-captioned proceeding, and its accompanying exhibits, and the TRO Motion.

DISCUSSION

The Amended Complaint lays out in detail factual allegations and violations of the U.S. Constitution and the Wisconsin Election Code, supported by more than a dozen sworn affidavits from fact and expert witnesses. Yet Defendants dismiss the Amended Complaint as a "mishmash of speculation, conjecture, and conspiracy theories, all without a shred of evidence." ECF No. 59 at 1. Defendants and *Amicus* filings have not presented any facts or witness testimony that responds to, much less rebuts, Plaintiffs' factual allegations and witnesses. Accordingly, Plaintiff's allegation and witness testimony remains unrebutted and unchallenged and must be accepted as true for the purpose of this response.

In Section I, Plaintiff will first review the legal standard for granting injunctive relief, and the evidentiary standards applicable to the TRO Motion where, as here, defendants fail to offer any rebutting evidence. Thereafter, Plaintiff will again demonstrate that it has met the requirements for injunctive relief, which are: (1) substantial likelihood of success on the merits, and in particular that Plaintiffs have adequately pled their Constitutional and statutory claims; (2) irreparable injury, (3) the balance of equities tips in their favor, and (4) the requested relief is in the public interest.

In Section II, Plaintiff will demonstrate that he has met the applicable pleading standard for constitutional election fraud and other constitutional claims under 42 U.S.C. § 1983, in particular, under Federal Rules of Civil Procedure Rule 9(b) and Rule 12(b)(6). As an initial matter, we would note that dismissal of election-related challenges is inappropriate before the development of the evidentiary record.

Finally, Section III will respond to, and dispose of, specious legal arguments by Defendants and *Amicus* for denial of Plaintiffs' TRO Motion, and/or dismissal of the Amended Complaint, on

grounds of: (1) standing, (2) laches, (3) mootness, (4) the Eleventh Amendment, (5) administrative exhaustion and exclusive state jurisdiction, and (6) abstention

I. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF

A. Legal Standard for Injunctive Relief.

"To obtain a preliminary injunction, a plaintiff must show three things: (1) without such relief, he will suffer irreparable harm before his claim is finally resolved; (2) he has no adequate remedy at law; and (3) he has some likelihood of success on the merits. *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017) (*citing Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am.*, Inc., 549 F.3d 1079, 1086 (7th Cir. 2008)." "If the plaintiff can do that much, the court must then weigh the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one." *Harlin*, 866 F.3d at 758 (*citing Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). In addition, the court must ask whether the preliminary injunction is in the public interest. *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1058 (7th Cir. 2016).

All elements are met here, under either standard, and Defendants' and *Amicus* responses have not shown otherwise. Further, this Court can grant the requested injunctive relief on the pleadings, without an evidentiary hearing, because Defendants have failed to provide any fact or expert witness testimony whatsoever to rebut Plaintiff's fact and expert witnesses. *See, e.g., Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 663 F.3d 922, 930-31 (Fed. Cir. 2012) (affirming district court grant of preliminary injunction that relied on plaintiff's unrebutted expert testimony).

Of course, as an initial matter, "[w]hen the acts sought to be enjoined have been declared unlawful or clearly are against the public interest, plaintiff need show neither irreparable injury nor a balance of hardship in his favor." 11 Wright & Miller, Federal Practice & Proc. ¶ 2948 (3d ed. 1998)) (internal quotation marks omitted); *see also Current-Jacks Fork Canoe Rental Ass'n v. Clark*, 603 F. Supp. 421, 427 (E.D. Mo. 1985) (stating that "[i]n actions to enjoin continued

violations of federal statutes, once a movant establishes the likelihood of prevailing on the merits, irreparable harm to the public is presumed."). Certifying election results tainted by election fraud and failing to retract such a certification is clearly unlawful and against the public interest. Hence, Plaintiffs discuss irreparable hardship and the public interest only in the alternative.

B. Plaintiff Has Satisfied Requirements for Preliminary Injunction and TRO.

1. Plaintiff has a substantial likelihood of success.

The Plaintiff does not need to demonstrate a likelihood of absolute success on the merits. "Instead, [it] must only show that [its] chances to succeed on his claims are 'better than negligible.'" *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046 (7th Cir. 2017). (*quoting Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999)). "This is a low threshold," *id.*, that Plaintiff has easily passed.

Through detailed fact and expert testimony including documentary evidence contained in the Amended Complaint and its exhibits, Plaintiff has made a compelling showing that Defendants' intentional actions jeopardized the rights of Wisconsin citizens to select their leaders under the process set out by the Wisconsin Legislature through the commission of election frauds that violated Wisconsin laws, including multiple provisions of the Wisconsin election laws. These acts also violated the Equal Protection and Due Process Clauses of the United States Constitution. U.S. Const. Amend XIV. And pursuant to 42 U.S.C. § 1983, plaintiffs must demonstrate by a preponderance of the evidence that their constitutional rights to equal protection or fundamental right to vote were violated. *See, e.g., Radentz v. Marion Cty.*, 640 F.3d 754, 756-757 (7th Cir. 2011).

