SUPREME COURT OF WISCONSIN

No. 2020AP1971-OA

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

ANTHONY S. EVERS, *et al.*,
Respondents.

Original Action in the Wisconsin Supreme Court

RESPONSE OF PROPOSED RESPONDENT-INTERVENORS MARGARET EG ANDRIETSCH, SHEILA STUBBS, RONALD MARTIN, MANDELA BARNES, KHARY PENEBAKER, MARY ARNOLD, PATTY SCHACHTNER, SHANNON HOLSEY, TONY EVERS, AND BENJAMIN WIKLER TO EMERGENCY PETITION FOR ORIGINAL ACTION

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INTRODUCTION

President-elect Joseph R. Biden, Jr. and Vice President-elect Kamala D. Harris won the 2020 national popular vote by over six million votes. While the margins in several states were close, Biden and Harris are projected to win the Electoral College vote by a tally of 306-232. Wisconsin was one of the close states, with the Biden-Harris ticket initially winning by a margin of 20,585 votes out of 3.2 million cast. The partial recount demanded by President Trump and Vice President Pence increased the Biden-Harris winning margin in Wisconsin to 20,682 votes. Biden and Harris are therefore entitled as a matter of state and federal law to Wisconsin's ten electoral votes. *See* Wis. Stat. §§ 5.10, 5.64(1)(em), 7.70(5)(b), 8.18, 8.25(1); *see* Part VI *infra*.

Rather than pursuing the "exclusive judicial remedy" for review of a contested recount, Wis. Stat. § 9.01(11), Petitioners Trump, Pence, and Donald J. Trump for President,

Inc. have filed a "Petition for Original Action Pursuant to Wis. Stat. § 809.70" in this Court seeking to exclude four categories of ballots from the Presidential election results in Wisconsin:

- All in-person absentee ballots cast in Milwaukee and Dane Counties that were not requested through a separate written application, although all such ballots cast in Wisconsin's other 70 counties would remain included in the election results.

- All absentee ballots cast in Milwaukee and Dane Counties as to which local election clerks filled in missing witness addresses, although all identically situated ballots cast in Wisconsin's other 70 counties would remain included in the election results.

- All absentee ballots cast in Milwaukee and Dane Counties by voters certifying they are "indefinitely confined" under Wisconsin law and therefore exempt from Wisconsin's voter ID requirement, although all identically situated ballots cast in Wisconsin's other 70 counties would remain included in the election results.

- A drawdown of ballots in Dane County equal to the number of absentee ballot envelopes returned to local election officials at "Democracy in the Parks" events held in Madison in late September and early October, after the start of absentee ballots.

Petitioners seek to disenfranchise only voters in Dane and Milwaukee Counties even though all but the "Democracy

in the Park" objections are to practices that were followed by voters and local election officials statewide pursuant to longstanding guidance of the Wisconsin Elections Commission, the agency charged with administering Wisconsin's election laws. That requested "relief" is an affront to the voters of Dane and Milwaukee Counties--not coincidentally, the counties with the most urban residents and voters of color, who voted overwhelmingly for the Biden-Harris ticket. Such a blatantly discriminatory result would be an afront to our most cherished constitutional and democratic values. We are unaware of any state or federal court that has ever endorsed such relief, which would violate both the Wisconsin and federal constitutions. "Wisconsinites have a fundamental right to vote. Therefore, a vote legally cast and received by the time the polls close on Election Day **must be counted** if the ballot expresses the will of the voter." *O'Bright*

v. Lynch, No. 2020AP1761-OA (Wis. Sup. Ct. Oct. 29, 2020) (Roggensack, C.J., concurring) (emphasis added).[1]

Petitioners' Petition for Original Action should be denied for many reasons. *First*, the Petition seeks an improper end-run around Wisconsin's "exclusive judicial remedy" for any "alleged irregularity, defect or mistake committed during the voting or canvassing process." Wis. Stat. § 9.01(11). That "exclusive" remedy is not an original action in this Court by individual voters, but an action in circuit court by the defeated candidate when the recount is over.

[1] *See also Ollmann v. Kowalewski*, 238 Wis. 574, 579, 300 N.W. 183, 185 (1941) (failure to count voter's ballot "for no fault of his own would deprive him of his constitutional right to vote," which "'cannot be baffled by latent official failure or defect'") (citation omitted); *United States v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted …."); *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)).

Second, Petitioners seek to challenge through an original action longstanding WEC guidance documents that were relied upon by local election officials and voters throughout the State. But 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. This "exclusive" avenue for review includes any argument that an agency guidance document "exceeds the statutory authority of the agency"—precisely what Petitioners claim here. *Id.* § 227.40(4)(a).

