IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

KHARY PENEBAKER, MARY ARNOLD,
and BONNIE JOSEPH,

Plaintiffs,

v. Case No. 3:22-cv-334

ANDREW HITT, ROBERT F. SPINDELL, JR.,
BILL FEEHAN, KELLY RUH, CAROL BRUNNER,
EDWARD SCOTT GRABINS, KATHY KIERNAN,
DARRYL CARLSON, PAM TRAVIS, MARY BUESTRIN,
JAMES R. TROUPIS, and KENNETH CHESEBRO,

Defendants.

MOTION OF DEFENDANT JAMES R. TROUPIS TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

COMES NOW Defendant James R. Troupis, by and through counsel, and moves pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted. In support of this Motion, Defendant Troupis makes the following points, and submits the accompanying Memorandum in Support, which is hereby incorporated as if fully set forth herein.

1. Defendant James R. Troupis served as legal counsel for Donald Trump, Mike Pence, and the 2020 Trump-Pence campaign and litigated a recount of the Wisconsin votes for the presidential electors between November 18, 2020 and February 2021, pursuant to Wis. Stat. § 9.01(6)(a). (Comp. ¶¶ 70-73, 88). The Troupis-led litigation yielded a 4-3 loss in the Wisconsin Supreme Court, based primarily on the doctrine of laches and not on the merits; his petition for certiorari to the United States Supreme Court was filed on December 29, 2020 and denied in February 2021.

2. Defendant Troupis' skill, honesty, and diligence in litigating these cases were not questioned or attacked at the time, nor are they questioned or attacked by Plaintiffs now. Instead, Plaintiffs (two Biden-Harris electors and one voter about whom the Complaint says little) attack Defendant Troupis for injuring their reputations, harming them as fellow taxpayers, and creating an ongoing public nuisance to the health, safety, and morals of Wisconsin, when he committed the act of receiving two legal memoranda from attorney Kenneth Chesebro. The three Plaintiffs claim that Troupis' act in receiving the memoranda was so malicious that they should be paid punitive damages.

3. Plaintiffs couch their claims against Defendant Troupis as sounding in civil conspiracy and public nuisance. At the tail end of their Complaint, they also attempt to plead "punitive damages" and "Article I, Section 9" of the Wisconsin Constitution as distinct causes of action. All of these claims lack merit. In fact, they lack any good faith basis in fact or law.

Pleading Requirements

4. This Motion tests the sufficiency of the Complaint in light of its allegations and certain other materials that are public records or were appended to or referenced in the Complaint. Aside from the usual pleading burden under Rule 8, Plaintiffs were under a duty to include specific facts linking Troupis to their allegations of a fraudulent conspiracy—including the who, what, where, when, and how of the alleged fraud. Fed. R. Civ. P. 9(b). (*See* Memorandum in Support, Section I.) Instead, they allege only that Troupis received two legal memoranda while he was leading major election-related and constitutional litigation.

Legal Immunity

5. Plaintiffs' reference to the legal memoranda received by Defendant Troupis is significant for another reason: Troupis is protected by legal immunity for his work as counsel for

all but fraudulent or unlawful acts. (*See* Memorandum in Support, Section II). During the litigation, he openly disclosed to the Wisconsin Supreme Court the entire "conspiracy" he is accused of aiding, in which the Trump-Pence electors would cast and transmit their votes on the required date, December 14, 2020, so that they could be counted in the event his legal challenge was sustained in the weeks after December 14:

> Following the recommended approach to situations involving court challenges in Presidential elections which are not resolved by the time the Presidential electors must cast their votes pursuant to Art. II, § 1, cl. 4, and 3 U.S.C. § 7 (this year, December 14), the Trump-Pence Campaign has requested its electors to sign and send to Washington on that date their votes, to ensure that their votes will count on January 6 if there is a later determination that they are the duly appointed electors for Wisconsin.
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> This practice dates back at least as far as 1960, when the Kennedy electors in Hawaii voted on the date the Electoral College met, even though on that date the Nixon electors had been ascertained by the acting Governor to have won the state; only after further litigation were the votes of the Kennedy electors approved and ultimately counted in Congress.