Defendants and *Amicus* misrepresent Plaintiff's constitutional claims. Plaintiff alleges both vote dilution and voter disenfranchisement, both of which are claims under the Equal Protection and Due Process Clause, due to the actions of Defendants in collusion with public

employees and voting systems like Dominion. The Amended Complaint describes in great detail Defendants' actions to dilute the votes of Republican voters through counting and even manufacturing hundreds of thousands of illegal, ineligible, duplicative or outright fraudulent ballots.

While the U.S. Constitution itself accords no right to vote for presidential electors, "[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 source 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, 104 (2000) (emphasis added). The evidence shows not only that Defendants failed to administer the November 3, 2020 election in compliance with the manner prescribed by the Wisconsin Legislature, but they administered the voter registration, absentee ballot rules, and subsequent ballot processing and counting in a manner that facilitated fraudulent and illegal voter registration and ballot tabulation by election workers, Dominion, Democratic Party officials and activists and other third parties making certain the election of Joe Biden as President of the United States. This conduct violated Equal Protection and Due Process rights of Plaintiff and other similarly situated voters, as well rights under the Wisconsin election laws. *See Kasper v. Bd. of Election Com'rs of the City of Chicago*, 814 F.2d 332, 343 (7th Cir. 1987) (state officials "casting (or approving) of fictitious votes can violate the Constitution and other federal laws.").

But Defendants' actions also disenfranchised Republican voters in violation of the U.S. Constitution's "one person, one vote" requirement by:

- **Republican Ballot Destruction**: "1 Person, 0 Votes." Fact and witness expert testimony alleges and provides strong evidence that tens or even hundreds of thousands of Republican votes were destroyed, thus completely disenfranchising that voter.

- **Republican Vote Switching**: "1 Person, -1 Votes." Plaintiff's fact and expert witnesses further alleged and provided supporting evidence that in many cases, Trump/Republican votes were switched or counted as Biden/Democrat votes. Here, the Republican voter was not only disenfranchised by not having his vote counted for his chosen candidates, but the constitutional injury is compounded by adding his or her vote to the candidates he or she opposes.

- **Dominion Algorithmic Manipulation**: For Republicans, "1 Person, 0.5 Votes," while for Democrats "1 Person, 1.5 Votes. Plaintiff presented evidence in the Complaint regarding Dominion's algorithmic manipulation of ballot tabulation, such that Republican voters in a given geographic region, received less weight per person, than Democratic voters in the same or other geographic regions. See ECF No. 6, Ex. 104. This unequal treatment is the 21st century of the evil that the Supreme Court sought to remedy in the apportionment cases beginning with *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964). Further, Dominion has done so in collusion with State actors, including Defendants, so this form of discrimination is under color of law.

This Court should consider the totality of the circumstances in evaluating Plaintiff's constitutional and voting rights claims, *see, e.g., Chisom v. Roemer*, 111 S.Ct 2354, 2368 (1991), and thus the cumulative effect of the Defendants' voter dilution, disenfranchisement, fraud and manipulation, in addition to the effects of specific practices. Taken together, these various forms of unlawful and unconstitutional conduct destroyed or shifted tens or hundreds of thousands of Trump votes, and illegally added tens or hundreds of thousand of Biden votes, changing the result of the election, and effectively disenfranchising the majority of Wisconsin voters. Defendant (and *Amicus*) were fully aware of these constitutional violations, and did nothing to stop it.

While Plaintiff alleges several categories of traditional "voting fraud", Plaintiff has also alleged new forms of voting dilution and disenfranchisement made possible by new technology. The potential for voter fraud inherent in electronic voting was increased as a direct result of Defendants' and *Amicus*'s efforts to transform traditional in-person paper voting – for which there are significant protections from fraud in place – to near universal absentee voting with electronic tabulation – while at the same time eliminating through legislation or litigation. And when that failed by refusing to enforce – traditional protections against voting fraud (voter ID, signature

matching, witness and address requirements, etc.). Defendants' design and administration of the Wisconsin Election Code facilitated illegal and fraudulent voter registration and voting, and thus evinced a state "policy" that "honest voting is unnecessary or unimportant." *Kasper*, 814 F.2d at 344. Defendants' filing in this proceeding – where they seek to cover up the illegal conduct of state officials and other third parties and prevent the evidence from ever seeing the light of day – provide further proof that Defendants are complicit in the massive election fraud scheme described in the Amended Complaint.

