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DEC 11 2020

CLERK OF SUPREME COURT
OF WISCONSIN

No. _____

In the Supreme Court of Wisconsin

DONALD J. TRUMP, MICHAEL R. PENCE, and DONALD J. TRUMP FOR PRESIDENT, INC.,

PETITIONERS/APPELLANTS,

v.

JOSEPH R. BIDEN, KAMALA D. HARRIS, MILWAUKEE COUNTY CLERK c/o GEORGE L. CHRISTENSON, Milwaukee County Clerk, MILWAUKEE COUNTY BOARD OF CANVASSERS c/o TIMOTHY H. POSNANSKI, Chairman of Milwaukee County Board of Canvassers, DANE COUNTY CLERK c/o SCOTT MCDONNELL, Dane County Clerk, DANE COUNTY BOARD OF CANVASSERS c/o ALAN A. ARNSTEN, Member of Dane County Board of Canvassers, WISCONSIN ELECTION COMMISSION, and ANN S. JACOBS, Chairperson Wisconsin Elections Commission,

RESPONDENTS/APPELLEES

ON APPEAL FROM A DECEMBER 11, 2020 DECISION AND ORDER AFFIRMING DETERMINATIONS OF CANVASSING BOARDS BY HONORABLE JUDGE STEPHEN SIMANEK IN MILWAUKEE COUNTY CASE NO. 2020CV7092

BRIEF OF PLAINTIFFS-PETITIONERS/APPELLANTS

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I. INTRODUCTION[1]

A Presidential election is one of the most important matters in our Republic, representing to all Americans and to the World the sanctity of the rule of law. This matter poses the fundamental legal question regarding such an election: Do our state statutes governing elections mean what they say?

Wisconsin has made explicit choices on how it will conduct its elections, including a choice to treat absentee voting with great caution, guarded by mandatory rules. The Wisconsin Elections Commission ("WEC") made choices explicitly contradicting what those statutes required and then, either on WEC's advice or on their own volition, municipal clerks chose not to follow the absentee voting statutes.

This Court must address these fundamental issues immediately, as identifying the validly-appointed Presidential Electors to represent Wisconsin must be done on a timetable set in the United States Constitution that cannot be changed.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. May the State of Wisconsin establish mandatory procedures for absentee voting by law?

[1] Citations to "P. App. ___" refer to the page(s) of the Appendix filed with Petitioners' Emergency Petition for Bypass the Court of Appeals in this matter; citations to the transcript of the Recount proceedings in Milwaukee County appear as "Milwaukee Cty. Trans. [date] at [page:line]"; and citations to the transcript of the Recount proceedings in Dane County appear as "Dane Cty. Trans. [date] at [page:line]."

2. Were the procedures established by the laws of the State of Wisconsin for absentee voting complied with in Dane and Milwaukee Counties in the November 3, 2020 election?

3. Are the remedies prescribed by Wisconsin's election laws for violations of absentee-voting requirements mandatory?

III. STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Oral argument is warranted to ensure that the issues presented in this case are fully developed. Publication is warranted because the development of a robust body of published case law addressing the issues presented would serve to guide election officials and lower courts in connection with future elections.

IV. STATEMENT OF THE CASE

A. Nature of the Case

This matter addresses certain irregularities, defects and mistakes arising out of the November 3, 2020 election for President and Vice President in the State of Wisconsin. It seeks to have this Court overturn the findings and conclusions of the Dane County and Milwaukee County Canvassing Boards, and the Circuit Court's ruling that was based substantially on misinterpretations of law. The Court is then asked to address the appropriate relief prior to January 6, 2021, so that the votes of the State of Wisconsin may be duly considered in the election for President and Vice President of the United States.

B. Procedural Status

Following the November 3, 2020 election, a verified Recount Petition was timely filed by Donald J. Trump and Michael R. Pence. Verified Recount Petition to WEC, November 18, 2020, https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Trump%20Campaign%20Recount%20Petition.pdf. (P. App. 1-9). The Wisconsin Election Commission entered an Order directing a recount of Dane and Milwaukee Counties, as requested. *In the Matter of: A Recount of the General Election for President of the United States Held on November 3, 2020*, WEC – Order for Recount (Recount EL 20-01), *available at* https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/WEC%20-%20Final%20Recount%20Order.pdf. That recount was completed and the results were noted by the Wisconsin Election Commission. WEC, Signed Canvass for President – Vice President, available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20President%20-%20Vice%20President.pdf; Milwaukee Cty.Trans. 11/27/20 at 27:11 - 28:4 (P. App. 10-11); Dane Cty. Trans. 11/29/20 at 12:15 - 13:5 (P. App. 12-13).

The Appellants, as Petitioners, sought immediate review by Original Action before this Court and that Petition was denied. *Trump v. Evers*, Dec. 3, 2020 Order, No. 2020AP1971-OA. The Appellants timely filed a Notice of Appeal in the Circuit Courts of Dane and Milwaukee Counties and the matters were assigned by the Chief Justice to be heard before the Honorable Judge Stephen Simanek. (P. App. 537-

541). After comprehensive filings and consideration by the Court, Judge Simanek entered a Final Order on December 11, 2020. (P. App. 542). The Appellants immediately filed a Notice of Appeal and filed a Petition for Bypass so that this Court may timely consider the matters raised.

1. Disposition in Circuit Court

The Circuit Court entered a Final Order affirming the determinations of the Dane County and Milwaukee County Boards of Canvassers on December 11, 2020. (P. App. 542)

2. Facts Relevant for Review

Wisconsin allows qualified electors two distinct methods of voting: election day at the polls and absentee voting. Absentee voting is strictly regulated as the Legislature explicitly found there is a substantially higher risk for fraud, abuse, undue influence and other illegal acts. Wis. Stat. § 6.84(1). The process described in the Statutes are mandatory and ballots cast in contravention of those absentee procedures cannot be included in the final certified results of an election. Wis. Stat. § 6.84(2). While described more fully within the context of the Argument below, the essential facts are straightforward.