(*See* Memorandum in Support, p. 15); (Fernholz Dec., ¶ 8, Ex. F, *Emergency Petition for Bypass Court of Appeals* at 8, n.3.) No person involved in this underlying case objected to this proposed course of conduct, claimed it would constitute a fraud or might accidentally deceive the United States Government, suggested that it might cause an ongoing public nuisance to the health, safety, or morals of Wisconsin citizens, or expressed concern that it would tarnish the reputations and impugn the character of the two elector Plaintiffs among their community, friends, and family.[1]

[1] It is significant that Plaintiffs' 288-paragraph Complaint includes a few hundred paragraphs of commentary on events that have nothing to do with Defendant Troupis' litigation, including references to a "violent mob," chants of "hang Mike Pence," actions by a retired Wisconsin Supreme Court justice after the election, and a multitude of actions in other states. (*See* Comp. at p. 3–5, ¶¶ 130, n. 37, 163–170.) As lead counsel for Trump and Pence in Wisconsin's election litigation, Troupis only put forward claims solidly grounded in Wisconsin law. That is why three Wisconsin Supreme Court Justices sided with Trump and Pence on the merits and, later, a majority of that Court agreed with related legal claims in a subsequent challenge to drop-boxes and absentee voting rules. *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, *cert. denied*, 141 S. Ct. 1387 (2021); *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶¶ 72, 83, 976 N.W.2d 519.

Plaintiffs' claims, then, cannot surmount the hurdles of basic pleading requirements and legal immunity.

6. Plaintiffs' Complaint also fails to properly plead its basic state-law tort claims.

Civil Conspiracy

7. First, the civil conspiracy claim (Count I) lacks merit. Plaintiffs claim they can satisfy the elements of civil conspiracy: (1) the formation and operation of a conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts. (Comp., ¶ 213.) Plaintiffs argue that Troupis committed wrongful acts by conspiring with, or aiding and abetting, another set of defendants, the Defendant Electors, in violating several Wisconsin and federal statutes. Specifically, Plaintiffs argue that the Defendant Electors—the duly-nominated electors for the Trump-Pence ticket—broke the law when they met at the State Capitol on December 14, 2020, and cast and transmitted votes for the parties for which they had been nominated.

8. This claim fails for three main reasons.

9. First, Plaintiffs utterly fail on the required element of injury. (*See* Memorandum in Support, Section III.A.) They claim that a taxpayer injury occurred to the extent that any state resources were expended when the Defendant Electors entered the State Capitol. But taxpayer injury is a concept used to confer standing where it would otherwise be absent—due to the non-justiciability of generalized grievances—in actions against the government. "Taxpayer injuries," or, better put, miniscule proportions of government expenditures, cannot be recovered by one taxpayer from another taxpayer in a tort suit. There is no precedent for such a claim, and Plaintiffs do not and cannot cite precedent for it. Further, the two Biden-Harris electors claim that the news of the Defendant Electors' casting of votes harmed their "reputations by casting doubt on their

status as presidential electors." (Comp., ¶ 219.) But this is not a cognizable "reputational" injury. The dispute about whether election officials properly followed the law, and, therefore, about who won the election, has nothing to do with the character of any elector and has no bearing on the character of any elector. Plaintiffs' claims that any elector's "character" is at issue is illogical and lacks any good-faith basis in fact or law. Additionally, Plaintiffs fail to show that the acts involved in the alleged conspiracy—meeting in Madison, or Defendant Troupis' receipt of two memoranda—actually resulted in any injury to their reputations. Finally, Plaintiffs failed to plead any financial damages, as required to the extent they assert a claim for a conspiracy to injure their reputations.

10. The second reason Plaintiffs' claims fail is their inability to allege a wrongful predicate act. Plaintiffs cite a total of four Wisconsin statutes and three federal statutes that they claim were violated. None of them were, in fact, violated. (*See* Memorandum in Support, Section III.B.)