Third, the Court should not exercise jurisdiction over this case because Petitioners' claims involve numerous disputed issues of disputed fact. Petitioners' claims rest not only on questions of law, but also on assertions that certain jurisdictions improperly promoted absentee voting; that some voters who self-identified as indefinitely confined were not, in fact, indefinitely confined; and that municipal clerks

improperly cured witness address issues. These are questions of fact that the parties are sure to dispute. Petitioners' allegations, if they state any claim at all, must be the subject of discovery and fact-finding. This Court has repeatedly said it will not exercise jurisdiction in such a case, and there is no reason to make an exception here.

Fourth, this Court has emphasized that it will not exercise its original jurisdiction when a petitioner could have challenged the disputed practice much earlier, before others relied on it. Whether labeled as laches, estoppel, unclean hands, or simply the exercise of sound equitable discretion, this Court does not grant original jurisdiction 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. Petitioners could have raised their objections long before the election—as long as ten years

ago—and they have no right now to use an original action to retroactively disenfranchise the voters in two out of Wisconsin's 72 counties simply for following the law as construed and applied by the WEC and local election officials throughout the State.

Sixth, Petitioners are unlikely to prevail on the merits of any of their challenges. In brief:

- **In-Person Absentee Ballot Applications**. The Petition alleges 170,400 voters in Dane and Milwaukee Counties should be disenfranchised for failing to submit a written application for an absentee ballot when they voted in-person at the clerk's office. The contention is provably false. Each such voter completed WEC form EL-122 as part of the in-person absentee process, the title of which is "Official Absentee Ballot Application/Certification." The combination envelope/application was unanimously approved by the Government Accountability Board ("GAB") in 2010 and has been in use continuously since that time. *See* Affidavit of Kevin Kennedy (App. 31). The WEC Election Administration Manual states at page 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."

- **Correcting Missing Witness Address Information.** The Legislature created Wis. Stat. § 6.87(6d) in 2016. It states: "If a certificate is missing the address of a witness, the ballot may not be counted." Shortly after the statute's enactment, the WEC unanimously approved the issuance of guidance to all municipal clerks, including the following: "The WEC has determined that clerks **must** take corrective actions in an attempt to remedy a witness address error. If clerks are reasonably able to discern any missing information from outside sources, clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope." Voters cannot now be retroactively disenfranchised because clerks followed this unambiguous guidance in place for the past 11 statewide election cycles.

- **Indefinitely Confined Voters.** In late March of this year, the WEC issued and this Court approved guidance on this issue, stating: "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." App. 56; *Jefferson v. Dane Cty.*, No 2020AP557-OA (Mar. 31, 2020). President Trump's demand that

28,395 voters in Dane and Milwaukee Counties who self-designated as indefinitely confined be disenfranchised, based simply on a sampling of seven (7) non-authenticated Facebook posts, is as baseless as it is outrageous.

- **Democracy in the Park.** Petitioners seek to throw out 17,271 absentee ballots that City of Madison voters hand-delivered to the City of Madison Clerk's employees at public parks on two days in late September and early October. Petitioners claim, wrongly, that the collection effort was "illegal" either because it constituted early in-person absentee voting prior to the statutory window for such voting or represented delivery of absentee ballots to someone other than the clerk, as required by statute. This after-the-fact mass disenfranchisement effort fails as well. No ballots were issued during the event, and municipalities are absolutely allowed to establish off-site places to accept delivery of absentee ballots. *See* Affidavit of Michael Haas. App.

Finally, the extraordinary relief Petitioners request—discarding the votes of large numbers of Dane and Milwaukee voters for doing the same thing as voters in other counties, following the same WEC guidance and instructions as all other voters--would violate the rights of Wisconsin voters under the United States and Wisconsin Constitutions and federal law.

LEGAL STANDARD

This Court has discretion to exercise original jurisdiction over a case that "so importantly affect[s] the rights and liberties of the people of this state as to warrant such intervention." *Petition of Heil*, 230 Wis. 428, ¶¶ 11, 284 N.W. 42, 49 (1938); *see also* Wis. Const. art. VII, § 3(2); Wis. Stat. § 809.70. The Court, however, has declined to exercise such jurisdiction where it is "too late to grant petitioners any form of relief that would be feasible," or where granting relief would cause "undue damage." *Hawkins*, 2020 WI 75, ¶ 5. The Court also typically declines to exercise original jurisdiction where

material facts are disputed, because it "is not a fact-finding tribunal." Wis. S. Ct. Internal Operating Procedures III.B.3.

COUNTERSTATEMENT OF THE CASE & THE FACTS

The Petition targets four broad categories of ballots from Dane and Milwaukee Counties for exclusion from the final Presidential election results, while including similarly situated ballots from every other Wisconsin county in those final results. We address each of these categories in turn.

A. ABSENTEE BALLOT APPLICATIONS

A municipal clerk may not issue an absentee ballot without receiving "a written application therefor from a qualified voter of the municipality." Wis. Stat. § 6.86(1)(ar). The statute broadly defines "written application … for an official ballot" to include a variety of "methods," including "[b]y mail," "[i]n person at the office of the municipal clerk," on request forms, and "[b]y electronic mail or facsimile transmission." Wis. Stat. § 6.86(1)(a). The WEC for many

years has applied this broad definition to allow on-line ballot requests through the MyVote website and early in-person ballot requests to be made on an official WEC form, EL-122, titled "**Official Absentee Ballot Application/Certification**." *See* App. 7 (image of Form EL-122). No one has ever objected to these practices or to Form EL-122.