Thus, while Plaintiff's claims include novel elements due to changes in technology and voting practices, that does not nullify the Constitution or Plaintiff's rights thereunder. Defendants and Defendant-Intervenors have implemented likely the most wide-ranging and comprehensive scheme of voting fraud yet devised, integrating new technology with old fashioned urban machine corruption and skullduggery. The fact that this scheme is novel does not make it legal, or prevent this Court from fashioning appropriate injunctive relief to protect Plaintiff's right and prevent Defendants from enjoying the benefits of their illegal conduct.

2. The Plaintiff Will Suffer Irreparable Harm.

Plaintiff will suffer an irreparable harm due to the Defendants' myriad violations of Plaintiff's rights under the U.S. Constitution, and Wisconsin Election Code, and Defendant and Defendant Intervenors have not shown otherwise.

Where, as here, plaintiff has demonstrated a likelihood of success on the merits as to a constitutional claim, such an injury has been held to constitute irreparable harm." *Democratic Nat'l Comm. v. Bostelmann,* 447 F.Supp.3d 757, 769 (W.D. Wis. 2020) (*citing Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (where plaintiff had proven a probability of success on the merits, the threatened loss of First Amendment freedoms "unquestionably constitutes irreparable injury"); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.4 (7th Cir.

1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm."). Moreover, courts have specifically held that infringement on the fundamental right to vote constitutes irreparable injury. *See Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) ("A restriction on the fundamental right to vote ... constitutes irreparable injury."); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (holding that plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon")."

"Additionally, traditional legal remedies would be inadequate, since infringement on a citizens' constitutional right to vote cannot be redressed by money damages." *Bostelmann*, 447 F.Supp.3d at 769 (*citing Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate."); *League of Women* Voters *of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress.")."

In this Response, Plaintiff has refuted and rebutted Defendants' arguments in detail, in particular, regarding standing, equitable defenses, and jurisdictional claims, as well as establishing their substantial likelihood of success. Having disposed of those arguments, and shown a substantial likelihood of success, this Court should presume that the requirement to show irreparable injury has been satisfied.

3. The Balance of Equities & The Public Interest

Under Seventh Circuit law, a "sliding scale" approach is used for balancing of harms: "[t]he more likely it is that [the movant] will win its case on the merits, the less the balance of harms need weigh in its favor." *Girl Scouts of Manitou Council v. Girl Scouts of United States of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). Plaintiff has shown a strong likelihood of success on the merits above.

Granting Plaintiff's primary request for injunctive relief, enjoining certification of the 2020 General Election results, or requiring Defendants to de-certify the results, would not only not impose a burden on Defendants, but would instead relieve Defendants of the obligation to take any further affirmative action. The result would be to place the decision regarding certification and the selection of Presidential Electors back into the hands of the Wisconsin Legislature, which is the ultimate decision maker under the Elections and Electors Clause of the U.S. Constitution.

Conversely, permitting Defendants' certification of an election so tainted by fraud and Defendants' own unlawful conduct that it would impose a certain and irreparable injury not only on Plaintiff, but would also irreparably harm the public interest insofar as it would undermine "[c]onfidence in the integrity of our electoral processes," which "is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 127 S.Ct. 5, 7 (2006) (per curiam).

II. PLAINTIFF SATISFIES APPLICABLE PLEADING STANDARDS

Defendants urge this Court to dismiss the Amended Complaint for failure to state a claim under Rule 12(b)(6) or to plead with particularity under Rule 9(b). *See* ECF No. 54 at 2; ECF No. 59 at 21-22; ECF No. 57 at 21-26.

The pleading requirements for stating a constitutional election fraud claim in the Seventh Circuit under Section 1983 are set forth in *Kasper*, a case addressing widespread voter fraud in Chicago on a scale similar to what occurred in the 2020 General Election. 814 F.2d at 342-344. While "intent is an essential ingredient of a constitutional election fraud case under § 1983," *id.* at 343, it is not the same intent as required in a common law fraud claim under Federal Rules of Civil Procedure 9(b). Instead, "section 1983 is implicated only when there is willful conduct which undermines the organic process by which candidates are elected." *Id.* (internal citations and quotation omitted).

