

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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KHARY PENEBAKER; MARY ARNOLD; and  
BONNIE JOSEPH, individually and as relators  
on behalf of the State of Wisconsin,

Case No.: 22CV334

*Plaintiffs,*

v.

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.*

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**MOTION TO SUSPEND BRIEFING SCHEDULE  
ON SOME DEFENDANTS' MOTION TO DISMISS**

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Plaintiffs respectfully request this Court suspend the briefing schedule automatically entered on the motion filed by some, but not all, Defendants to dismiss this action. This Court should grant Plaintiffs' motion for the following reasons:

1. Plaintiffs initiated this case in the Dane County Circuit Court on May 17, 2022, and undertook the task of serving the summons and complaint on each Defendant. (*See* Dkt. 1-2)
2. This case alleges that Defendants violated Wisconsin law in several respects, including by engaging in a conspiracy to violate numerous provisions of law, by posing as the presidential electors entitled to cast the State of Wisconsin's Electoral College votes for President and Vice President in 2020. Every claim for relief asserted in the complaint alleges violations of Wisconsin state law. (*See id.*)

3. On June 15, 2022, ten of the twelve Defendants filed papers removing the case to this Court, citing 28 U.S.C. § 1441(b). (Dkt. 1, ¶¶7, 11) Notwithstanding the citations to 28 U.S.C. § 1441(b), there is not diversity of citizenship among Plaintiffs and the removing Defendants.

4. On June 22, 2022, the same ten Defendants filed an amended notice of removal, replacing citations to 28 U.S.C. § 1441(b) with citations to 28 U.S.C. § 1441(a). (Dkt. 4, ¶¶7, 11)

5. Plaintiffs maintain that removal is defective and improper and that this Court lacks subject matter jurisdiction to adjudicate the parties' dispute.<sup>1</sup> Plaintiffs intend to file motion papers within the deadline set by 28 U.S.C. § 1447(c), seeking remand to state court.

6. Those Defendants who sought removal subsequently filed in this Court a motion to dismiss this case under Federal Rule of Civil Procedure 12(b)(6). (Dkt. 5)

7. The briefing schedule this Court set on those Defendants' motion to dismiss requires Plaintiffs to respond to the motion by July 13, 2022, which is *before* the statutory deadline for seeking remand due to a defect in the removal notice.

8. This Court must find removal to be proper and ensure its subject matter jurisdiction prior to considering the case's merits, including whether the complaint adequately states a claim. *See, e.g., Don Johnson's Haywood Motors, Inc. v. Gen. Motors LLC*, 387 F. Supp. 3d 939, 943 (W.D. Wis. 2019) (recognizing need to adjudicate remand motion before considering earlier-filed motion to dismiss for failure to state a claim); *cf., e.g., Crosby v. Cooper B-Line, Inc.*, 725 F.3d 795, 800 (7th Cir. 2013) ("The federal courts have an independent obligation at each stage of the proceedings to ensure that they have subject matter jurisdiction over the dispute." (cleaned up)).

9. For that reason, resolution of Plaintiffs' anticipated motion for remand should precede any briefing, much less adjudication, of a subset of Defendants' motion to dismiss.

WHEREFORE, Plaintiffs Khary Penebaker, Mary Arnold, and Bonnie Joseph respectfully request that this Court vacate the briefing schedule on some Defendants' motion to dismiss (Dkt. 5), pending determination of Plaintiffs' forthcoming remand motion and this Court's jurisdiction.

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<sup>1</sup> In filing this procedural motion, Plaintiffs concede neither the propriety of removal nor of subject matter jurisdiction in this Court. Plaintiffs expressly reserve all objections to both removal and jurisdiction.

July 6, 2022

Respectfully submitted,

*Electronically Signed by Mel Barnes*

Mel Barnes (SBN 1096012)  
LAW FORWARD, INC.  
222 West Washington Avenue, Suite 250  
Madison, WI 53703  
(608) 535-9808  
mbarnes@lawforward.org

Jeffrey A. Mandell (SBN 1100406)  
Carly Gerads (SBN 1106808)  
STAFFORD ROSENBAUM LLP  
222 West Washington Avenue, Suite 900  
Post Office Box 1784  
Madison, WI 53701-1784  
(608) 256-0226  
jmandell@staffordlaw.com  
cgerads@staffordlaw.com

Mary B. McCord\*  
Rupa Bhattacharyya\*  
Alex Aronson\*  
Joseph W. Mead\*  
Ben Gifford\*  
INSTITUTE FOR CONSTITUTIONAL  
ADVOCACY AND PROTECTION  
Georgetown University Law Center  
600 New Jersey Ave NW  
Washington, DC 20001  
(202) 662-9042  
mbm7@georgetown.edu  
rb1796@georgetown.edu  
aa2595@georgetown.edu  
jm3468@georgetown.edu  
bg720@georgetown.edu

*Attorneys for Plaintiffs*

\* Application for admission *pro hac vice* forthcoming