Until now. Petitioners 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.

But Petitioners 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. Petitioners offer no excuse for not challenging these long-standing practices *before* the election rather than waiting until they had lost.

B. 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 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. App. The WEC has repeated these instructions in multiple guidance documents over the past four years. *See* App. (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"). This construction was adopted unanimously by the WEC over four years ago; has governed in *eleven* statewide races since then, including the 2016 presidential election and recount; has been relied upon by local election officials and voters throughout the State; and has never been challenged through Chapter 227 judicial review or otherwise. App.

Until now. Petitioners 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. And Petitioners do not explain why they did not challenge this longstanding guidance *before* the election, whether under chapter 227 or otherwise.

C. 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 this Court disagreed with that broad and unqualified reading. Instead, the WEC issued, and this 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.

App. 56-57. 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.

App. 57 (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. "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.*[2]

In a March 31, 2020 order, this Court granted the Republican Party of Wisconsin's motion for a temporary restraining order, directing the Dane County Clerk to "refrain from posting advice as the County Clerk for Dane County inconsistent with the above quote from the WEC guidance." *Jefferson v. Dane Cty.*, No 2020AP557-OA (Mar. 31, 2020). In so holding, this 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 this Court provided further guidance before the November 3 election. This Court heard

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[2] 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.

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

D. "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. At each of these events, municipal election workers helped to register voters and assisted voters in the return and collection of their absentee ballots. The Madison City Attorney emphasized:

> 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.

Both major parties were invited to observe the entire process. Over 18,000 completed absentee ballots were deposited in the staffed drop boxes during the Democracy in the Parks events.

Petitioners argue that these 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 "alternative 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 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 Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896, 931-35, 956 (W.D. Wis. 2016). 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.

Petitioners 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." App. 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. 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.

ARGUMENT

I. THIS COURT SHOULD DENY THE PETITION BECAUSE IT IS PROCEDURALLY IMPROPER

Wisconsin's Election Code establishes an "exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect, or mistake committed during the voting or canvassing process." WIS. STAT. § 9.01(11). That remedy is a recount, which an aggrieved candidate or, in the case of a referendum, an elector, may request by petition. *Id.* § 9.01(1)(a). If, when the recount is complete, a candidate is "aggrieved by the recount," he may appeal to circuit court. *Id.* § 9.01(6)(a).

This Court has emphasized that "the recount statute plainly and unambiguously provides the exclusive remedy for challenging the results of an election based on mistakes in the

canvassing process." *State ex rel. Shroble v. Prusener*, 185 Wis. 2d 102, 107, 517 N.W.2d 169 (1994); *see also Carlson v. Oconto Cty. Bd. of Canvassers*, 2001 WI App 20, ¶ 7, 240 Wis. 2d 438, 623 N.W.2d 195 ("In Wisconsin, relief for the losing candidate is confined to the recount statute. The statute is the exclusive remedy for any claimed election fraud or irregularity.").

No provision of Wisconsin law authorizes Petitioners to bypass the "exclusive remedy" available to them in circuit court. Indeed, Petitioners themselves requested and obtained a recount pursuant to Section 9.01. *See* Nov. 19, 2020, Order for Recount, Recount EL 20-01, *In the Matter of: A Recount of the General Election For President of the United States held on November 3, 2020*, at 1. Accordingly, Petitioners are bound by the requirements of Section 9.01 and any challenge they may wish to assert concerning the recount must be raised in the circuit court. In *Shroble*, observing that Section 9.01 is an

"exclusive remedy," this Court rejected petitioners' attempt to challenge a recount directly in this Court via a *quo warranto* action. 185 Wis. 2d 107, 517 N.W.2d at 171. The result here should be the same.

Nothing about this case provides a basis to deviate from the statutory requirements just described. Petitioners contend that exigency supports their request for an exercise of original jurisdiction and a jettisoning of the statutory framework. But the statutory framework contemplates no such exception. Moreover, any supposed exigency is of Petitioners' own making. This Court has properly rejected similar requests to accept original jurisdiction on the basis of "emergencies" manufactured by the petitioners themselves. *See Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877. As the Court has explained, "'[m]ere expedition of causes, [and] convenience of parties to actions … are matters which form no basis for the exercise of original

jurisdiction.'" *State ex rel. Atty. Gen. v. John F. Jelke Co.*, 230 Wis. 497, 503, 284 N.W. 494, 497 (1939) (quoting *In re Zabel*, 219 Wis. 49, 261 N.W. 669 (1935)). Rather, "[b]ecause it is the principal function of the circuit court to try cases and of this court to review cases which have been tried, due regard should be had to these fundamental considerations" and "the excluding jurisdiction of this court will not be exercised in doubtful cases." *Id*.