In *Kasper*, Republican plaintiffs alleged a range of illegal conduct strikingly similar to what has occurred in Wisconsin and other state in the 2020 General Election, in particular, maintenance of voter lists with ineligible voters, fictitious or fraudulent votes, and failure to enforce safeguards against voting fraud. Their complaint did not allege active state participation in vote dilution or other illegal conduct, but rather that the state defendants were aware that a substantial number of registrations are bogus and [had] not alleviated the situation." *Id.* The *Kasper* held that "casting (or approval) of fictitious votes can violate the Constitution and other federal laws," and that for the purposes of Section 1983, it is sufficient to allege that this conduct was permitted pursuant to a state "'policy" of diluting votes" that "may be established by a demonstration" state officials who "despite knowing of the practice, [have] done nothing to make it difficult." *Id.* at 344. This "policy" may also lie in the "design and administration" of the voting system that is "incapable of producing an honest vote," in which case "[t]he resulting fraud may be attributable" to state officials "because the whole system is in [their] care and therefore is state action." *Id.*

Accordingly, Plaintiff is not required to allege that Defendants directly participated in illegal conduct, or to meet Rule 9(b) requirements to plead with particularity facts demonstrating their active participation. Instead, it is sufficient, both for purposes of Rule 9(b) and Rule 12(b)(6) that Defendants' administration of the Wisconsin Election Code, in particular their guidance that nullified express provisions intend to prevent absentee voter fraud, certification of and reliance on Dominion voting machines, and their certification of results tainted by widespread fraud, in a manner that facilitated voter fraud and resulted in the constitutional violations set forth in the Compliant. "In a system of notice pleading, judges should read complaints generously," *id.* at 343, and Plaintiff's Amended Complaint, detailing several distinct types of voter fraud and constitutional violations, supported by over a dozen sworn affidavits from fact and expert

witnesses providing evidence of voter fraud, easily exceeds the applicable pleading requirements under the Federal Rules of Civil Procedure.

III. DEFENDANTS' JURISDICTIONAL AND OTHER GROUNDS FOR DISMISSAL.

A. Plaintiff Has Standing.

Plaintiff is a lawfully registered Wisconsin voter, who voted for President Trump in the 2020 General Election, and a nominee of the Republican Party to be a Presidential Elector on behalf of the State of Wisconsin. See ECF No. 1, "Parties" and Exh. 1, Declaration of William Feehan.

1. Plaintiff Elector Has Standing under Electors and Elections Clause.

Defendants arguments on standing rely on the Third Circuit's decision in *Bognet v. Sec'y of Commonwealth*, No. 20-2314, 2020 WL 6686120 (3d Cir. Nov. 13, 2020), *see* ECF No. 52 at 7; ECF No. 59 at 7-8, as well as a recent district court decision in Michigan that followed *Bognet*. ECF No. 59 at 8. (*citing King v. Whitmer*, No. 2:20-vc-13134 (E.D. Mich. Dec. 7, 2020). The *Bognet* court addressed a complaint by Pennsylvania voters and a congressional candidate, but not by a Presidential Elector.

Plaintiff Feehan has standing for the same reason that the Eighth Circuit held that Minnesota Electors had standing in *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). The *Carson* court affirmed that Presidential Electors have both Article III and Prudential standing under the Electors and Elections Clauses, "was rooted heavily in the court's interpretation of Minnesota law." Defendants neglect to mention is that the Carson court relied on provisions of Minnesota law treating electors as candidates for office are just like the corresponding provision of the Wisconsin Election Code because in both States an elector is a candidate for office nominated by a political party, and a vote cast for a party's candidate for President and Vice-President is cast for

that party's Electors. The Carson court concluded that, "[b]ecause Minnesota law plainly treats presidential electors as a candidate, we do, too." *Carson*, 978 F.3d at 1057.

Like the Minnesota statute addressed by the *Carson* court, Wisconsin statutes provide, first, that electors are candidates for office nominated by their political party at their state convention held "on the first Tuesday in October of each year in which there is a Presidential election." Wis. Stat. § 8.18.

More importantly, Wisconsin voters do not vote directly for the office of President and Vice-President, but instead vote for Electors like Mr. Feehan:

> Presidential electors. By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress. ***A vote for the president and vice president nominations of any party is a vote for the electors of the nominees.***
>
> Wis. Stat. §8.25.
>
> When presidential electors … are to be voted for, ***a vote cast for the party candidate for president and vice-president shall be deemed a vote cast for that party's electors*** … as filed with the secretary of state.
>
> Minn. Stat. § 208.04(1) (emphasis added).

In Wisconsin as in Minnesota, the President and Vice-President are not directly elected by voters. Instead, voters elect the Presidential Electors, who in turn elect the President and Vice-President A vote for President Trump and Vice-President Pence in Wisconsin ***was*** a vote for Plaintiff and his fellow Republican Presidential Electors. It goes without saying that Presidential Electors play a unique – and central – role in Presidential elections, a role expressly spelled out in the Electors Clause of the U.S. Constitution. As such, election fraud or other violations of state election law impacting federal Presidential elections, have a unique and distinct impact on Presidential Electors, and illegal conduct aimed at harming candidates for President similarly

injures Presidential Electors. As such, Plaintiff Elector has "a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson*, 978 F.3d at 1058. *See also McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (*per curiam*).