11. Plaintiffs lose under all of their state and federal statutory predicates for one overriding reason, which is a matter of federal law. Plaintiffs believe that merely by casting votes and transmitting them to the federal officials designated under the Electoral Count Act, the Defendant Electors either tried to falsely hold themselves out as public officials exercising the prerogatives of their offices, or otherwise engaged in some deceitful or corrupt act. This is wrong as a matter of federal law.

a. Under the Electoral Count Act, electors (even competing electors) might cast a vote, but that vote cannot be counted—it cannot have effect—unless it is accompanied by the Governor's certificate of ascertainment. Here, everyone knew that by operation of the Electoral Count Act, the Governor's certificate

had been sent to *only* the Biden-Harris electors (3 U.S.C. § 6), and then was affixed *only* to those votes (3 U.S.C. § 9) when they were sent to the U.S. Archivist and other federal officials (3 U.S.C. § 11). Not one of the Defendant Electors has tried to claim otherwise, then or now. This certificate is critical.

b. It is the Governor's certificate—sent along with the votes, and also sent directly to the U.S. Archivist—that credentials the electors; it shows that votes were given by electors "whose appointment has been lawfully certified to according to section 6 of this title," and further, ensures that those votes will not be rejected unless both Houses agree that the votes were not "regularly given by electors whose appointment has been so certified." 3 U.S.C. § 15.

c. The Governor's certificate not only controls, but it can change based on the decision of a tribunal considering election litigation. Had litigation that was ongoing after December 14, 2020 resulted in a reconsideration (in Wisconsin) or reversal (on a petition for certiorari) of the current ascertainment that the Biden-Harris electors had been selected, then the Governor would have issued a new certificate of ascertainment under 3 U.S.C. § 6.[2] That statute provides that "if there shall have been any final determination in a State in the manner provided by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such

[2] Indeed, as Defendant Chesebro noted in a memo to Troupis, this is precisely what happened in Hawaii in the Kennedy-Nixon election of 1960. "On the date the Electoral College met, December 19, 1960, Nixon's electors had in hand a certificate from the Hawaii governor certifying that Nixon had won the state (by 141 votes)." (Fernholz Dec. ¶3, Ex. A.) The "Kennedy electors nonetheless also met and voted on that day, to preserve the possibility that their votes would eventually be certified as the valid ones." *Id*. On December 28, 1960, the Hawaii courts issued a final decision "finding that Kennedy had, in fact, won the state (by 105 votes)." *Id*. The "governor signed an amended certificate of election which was then rushed to Washington, in time to be counted in Congress," and the "electoral votes were awarded to Kennedy." *Id*.

State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made."

d. Troupis openly disclosed in his Emergency Petition for Bypass the Court of Appeals, filed in the Wisconsin Supreme Court, that the Defendant Electors were going to follow this authority, and why they were going to do it: "Following the recommended approach to situations involving court challenges in Presidential elections which are not resolved by the time the Presidential electors must cast their votes pursuant to Art. II, § 1, cl. 4, and 3 U.S.C. § 7 (this year, December 14), the Trump-Pence Campaign has requested its electors to sign and send to Washington on that date their votes, to ensure that their votes will count on January 6 if there is a later determination that they are the duly appointed electors for Wisconsin." (Fernholz Dec., ¶8, Ex. F.) No one objected to this course of action, including national counsel for the defense.

e. Moreover, the position espoused by Troupis in the recount case was shared by the Wisconsin Elections Commission (WEC). In WEC's December 1, 2020 brief opposing President Trump and Vice President Pence's petition for an original action, the government agency tasked with administering and enforcing election laws argued to the Wisconsin Supreme Court that "it is not necessary to super-expedite state court proceedings to complete them by December 14," as "even if a state court reaches a final decision on an election contest after the originally certified electors have convened and voted, the

certificate of determination ensures that Congress will be advised of the state court decision when it convenes in joint session **on January 6, 2021**, for the purpose of counting the electoral votes from all the states." (Fernholz Dec.¶9, Ex. G, pages 8–10) (emphasis added).

f. The Defendant Electors could not and did not purport to submit a Governor's certificate of ascertainment; nor did they falsely state that the Governor had completed the certificate in their favor.

g. Thus, both the Defendant Electors and Biden-Harris electors met and cast votes on December 14, 2020, but as a matter of federal law under the Electoral Count Act, it was clear to all electors, and to the federal officials who received the competing electors' votes for potential action, that the Governor's six credentials—the six certificates of ascertainment that made the electors' votes actionable—accompanied, and were assigned to, only the Biden-Harris electors. And as a matter of federal law, the authority to have their votes counted rested upon those Governor's credentials and the decision of Congress, *see* 3 U.S.C. §§ 6 and 15. The credentials could change with a new decision from a tribunal in litigation pursuant to 3 U.S.C. § 6, or Congress could issue a decision under the criteria in 3 U.S.C. § 15.