Section 9.01 reflects the Legislature's decision to adopt an "exclusive" remedy for alleged election defects. Having availed themselves of a recount, Petitioners must now challenge its outcome in circuit court.

II. THIS COURT SHOULD DENY THE PETITION TO THE EXTENT IT CHALLENGES WEC GUIDANCE DOCUMENTS SUBJECT TO THE EXCLUSIVE JUDICIAL REVIEW PROVISIONS OF WIS. STAT. § 227.40(1).

Petitioners devote a substantial part of their challenge to claiming that the WEC's guidance to local election officials

and voters about absentee ballot applications, curing missing witness addresses, and claiming "indefinitely confined" status violates the relevant statutes and should be declared illegal, *and* that voters who relied on this guidance should now be disenfranchised -- but only those voters who live in Dane or Milwaukee Counties. As discussed above, the WEC since 2010 has used a combination absentee-ballot Application/Certification envelope to satisfy the "written application" requirement. And since October 2016, the WEC has instructed local election officials that they should attempt to fill in missing witness addresses either by contacting the witnesses or looking up the addresses through reliable public databases. As for "indefinitely confined" status, the Commission issued guidance last March 29 (endorsed by this Court on March 31) that, to claim this 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." App. 57.

Petitioners may not challenge this Commission guidance through an original action in this Court because "the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document brought in the circuit court," not this Court. Wis. Stat. § 227.40(1). These "exclusive" review procedures are the way to present claims that an agency guidance document "exceeds the statutory authority of the agency," *id.* § 227.40(4)(a), which is precisely what Petitioners are seeking here.

The Commission unquestionably is subject to chapter 227 review. *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). And the Commission's pronouncements about what constitutes a "written application" for an absentee ballot, whether and to what extent local election officials should cure missing witness addresses, and when voters may claim to be "indefinitely confined" during the current public health crisis caused by the pandemic, are clearly "guidance documents." They are official communications issued by the WEC advising local election officials and voters how it interprets and applies the statutory written application, witness address, and "indefinitely confined" provisions. *Id.* § 227.01(3m)(a).[3] The

[3] Section 227.01(3m)(a) provides that, with limited exceptions not relevant here, "'guidance document' means … 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."

exclusive review provisions of Section 227.40 "are not permissive, but rather are mandatory." *Richards v. Young*, 150 Wis.2d 549, 555, 441 N.W.2d 742 (1989); *see State v. Town of Linn*, 205 Wis.2d 426, 449, 556 N.W.2d 394 (Ct. App. 1996).

III. THIS COURT SHOULD DENY THE PETITION BECAUSE IT IS HIGHLY FACT-BOUND

A further reason this Court should decline to exercise its original jurisdiction is that this matter cannot be adjudicated without extensive fact-finding of the sort that is the province of trial courts, not this Court.

This Court "generally will not exercise its original jurisdiction in matters involving contested issues of fact." Wis. S. Ct. Internal Operating Procedures III.B.3; *see Green for Wis. v. State Elections Bd.*, 2007 WI 45, ¶ 3, 300 Wis. 2d 164, 732 N.W.2d 750 (Crooks, J., concurring) ("This court grants petitions for original jurisdiction 'with the greatest reluctance ... especially where questions of fact are involved.'" (citation

and internal quotation marks omitted)). Instead, the Court typically grants petitions for original action only when the parties seek to resolve important questions of pure law. *See State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 19, 334 Wis. 2d 70, 798 N.W.2d 436 (Prosser, J., concurring) (original action proper in part because case presented "no issues of material fact").

Nor can there be any doubt that the petition presents issues of fact making it improper for the exercise of this Court's original jurisdiction. The petition itself is rife with factual allegations the parties are certain to dispute. Petitioners allege, for example, that certain jurisdictions "knew in 2020 that Biden's voters would be voting primarily by absentee vote which is why [they] aggressively 'promoted,' 'encouraged' and overzealously solicited' voters to vote absentee—including eliminating absentee ballot security requirements." Pet. ¶ 70. Similarly, Petitioners contend that "clerks did not

remove from the absentee voter list … absentee voters who claimed 'indefinitely confined' status. but who in fact were no longer 'indefinitely confined' …." *Id.* ¶ 81. "***This fact***," Petitioners allege, "resulted in electors … casting ballots as 'indefinitely confined' … who were not actually 'indefinitely confined.'" *Id.* ¶ 82. Petitioners similarly rely upon numerous factual allegations to support their claims concerning alleged deficiencies in the handling of absentee ballots with missing witness information, alleged failures to enforce residency requirements, alleged double voting, and alleged lack of transparency. *See, e.g.*, *id.* ¶¶ 104, 106-107, 109-114. On other claims, their evidence falls short of accurately representing the truth. *See* Petition at ¶ 20 (claiming other municipalities use an independent written application). All of

those allegations will be vigorously disputed by the parties. And importantly, 4 *See e.g*. Petition at ¶¶ 19, 23, 25, 55, 58.