2. Plaintiff Has Standing for Equal Protection and Due Process Claims as a Registered Voter on His Own Behalf and on Behalf Similarly Situated Voters for Republican Candidates

Defendants misrepresent Plaintiff's Equal Protection and Due Process claims, both in terms of substance and for standing purposes, insofar as they claim that Plaintiffs' claims are based solely on a theory of vote dilution, and therefore is a "generalized grievance," rather than the concrete and particularized injury required for Article III standing. *See* ECF No. 52 at 6; ECF No. 4 at 6: ECF No. 59 at 9.[5] Defendants also cite the Eleventh Circuit's decision in *Wood v. Raffensperger*, No. 20-14418 (D.C. Cir. Dec. 5, 2020). *See* ECF No. 57 at 14. But they fail to recognize that The Eleventh Circuit's decision in *Wood* supports Plaintiff's standing argument, and refutes theirs. The court dismissed plaintiff Wood's claim because he was not a candidate. "[I]f Wood were a political candidate," like the Plaintiff here, "he would satisfy this requirement because he could assert a personal, distinct injury." ECF No. 55-4 at *4 (citations omitted).

Plaintiff, on behalf of himself and other similarly situated voters allege, first, and with great particularity, that Defendants have both violated Wisconsin law and applied Wisconsin law, in an arbitrary and disparate manner, to dilute the votes of (or voters for Republican candidates) with

[5] *Amicus* also cites *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, 2020 WL 6821992 (M.D. Penn Nov. 21, 2020). *See* ECF No. 57 at 13. This case addressed a number of theories for standing -- associational, organizational, and standing of a political party based on harm to that party's candidates -- that are not present here because each Plaintiff bring suit in their personal capacity as registered Arizona voters and 11 of the Plaintiffs as Presidential Electors.

illegal, ineligible, duplicate or fictitious votes. The fact and expert witness testimony describes and quantifies the myriad means by which Defendants and their collaborators illegally inflated the vote tally for Biden and other Democrats. See ECF No. 9, Section II and III. Thus, the vote dilution resulting from this systemic and illegal conduct did not affect all Wisconsin voters equally; it had the intent and effect of inflating the number of votes for Democratic candidates and reducing the number of votes for Trump and Republican candidates.

Further, Plaintiff has presented evidence that, not only did Defendants dilute the votes of Plaintiff and similarly-situated voters for Republican candidates, they sought to actively disenfranchise such voters to reduce their voting power, in clear violation of "one person, one vote." *See generally Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964). The Constitution protects "the right of all qualified citizens to vote in state and federal elections ... and [ ] the right to have votes counted without dilution as compared to the votes of others." *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986). Similarly, federal courts in Wisconsin have held that voters have standing to challenge state laws that collectively reduce the value of one party's impose an injury that is statewide. *See Whitford v. Nichol*, 151 F.Supp.3d 918, 926 (W.D. Wis. 2015).

Defendants engaged in several schemes to devalue Republican votes as detailed in the Amended Complaint, including Republican ballots being destroyed or discarded, or "1 person, 0 votes," vote switching "1 person, -1 votes," (Dominion and election workers switching votes from Trump/Republican to Biden/Democrat), and Dominion algorithmic manipulation, or for Republicans, "1 person, 1/2 votes," and for Democrats, "1 person, 1.5 votes." *See e.g.*, ECF No. 9, Section II.C (ballot destruction/discarding) Ex. 2 (Dr. Briggs Testimony regarding potential ballot destruction), Ex. 17 (Ramsland testimony regarding additive algorithm), Section IV

(multiple witnesses regarding Dominion vote manipulation). Plaintiff's injury is that the relative value of his particular votes was devalued, or eliminated altogether, and as such, it is not a "generalized grievance," as Defendants claim.

It is hard to square Defendants' argument that a candidate Plaintiff—whose interests and injury are identical to that of President Trump—lacks standing to raise Equal Protection and Due Process claims of similarly situated Republican voters, with the Supreme Court's 7-2 decision in *Bush v. Gore*, 531 U.S. 98 (200), "then-candidate George W. Bush of Texas had standing to raise the equal protection rights of Florida voters that a majority of the Supreme Court deemed decisive" in that case. *Hawkins v. Wayne Twp. Bd. of Marion Cty., IN*, 183 F. Supp. 2d 1099, 1103 (S.D. Ind. 2002).

Plaintiff can also establish that the alleged particularized injury in fact is causally connected to Defendants' actions. Specifically, "WEC's administration of Wisconsin's elections, including the enforcement of its current election laws, is the cause of plaintiff['s] alleged injuries. Moreover, the WEC has the authority to implement a federal court order relating to election law to redress these alleged injuries." *Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 5627186, at *12 (W.D. Wis. Sept. 21, 2020). Defendant Evers can also provide partial redress in terms of the requested injunctive relief, namely, by refusing to certify or transmit the election results, and providing access to voting machines, records and other "election materials." ECF No. 9 ¶142(4).