h. Indeed, the Electoral Count Act anticipates that, occasionally, more than one set of electoral votes ("more than one return or paper purporting to be a return from a State") may be returned to Congress, in which case, depending on the facts, the Governor's certificate of ascertainment or a vote of Congress itself will determine which one is to be counted. 3 U.S.C. § 15; *see also Bush v.*

Gore, 531 U.S. 98, 127, 121 S.Ct. 525 (2000) (Stevens, J., dissenting) (explaining that in 1960, Congress chose to count one of two slates of electors submitted from Hawaii). Thus, it is the Electoral Count Act that defines the rights, duties, and limits of authority of electors, as well as the federal officers who receive, investigate, and ultimately decide whether to count their votes.

i. The Defendant Electors' votes were therefore necessary, but on their face and as a matter of law, not sufficient, for official action—the actual counting of the votes—to occur. Thus, under the Electoral Count Act, Plaintiffs cannot meet the key element of their state or federal claims because none of the Defendant Electors—who lodged their votes knowing they could not yet be counted due to the absence of the Governor's all-important credential, and who openly and deliberately refrained from attaching that credential—could have taken the steps necessary to assume to act in an official capacity. Under the Electoral Count Act, it remained to the Governor or some other authority to make their act official.

12. Plaintiffs also lose under each individual statutory theory on the peculiar elements of each statute. The reasons for this are set forth in more detail in the accompanying Memorandum in Support.

13. Finally, Plaintiffs lose under their civil conspiracy claim for a third reason: they have not pleaded actual malice against Troupis or any of the other defendants, which is necessary under Wisconsin law when making a claim for a civil conspiracy to injure a person's reputation. (*See* Memorandum in Support, Section III.C.)

Public Nuisance

14. Plaintiffs' public nuisance claims (Counts II and III) fare no better. (*See* Memorandum in Support, Section IV.) First, they fail because a public nuisance claim must be based on a violation of a public right, but public rights are only those rights related to public property, health, morals, and safety. One citizen's political grievance against another has never been within the ambit of public nuisance law. Relatedly, Plaintiffs do not articulate specific injuries (the same problem identified with their conspiracy claim), and they also fail to articulate specific injuries unique to them, as opposed to all other Wisconsin voters or taxpayers. Additionally, there is no "nuisance per se" based on the alleged repeated violation of criminal laws because that doctrine only applies to property or public health, safety, and morals, and not election laws. Further, as noted above in the conspiracy analysis, Plaintiffs are unable to show that the Defendant Electors broke any laws. Finally, Plaintiffs do not come close to alleging an ongoing injury.

Remaining Claims

15. Plaintiffs' final two claims are even further removed from reason, fact, or law. Plaintiffs plead "punitive damages" (Count V), but the law is clear that this is a remedy, not a cause of action, and Plaintiffs have come nowhere near pleading such an entitlement. *See* Memorandum in Support, Section V.)

16. Plaintiffs also ask the Court to create its own cause of action fashioned to their specific case, citing Article I, Section 9 of the Wisconsin Constitution (Count VI), but that claim is frivolous because the cited section does not confer any legal right or create a new claim for Plaintiffs, it simply guarantees them a day in Court. (*See* Memorandum in Support, Section VI.)

Conclusion

17. Plaintiffs' Complaint articulates a funder's political grievances, not *bona fide* injuries actually experienced by a real plaintiff in need of legal redress, and not state law tort theories that bear any resemblance to claims recognized by courts. Plaintiffs' Complaint ultimately raises questions centered on the United States Constitution and Electoral Count Act. Those questions may well be resolved in other federal courts, but they should be resolved in cases where the United States itself is a litigant, or at least with parties who can present something more than artificial injuries and tort claims.

WHEREFORE, for all of these reasons, as well as for the reasons more fully set forth in his Memorandum in Support, Defendant James R. Troupis respectfully moves this Court to dismiss the Complaint against him for failure to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6), and to award all other relief which may be just and necessary.

Dated this 2nd day of August, 2022.

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