Here, the Petition is rife with factual allegations subject to dispute. For example:

- Petitioners allege that clerks in "municipalities outside of Dane and Milwaukee County followed" the requirement to obtain a written application before issuing absentee ballots. Pet. ¶ 20.

- Petitioners allege that voters self-identifying as indefinitely confined after March 25, 2020 "include numerous persons easily identified" as ineligible. Pet. ¶ 24.

- Petitioners allege that "no effort was made" by certain clerks to determine whether voters were, in fact, indefinitely confined. Pet. ¶ 56.

- Petitioners allege that certain "Ballot envelopes were left incomplete but nonetheless counted." Pet. ¶ 21.

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4 [1] While the Trump Campaign alleges that various total numbers of ballots are subject to their challenge, no official record has been requested or transferred subject to Wis. Stats. sec. 9.01(7)(a).

- Petitioners allege that their candidate would "necessarily win" in the event of a drawdown. *See* Petition at ¶ 24 n. 4.

These factual allegations are sure to be hotly contested. Thus, Petitioners' contention that the election results must be voided rests not solely on a legal issue of the sort that typically supports this Court's original jurisdiction, but also on numerous factual assertions, all of which are subject to discovery and dispute to the extent this case goes forward.

Petitioners' contention that exigency supports an exercise of original jurisdiction over this fact-bound dispute is incorrect. The issues Petitioners raise could have been raised previously and, in particular, before the State of Wisconsin and thousands of voters relied upon the election procedures Petitioners now challenge. Nevertheless, Petitioners opted to wait and see how the election turned out, then assert their meritless challenge. This Court has rejected similar requests to accept original jurisdiction on the basis of "emergencies"

manufactured by the petitioners themselves. *See Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877. "Mere expedition of causes, [and] convenience of parties to actions … are matters which form no basis for the exercise of original jurisdiction." *State ex rel. Atty. Gen. v. John F. Jelke Co.*, 230 Wis. 497, 503, 284 N.W. 494 (1939) (internal quotation marks omitted).

As this Court has explained, "[t]he circuit court is much better equipped for the trial and disposition of questions of fact than is this court and such cases should be first presented to that court." *In re Exercise of Original Jurisdiction of Sup. Ct.*, 201 Wis. 123, 128, 229 N.W. 643 (1930) (per curiam). That sensible observation is just as true 90 years later and counsels denial of the petition.

IV. THIS COURT SHOULD DENY THE PETITION BECAUSE EQUITY BARS RELIEF

The petition should also be denied because Petitioners are barred from relief by the equitable doctrines of laches, unclean hands, and equitable estoppel.

1. Laches Bars Petitioners' Requested Relief

Petitioners 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 and internal quotation marks omitted), *cert. denied sub nom. Wis. ex rel. Wren v. Richardson*, 140 S. Ct. 2831 (June 1, 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 Cty. 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 Petitioners' claims.

a. Petitioners have unreasonably delayed in raising their challenge.

Petitioners 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. Pet. 5, 25. 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, Petitioners 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—and known to Petitioners—for months or even years.

For example, Petitioners challenge the Wisconsin procedure for curing issues with witness addresses. Pet. 5, 25. That procedure was endorsed by the WEC *four years ago*. After receiving unanimous bipartisan approval in 2016, the procedure went unchallenged by Petitioners, or anyone else, for *eleven* subsequent election cycles, including the 2016 presidential election in which Petitioners participated. This year, municipal election clerks again relied on the WEC's guidance concerning the cure procedure. Petitioners 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, Petitioners waited to see the outcome of that election and, obviously unsatisfied, challenge the procedure now. That is a textbook example of unreasonable delay.

Petitioners 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. Pet. 5, 25. Here too, Petitioners 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—this Court granted temporary injunctive relief based on its conclusion that the 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, Petitioners 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, Petitioners 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. Pet. 5, 25. 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,[5] the practice was employed in

[5] *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."),

the general election not only this year, but also in multiple prior elections. Petitioners challenge it only now after waiting to see the result of the 2020 presidential election. This, again, constitutes unreasonable delay.

Finally, Petitioners challenge ballots "cast or received" at "Democracy in the Park" events in Madison. Pet. 5, 25. Yet that event was announced on or before August 31, 2020.[6] This announcement provided Petitioners 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.

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available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Election%20Administration%20Manual%20%282020-09%29.pdf.

[6] *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.

b. Respondents-Intervenors did not know Petitioners would raise their claims here.

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

c. Petitioners' delay has prejudiced Respondents-Intervenors 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).

Petitioners' delay in asserting their groundless claims will be enormously prejudicial to Respondents, Respondents-Intervenors, and many thousands of Wisconsinites who relied upon the election practices Petitioners belatedly challenge.