Plaintiff thus meets the requirements for standing: (1) the injuries of their rights under the Equal Protection and Due Process clauses that concrete and particularized for themselves, and similarly situated voters, whose votes have been devalued or disregarded altogether (2) that are actual or imminent and (3) are causally connected to Defendants conduct because the debasement

of their votes is a direct and intended result of the conducts of the Defendants and the public employee election workers they supervise. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

B. Laches

Defendants assert that Plaintiff's claims are barred by laches. See ECF No. 52 at 8; ECF No. 59 at 16-20. To establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself. *See ,e.g., Lingenfelter v. Keystone Consolidated Indus., Inc.,* 691 F.2d 339, 340 (7th Cir.1982).

First off, "ordinarily a motion to dismiss is not the appropriate vehicle to address the defense of laches," *American Commercial Barge Lines, LLC v. Reserve FTL, Inc.*, 2002 WL 31749171 (N.D. Ill. Dec. 3, 2002) (*citing Farries v. Stanadyne/Chicago Div.*, 832 F.2d 374, 376 (7th Cir. 1987)), because "the defense of laches … involves more than the mere lapse of time and depends largely on questions of fact." *Id.* (*quoting* 5 Wright & Miller, Federal Practice and Procedure § 1277 (2d ed. 1987). Accordingly, most courts have found the defense "unsuitable for resolution at the pleading stage." *Id.* (citation omitted).

Defendant Evers relies on *Soules v. Kauians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988), ECF No. 59 at 17, a case with entirely different facts. There, the Ninth Circuit held that plaintiff Equal Protection claim was barred by laches because they "knew the basis of their equal claim well in advance" of the election, months in advance in fact, *Soules*, 849 F.2d at 1181, and failed to provide any explanation for their failure to press their claim before the election. *Id*. at 1182.

Here, by contrast to Defendants' assertions, all of the unlawful conduct occurred during the course of the election and in the post-election vote counting, manipulation, and even fabrication. Plaintiff could not have known the basis of these claims, or presented evidence

substantiating their claim, until after the election. Further, because Wisconsin election officials and other third parties involved did not announce or publicize their misconduct, and in fact prevented Republican poll watchers from observing the ballot counting and handling, it took Plaintiff additional time post-election to gather the fact and expert witness testimony presented in the Amended Complaint. Had they filed before the election, as the Defendant Secretary asserts, it would have been dismissed as speculative--because the injuries asserted had not occurred--and on ripeness grounds.

Any "delay" in filing after Election Day is almost entirely due to Defendants failure to promptly complete counting until weeks after November 3, 2020. Wisconsin did not complete counting at the same time it certified results, which was not until November 30, 2020, and Plaintiff filed the initial complaint (which is materially the same as the Amended Complaint filed December 3, 2020), and TRO motion the ***very next day*** on December 1, 2020. Defendants cannot now assert the equitable affirmative defense of laches, when there is no unreasonable delay nor is there any genuine prejudice to the Defendants.

C. Mootness

Defendant Evers' mootness argument is similarly without merit. *See* ECF No. 59 at 13-14. This argument is based on the false premise that this Court cannot order any of the relief requested in the Amended Complaint or the TRO Motion because the "requests for relief relate to the general election held on November 3, 2020, and its results," *id.* at 13, and "[b]ecause Wisconsin has already certified its results." *Id.* at 14.

It is well settled that "the passage of an election does not necessarily render an election-related challenge moot and that such challenges may fall within the 'capable of repetition yet evading review' exception to the mootness doctrine." *Tobin for Governor v. Illinois State Bd. of Elections*, 268 F.3d 517, 528 (7th Cir. 2001) (citations omitted). This exception applies where:

"(1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Id*. at 529 (citations omitted). Plaintiff's claims regarding Defendants' arbitrary and disparate implementation of Wisconsin law, in a manner that directly contravenes Wisconsin Election Code provisions governing absentee voting—in particular their guidance relating to "indefinitely confined" (*see* Wis. Stat. § 6.86 & Amended Complaint, Section I.A) voters and witness address verification requirements (*see* Wis. Stat. § 6.87 & Amended Complaint Section I.B—where officials have violated statute in this election, and further assert that it was proper to do so, their conduct will certainly continue in the next election.

In any case, the certification of election results render Plaintiff's election-related claims moot. In *Siegel v. Lepore*, 234 F.3d 1163 (11th Cir. 2000), a case arising from the 2000 General Election, the Eleventh Circuit addressed post-certification election challenges:

> This Court has held that "[a] claim for injunctive relief may become moot if: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.
>
> We conclude that neither of these elements is satisfied in this case. The Democratic candidate, Vice President Gore, and others are currently contesting the election results in various lawsuits in numerous Florida state courts. There are still manual recount votes from at least Volusia and Broward Counties in the November 26th official election results of the Florida Secretary of State. **In view of the complex and ever-shifting circumstances of the case, we cannot say with any confidence that no live controversy is before us.**

Id. at 1172-73 (emphasis added). *See also Common Cause*, 347 F.Supp.3d at 1291 (holding that certification of election results did not moot post-election claim for emergency injunctive relief). The cutoff for election-related challenges, at least in the Seventh Circuit, appears to be the date that the electors meet, rather than the date of certification: "even though the ***election*** has passed,

the meeting of electors obviously has not, so plaintiff's claim here is hardly moot." *Swaffer v. Deininger*, No. 08-CV-208, 2008 WL 5246167, at *4 (E.D. Wis. Dec. 17, 2008).

A recent decision by this very Court appears to have applied the *Swaffer* court's interpretation—that the relevant date for federal election-related claims is the December 14, 2020 meeting of the electors, rather than the date of certification—from which it follows that Plaintiff's request for relief are not moot. *See* ECF No. 29, *William Feehan v. Wisconsin Elections Commission*, et al., Case No. 20-cv-1771-pp (E.D. Wis. Dec. 4, 2020) ("*Feehan*"). In response to Plaintiff's request for an expedited briefing schedule, this Court explained that, under 3 U.S.C §5, while the "Safe Harbor" date is December 8, 2020, the Electoral College does not vote for president and vice president until December 14, 2020. *Id.* at 7. While "December 8 is a critical date for resolution of any *state court litigation* involving an aggrieved candidate," like Plaintiff, it is not necessary for this federal Court to grant or deny the injunctive relief requested "before the safe harbor deadline for *state* courts to resolve alleged violations of" Wisconsin election laws. *Id.* at 8 (emphasis in original). Implicit in this Court's determination that—because the "electors do not meet until December 14, 2020," a less "truncated briefing schedule" is appropriate—this Court can still grant some or perhaps all of the relief requested and this Plaintiff's claims are not moot.

Finally, Defendant Evers cites the Eleventh Circuit case in *Wood* as authority in his mootness argument, ECF No. 57 at 14, but fails to acknowledge the significant differences between Mr. Feehan's requests for relief in the Amended Complaint and Mr. Wood's in that proceeding. Unlike Plaintiff, Mr. Wood did not ask the district court to de-certify the election (instead asking for a delay in certification), nor did he assert claims under the Elections and Electors Clause. The *Wood* court held that Georgia's certification of results mooted Mr. Wood's request to delay certification, so the court could not consider a request for de-certification "made for the first time

on appeal." *Id.* at 18. Plaintiff made his request for de-certification and other injunctive relief in the Amended Complaint, Compl. at ¶¶ 142-145, and this request is not mooted by Defendants' certification of the results. While the *Wood* court finds that the mootness exception for "capable of repetition yet evading review," discussed above, was not applicable, their denial was based on the specific "posture of [his] appeal" and the specific relief requested (delay of certification), *id.* at *7, which are not applicable to Plaintiff's claims and requested relief.

This Court can grant the primary relief requested by Plaintiff – de-certification of Wisconsin's election results and an injunction prohibiting State Defendants from transmitting the results – as discussed in Section I.F. on abstention below. There is also no question that this Court can order other types of declaratory and injunctive relief requested by Plaintiff, in particular, impounding Dominion voting machines and software for inspection, nor have State Defendants claimed otherwise.

D. Eleventh Amendment

Defendants assert that Plaintiff's claims are barred by the Eleventh Amendment. *See* ECF No. 52 at 10-11; ECF No. 59 at 14-16. Defendants fail, however, to acknowledge that the Eleventh Amendment permits claims for prospective and injunctive relief enjoining state officials from ongoing violations of federal law or the U.S. Constitution. At this stage of the proceeding, this Court "need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Council 31 of the Am. Fed'n of State, Cty. & Mun. Employees, AFL-CIO v. Quinn*, 680 F.3d 875, 882 (7th Cir. 2012) (citations omitted).

Plaintiff's requests for relief in the Amended Complaint meet both requirements. First, Plaintiff has identified ongoing violations of federal law, among other things by certifying results of the 2020 General Election that are tainted not only by widespread fraud, but by ongoing

violations of the Electors and Elections Clauses, the Equal Protection and Due Process Clauses, as well as likely violations of federal law including the Voting Rights Act and the Help America Vote Act. Second, the declaratory and injunctive relief requested is prospective including: an order directing Defendants to de-certify the election results, enjoining Defendants from transmitting the currently certified election results to the Electoral College, TRO to seize and impound servers, voting machines and other "election materials" for forensic audit and inspection by Plaintiff. ECF No. 9 ¶142. Moreover, the Amended Complaint requests that this Court prospectively enjoin Defendants to take actions that are specifically in the scope of their statutory authority. *See Bostelmann*, 2020 WL 5627186, at *12 (finding that WEC is responsible for "administration of Wisconsin's elections," and "WEC has the authority to implement a federal court order relating to election law to redress [Plaintiff's] alleged injuries.").