By the time Petitioners filed this action, the election had been over for a full four weeks. More than 3.2 million Wisconsinites had voted in reliance on the very procedures that Petitioners now, their side having lost the election, insist were unlawful. To disenfranchise those voters as Petitioners demand would violate the constitutional rights of millions of Wisconsin voters. In *Brennan*, this 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.* at ¶ 31.

Petitioners' untimely challenges in this matter should similarly be rejected.

In the election context, this Court and other 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 v. Wis. Elections Comm'n*, 2020 WL 75, 393 Wis. 2d 629, 948 N.W.2d 877; *see also Democratic Nat'l Comm.*, 977 F.3d at 642; *Fulani*, 917 F.2d at 1031. Recently, in *Hawkins*, the 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*. at ¶¶ 9-10. Accordingly, the Court denied

the petition. Overturning the results of an election after it has been held, as Petitioners demand, would create far more confusion, disarray, and loss of confidence in the results.

This Court similarly declined to exercise its original jurisdiction when petitioners sought to enjoin the Wisconsin Elections Board from conducting the 2002 elections. *See Jensen v. Wis. Elections Bd.*, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537. The Board had established a date by which it hoped to certify new districts; accepting jurisdiction would cause "the legality of the new district boundaries [to] remain in doubt for an additional, unknown period of time." *Id.* at ¶ 21. The Court, therefore, could not "responsibly" exercise its original jurisdiction. *Id.* at ¶ 22. So too here.

Numerous other courts have likewise denied extraordinary relief in election-related cases due to laches or

similar considerations.[7] As one such court explained, "[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, 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

[7] *See, e.g.*, *Clark*, 791 N.W.2d at 294-296; *see also Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) ("It 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, 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).

at 813. That principle applies with even greater force here, where the election is not merely imminent, but over.

If Petitioners 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 Respondents-Intervenors, 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 Petitioners 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 Respondents-Intervenors and thousands of others. The Court should not countenance such a result.

2. Petitioners Are Equitably Estopped

Petitioners 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 Wisconsin, Inc.*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997).

The first and second elements of the equitable estoppel test are satisfied by Petitioners' inaction. *See Milas*, 214 Wis. 2d at 11. The third element is also satisfied because Petitioners' apparent acquiescence to the procedures they now challenge "induce[d] reasonable reliance," *id.* at 11, on the part of other Wisconsinites. Again, Respondents undertook an enormous effort to facilitate a general election in which more than 3.2 million Wisconsinites cast ballots. In doing so, Respondents 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 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 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 Petitioners were granted relief. Respondents, including the WEC, would suffer prejudice in the form of countless hours of lost time and enormous outlays of wasted resources. Winning candidates would be deprived of the result they rightfully obtained. And many thousands of voters, having cast the ballots that Petitioners 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. Petitioners' Own Unclean Hands Preclude Relief

Finally, Petitioners 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 Cty. Drainage Dist.*, 145 Wis. 2d 743, 753, 429 N.W.2d 512 (Ct. App. 1988) (internal quotation marks omitted). 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).

Petitioners today challenge the inclusion of four categories of Wisconsin ballots in the election results: (1) absentee ballots obtained using a form of written application approved by the WEC; (2) ballots cured by Wisconsin election clerks according to WEC guidance; (3) certain ballots cast by voters who were "indefinitely confined"; and (4) ballots cast or received at "Democracy in the Park events. Petitioners could have raised any or all of these issues 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. Petitioners thus have had ample opportunity to raise each of their purported challenges before the election.

Instead, Petitioners waited, knowing thousands of Wisconsinites would follow the procedures they now contend are unlawful. Then, when the outcome of the election did not satisfy Petitioners, 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, Petitioners 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.

V. PETITIONERS ARE NOT ENTITLED TO DECLARATORY OR INJUNCTIVE RELIEF

The Court should also decline to exercise its original jurisdiction because Petitioners are manifestly unable to satisfy the legal requirements for the relief they request.

A. Petitioners Cannot Meet the Requirements to Maintain a Declaratory Judgment Action

To obtain a declaratory judgment, Petitioners must demonstrate the existence of the "conditions precedent to the proper maintenance of a declaratory judgment action," including that they have a "legally protectible interest," *i.e.*, standing, and that this dispute is "ripe for judicial determination." *Tooley v. O'Connell*, 77 Wis. 2d 422, 433-34, 253 N.W.2d 335, 340 (1977). Moreover, in order to obtain a judgment, Petitioners would need to prevail on the merits. Petitioners fall short in multiple respects.

First, Petitioners lack standing for the reasons stated in Section I, *supra*. This precludes Petitioners from maintaining a declaratory judgment action (or any action). *See, e.g.*, *Lake Country Racquet & Ath. Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶¶ 23-24, 259 Wis. 2d 107, 118-19, 655 N.W.2d 189, 195.