E. Administrative Exhaustion and Exclusive State Jurisdiction

Defendant Evers asserts that Plaintiff's claims are barred alternately because he failed to exhaust administrative remedies (namely, a complaint to Defendant WEC under Wis. Stat. § 5.06) and because Wisconsin's recount statute, Wis. Stat. § 9.01(11), "'constitutes the exclusive judicial remedy' for such claims under ***state*** law." ECF No. 59 at 10 (emphasis added) (*citing Trump v. Evers*, No. 2020AP1971-OA, Order at *2 (Wis. Dec. 3, 2020)). Irrespective of whether the cited Wisconsin statutes set forth exclusive ***state*** administrative or judicial remedies, these provisions do not bar the Plaintiff's claims under the U.S. Constitution.

The Elections and Electors Clauses of the U.S. Constitution delegate to the Wisconsin Legislature the power to determine the manner of holding federal elections and selecting Presidential Electors:

> But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection 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 v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000). As such, the state laws – and the implementation thereof by the State's executive and judicial branches – are inherently a federal question, and a "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (finding that state court's recount standards violated the Equal Protection and Due Process Clauses). Accordingly, the Wisconsin statutes cited above cannot bar Plaintiff's federal constitutional claims, or impose an administrative exhaustion requirement where Plaintiff is not seeking review of state administrative action.

This Court has subject matter jurisdiction for Plaintiff's federal constitutional claims under 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This Court also has subject matter jurisdiction under 28 U.S.C. § 1343 because this action involves a federal election for President of the United States. The jurisdiction of the Court to grant declaratory relief is conferred by 28 U.S.C. §§ 2201 and 2202 and by Rule 57, Fed. R. Civ. P. "The right to vote is protected in more than the initial allocation of the franchise.

To the extent the Amended Complaint implicates Wisconsin statutory or constitutional law, jurisdiction remains appropriate under 28 U.S.C. § 1367. As a threshold matter, the supplemental jurisdiction statute, section 1367, says that district courts "shall have" jurisdiction over the non-federal claims forming part of the same case or controversy, ... if state law claims are asserted as part of the same case or controversy with a federal claim, the district court has discretion to exercise supplemental jurisdiction over the remaining state law claims and the mandatory remand provision of the procedure after removal statute does not apply.

F. Abstention

Defendant Evers urges this Court to dismiss the Amended Complaint and abstain from taking jurisdiction over the claims raised in the Amended Complaint. ECF No. 59 at 11-12. The standard for federal abstention in the voting rights and state election law context, *Harman v. Forssenius*, 380 U.S. 528, 534, (1965), where the Supreme Court explained that abstention may be appropriate where "the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law," and "deference to state court adjudication only be made where the issue of state law is uncertain." *Harman*, 380 U.S. at 534 (citations omitted). But if state law in question "is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question," then "it is the duty of the federal court to exercise its properly invoked jurisdiction." *Id.* (citation omitted).

Governor Evers claims that the "state law issues underlying Plaintiff's claims are sufficiently uncertain to warrant abstention," and points to the order of the Supreme Court of Wisconsin addressing a petition alleging misconduct by WEC during the 2020 General Election that "raises time-sensitive questions of state-wide concern." ECF No. 59 at 12 (*citing Wisconsin Voters Alliance v. Wisconsin Elections Commission*, No. 2020AP1930-OA, at *1 (Wis. Dec. 4, 2020) ("*Wisconsin Voters Alliance*"). What he neglects to mention is that the Wisconsin Supreme Court ***denied*** the petition, "the third time that a majority of [the Wisconsin Supreme Court] has turned its back on pleas from the public to address a matter of state-wide concern," involving alleged wrongdoing by Defendant WEC during the 2020 General Election, "that requires a declaration of what the statutes require for absentee voting." *Wisconsin Voters Alliance* at *5 (Roggensack, C.J., dissenting). Abstention requires more than uncertainty about state law – and notably, the majority asserted only that the petition required resolution of "disputed factual claims," *id.* at 3, not any uncertainty regarding the interpretation of the statutes – it requires the

likelihood that a state court will resolve that uncertainty. Here, the relevant state court has repeatedly refused to address these issues; by accepting jurisdiction this Court is not "injecting itself into the middle of [a] dispute," ECF No. 59 at 12, as there is no current state court proceeding addressing these issues (or at least not any identified by Defendant).

Respectfully submitted, this 8th day of December, 2020.

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