Second, this dispute is not ripe. For a claim to be ripe, "the facts [must] be sufficiently developed to avoid courts entangling themselves in abstract disagreements." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 43, 309 Wis. 2d 365, 749 N.W.2d 211 (internal quotation marks omitted). It is not necessary that "all adjudicatory facts … be resolved," but "[t]he facts on which the court is asked to make a judgment should not be contingent or uncertain." *Id.* Here, no discovery has occurred, and, to say the least, there are very substantial reasons to doubt the facts alleged. Not only that, the facts are contingent upon a pending recount addressing many of the

same issues. And, as relevant to Petitioners' demand to enjoin the WEC from certifying the election results "so that the Legislature can lawfully appoint the electors," Pet. at 42, the petition provides no basis to conclude that the Legislature itself would choose, or even cooperate with, such an extraordinary scheme.

Third, Petitioners are wrong on the merits. As explained in Section V.B. *infra*, a review of the petition demonstrates the infirmity of the legal theories underlying Petitioners' extraordinary demand to overturn the election results.

B. Petitioners Cannot Meet the Requirements to Obtain an Injunction

To obtain an injunction, Petitioners must demonstrate, among other things, that "on balance, equity favors issuing the injunction." *Diamondback Funding, LLC v. Chili's of Wis., Inc.*, 2007 WI App 162, ¶ 15, 303 Wis. 2d 746, 735 N.W.2d 193 (citation omitted). To the extent they seek a preliminary

injunction, Petitioners also must show they are likely to succeed on the merits. *See Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313 (1977). Petitioners cannot do so. They cannot demonstrate that equity favors granting the relief they seek, for all the reasons explained in Section V, *supra*. And they cannot show a likelihood of success on the merits. Rather, and as explained below, each of the legal theories advanced by Petitioners is fatally deficient.

1. Petitioners are not likely to succeed on their claim that the WEC unlawfully 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." App. 30-31. 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. 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). Thus, there is no authority for the rule Petitioners now seek to impose.

2. Petitioners are not likely to succeed on their claim that the WEC unlawfully 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, the WEC on March 29, 2020, issued guidance on applying the "indefinitely confined" exemption during the pandemic. *See* App. 40-42. 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 Cty.*, No. 2020AP557-OA, at 2 (Mar. 31,

2020). The WEC's guidance has remained unchanged since then and was effective for the 2020 general election.

Heedless of this history, Petitioners seek to invalidate thousands of ballots cast by persons who, consistent with the WEC's guidance, self-identified as indefinitely confined. That attempt must fail. Petitioners have identified no basis to invalidate votes cast in reliance on the guidance. Nor could they in light of this Court's conclusion that the guidance provided the required "clarification on the purpose and proper use of the indefinitely confined status."[8]

Petitioners further claim that the May 13, 2020 directive from the WEC Administrator concerning whether to de-

[8] Even if Petitioners 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).

activate a voter's absentee request was unlawful. *See* Pet. ¶¶ 79-90. That directive provided in relevant part as follows:

> Can I deactivate an absentee request if I believe the voter is not indefinitely confined?
>
> No. All changes to status must be made in writing and by the voter's request. Not all medical illnesses or disabilities are visible or may only impact the voter intermittently.

Pet. ¶ 79; *see id.* Ex. 16 at 3. The directive accurately reflects Wisconsin law, which provides in relevant part that "[i]f any elector is no longer indefinitely confined, *the elector* shall so notify the municipal clerk." WIS. STAT. § 6.86(2)(a) (emphasis added). Furthermore, under Wisconsin law an election clerk may remove an elector from the indefinitely confined list only if the elector fails to respond within 30 days to a written notice, "upon request of the elector[,] or upon receipt of reliable information that an elector no longer qualifies for the service." WIS. STAT. § 6.86(2)(b).

Far from showing that the WEC violated Wisconsin law, Petitioners merely highlight the WEC's adherence to the law.

VI. THE PETITION SHOULD BE DENIED BECAUSE THE REQUESTED RELIEF IS BARRED BY FEDERAL AND STATE LAW.

Finally, the Court should deny the petition because the relief Petitioners seek is impermissible as a matter of law. Petitioners seek a judgment "declar[ing] the Governor's certification of the election and naming of the electors void *ab initio* and order[ing] it withdrawn." Pet. 25. Such a remedy would be "drastic and unprecedented, disenfranchising a huge swath of the electorate," as well as "grossly disproportionate to the procedural challenges raised." *Donald J. Trump for President, Inc. v. Pennsylvania*, 2020 WL 7012522, at *1 (3d Cir. Nov. 27, 2020).

1. The Relief Sought Would Violate Federal And Wisconsin Constitutional And Statutory

Frameworks For Choosing Presidential Electors

The U.S. Constitution empowers state legislatures to choose the "Manner" of appointing presidential electors, U.S. Const. art. II, § 1, cl. 2, pursuant to their lawmaking authority. Under that provision, the Wisconsin Legislature, like every other state legislature, has chosen to appoint electors according to popular vote. Because the Legislature has determined that the "Manner" of appointing presidential electors in Wisconsin is by popular vote on Election Day, the Electors Clause of the U.S. Constitution requires that the presidential election be conducted in accordance with that chosen "Manner." *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("When the state legislature vest[s] the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental."). Petitioners cannot now upend this process and

demand that Wisconsin's electors be selected in a different "Manner."

Any such change to the "Manner" of selecting Wisconsin's electors could only have been made through Wisconsin's ordinary legislative process, including bicameralism and presentment to the Governor. *See* Wis. Const. art. IV, § 17 ("No law shall be enacted except by bill."); *id.* art. V, § 10(1)(a) ("Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor."); *Smiley v. Holm*, 285 U.S. 355, 373 (1932) (state legislature's power to choose "Manner" of congressional elections under Elections Clause requires following ordinary lawmaking requirements); *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015) (internal quotation marks omitted) (because prescribing manner of elections "involves lawmaking in its essential features and most important aspect," legislative decisions on

that subject "must be in accordance with the method which the State has prescribed for legislative enactments"); *id.* at 841 (Roberts, C.J., dissenting) (agreeing with majority that state legislature operates "within the ordinary lawmaking process" when it enacts election laws). And, in fact, in the last 49 years, Wisconsin has amended statutory provisions related to the time, place, and manner of federal elections more than 100 times, in *every instance* according to its constitutional lawmaking process, including presentment to the Governor. *See* Wis. Const. art. IV, § 17; *id.* art. V, § 10.

In addition, any such change to Wisconsin election law would have to have been made *before* Election Day. The U.S. Constitution grants Congress the power to "determine the Time of chusing the Electors." U.S. Const. art. II, § 1, cl. 4. Congress has done so, providing that electors "shall be appointed in each State, on the Tuesday next after the first Monday in November, in every fourth year," *i.e.*, on Election

Day. 3 U.S.C. § 1. As required, Wisconsin held its election on Election Day. The injunction Petitioners now request would violate Congress' directive that electors be chosen on Election Day.

Congress has provided for only one narrow exception to the general rule in 3 U.S.C. § 1. If a State "has held an election … and *has failed to make a choice* on the day prescribed by law, the electors may be appointed on a subsequent day" by the state legislature. 3 U.S.C. § 2 (emphasis added). But Wisconsin's voters *did* "make a choice" on Election Day. Approximately 3.2 million Wisconsin voters cast ballots. The specific choice they made was confirmed through the recount and certification process required by the Election Code.

In short, Wisconsin voters made their choice in the 2020 presidential election in the "Manner" prescribed by the Legislature and at the "Time" Congress selected. Petitioners'

attempt to bypass that choice is contrary to the U.S. Constitution and federal law, and must be rejected.

2. Voiding the Governor's Certification Would Unconstitutionally Disenfranchise Voters

The relief Petitioners seek—namely, "void[ing]" the Governor's certification of the presidential election and, in effect, nullifying the election results—would also violate Wisconsinites' fundamental right to have their votes counted under both the U.S. and Wisconsin constitutions. *See Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1061 (7th Cir. 2020) (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.").

a. Voiding the Governor's Certification Would Violate Wisconsin Voters' Due Process Rights

Petitioners 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. Invaliding these votes, nearly a month later, would be quintessentially unfair and would violate due process. *See Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1971).

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.*, *Northeast Ohio Coal. 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 v. Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995) ("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 v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (same). As in these cases, invalidating the ballots cast by thousands of Wisconsinites on Election Day, based solely upon Petitioners' flawed reinterpretation of the Election Code, would violate due process.

b. Voiding the Governor's Certification Would Violate Wisconsin Voters' First Amendment Rights

Invalidating thousands of Wisconsinites' votes based on Petitioners' 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." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. at 173, 184 (1979).

Here, granting the requested relief would result in Wisconsinites' votes being not only disfavored, but rendered

"void." Pet. 25. 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 Petitioners' 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.* (internal quotation marks omitted).

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

c. Voiding the Governor's Certification Would Violate Wisconsin Voters' Equal Protection Rights

Finally, Petitioners' 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*, 531 U.S. at 104 (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. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause."); *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 54, 132 N.W.2d 249 (1965) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.").

Here, among other things, Petitioners 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. Wisconsin Bell, Inc.*, 155 Wis. 2d 184, 193 (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). Petitioners have articulated no rational or non-arbitrary reason (let alone a "compelling" reason) to impose that disparate treatment—only Petitioners' own self-serving and lawless desire to render "void" an election that they lost.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Original Action Pursuant to Wis. Stat. § 809.70.

Dated: December 1, 2020

Respectfully Submitted,

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** Pro hac vice application forthcoming*

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted a copy of this response to petition for original action for filing via e-mail to the Court Clerk at clerk@wicourts.gov as per the Court's December 1, 2020 order. A copy of this certificate has been served on all opposing parties.

Dated: December 1, 2020

Charles G. Curtis, Jr.

CERTIFICATION OF SERVICE

I certify that on this 1st day of December, 2020, I caused a copy of this response to petition for original action to be served upon all parties via e-mail.

Dated: December 1, 2020.

Charles G. Curtis, Jr.