An application is required for every absentee ballot. Dane County and Milwaukee County received 61,193 and 108,947 absentee ballots by in-person voting within the statutory window allowed for that voting. Milwaukee Cty. Trans. 11/21/20 at 183:15 - 187:22 (P. App. 13-16); Dane Cty. Trans. 11/22/20 at 57:23 - 61:22 (P. App. 21-23); Dane Cty. Board Ex. 1 (P. App. 18). The canvassing boards

of those counties found that as to those in-person ballots there was no separate application. *Id.* Instead, the canvassing boards held that the ballot certification envelope acted as the statutorily required application. *Id.* Municipal clerks elsewhere followed the statutes and required a separate application. Milwaukee Cty. Trans. 11/25/20 at 84:16-85:9 (P. App. 171-172); Dane Cty. Trans. 11/28/20 at 6:7-25 (P. App. 170), Affidavit of Lori Opitz, dated November 20, 2020 at ¶¶ 2-4 (P. App. 31-32).

Absentee ballots must be returned to the municipal clerks in a secure, sealed ballot certification envelope. Wis. Stat. § 6.86(3)(c). The legislature has expressly required that the information on that ballot certification envelope must be fully completed, and if not, the ballot must not be counted. Wis. Stat. § 6.87. The recount disclosed that no fewer than 2,238 envelopes in Dane County and 2,231 envelopes in Milwaukee County were not complete or otherwise lacked essential requirements when received by the municipal clerks or at the time they were opened for counting. (P. App. 56-57, 138-162, 203-213). Some were altered by the municipal clerks to add or change information and some were not altered, but all were counted. *Id.*; P. App. 36-39; Cty. Trans. 11/20/20 at 48:25 - 49:8 (P. App. 58); Milwaukee Cty. Trans. 11/23/20 at 25:19 - 27:21 (P. App.59-61); Dane Cty. Trans. 11/20/20 at 60:1 - 65:14 (P. App. 62-63); Milwaukee Cty. Trans. 11/20/20 at 115:11 - 128:17 (P. App. 64-77).

Municipal clerks are directed by statute to remove those electors claiming indefinite confinement status who the clerk has reasonable information to believe are not qualified. Wis. Stat. § 6.86(2). Based on the recount records, electors were

not removed, claimed indefinite confinement status and subsequently voted without ID, after the clerks of those counties improperly advised them they could claim the status. Milwaukee Cty. Trans. 11/25/20 at Ex. 261, Aff. Jordan Moskowitz dated 11/25/20 (P. App. 128-137); Dane Cty. Trans. 11/28/20 at Ex. 17, Aff. Jordan Moskowitz dated 11/27/20 (P. App. 87-96). Those persons were suspect and should have been investigated and removed from the voting rolls.

A clerk's office is not allowed to conduct clerk-related activities except as expressly provided. Wis. Stat. § 6.855(1). The City of Madison, however, dispatched clerks to 206 separate locations on September 26 and October 3 where they conducted every aspect of an election excepting only distribution of ballots. 17, 271 ballots were received at those events. Dane Cty. Trans. 11/24/20 at 52:16 - 56:15 (P. App. 99-100); Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at ¶¶ 3-6, Ex. B-E (P. App. 101-113); Dane Cty. Trans. 11/24/20 at Ex. 2, Affidavit of Maribeth Witzel-Behl dated Nov. 23, 2020 (P. App. 122-134). Each of these four categories of ballots were counted during the recount over the Appellants objections. Dane Cty. Trans. 11/24/20 at 52:3 - 56:15 (P. App. 99-100); Dane Cty. Trans. 11/24/20 at 72:21 – 73:16 (P. App. 120-121). The final results of the recount include those ballots. *Id.* Those ballots, as more fully described below, should not have been counted. As noted below, all of the ballots cast within the above four categories do not comply with the mandatory provision

V. STANDARD OF REVIEW

Review of a recount determination is governed by Wis. Stat. § 9.01(8)(d). As to findings of law or interpretations of statute, appellate review is *de novo*. The *de novo* review, even before this Court, is to the determinations of the canvassing boards and, not the trial court. *Roth v. LaFarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶15, 268 Wis. 2d 335, 677 N.W.2d 599 (citing *Bar Admission of Vanderperren*, 2003 WI 37, P20, 261 Wis. 2d 150, 661 N.W.2d 27; *"K" Care, Inc. v. Town of Lac Du Flambeau*, 181 Wis. 2d 59, 65, 510 N.W.2d 697 (Ct. App. 1993)).

As to factual findings, the canvassing boards are the finders of fact and a court may not substitute its judgment for that of the board of canvassers as to the weight of the evidence on any disputed finding of fact. The court shall set aside the canvassing board's factual determinations if they are "not supported by substantial evidence." Wis. Stat. § 9.01(8)(d).

VI. ARGUMENT

> (1) LEGISLATIVE POLICY. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.
>
> (2) INTERPRETATION. Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2 and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

Wis. Stat. §§ 6.84(1)-(2).

This matter is straightforward. Are the election statutes to be enforced as written? Petitioners-Appellants (hereinafter, "Appellants") argue the statutes mean what they say and so the findings and conclusions of the Boards of Canvassers must be reversed. The Respondents-Appellees ("Appellees") argue that the advice of the Wisconsin Elections Commission ("WEC"), whether or not consistent with the statutes and case law, excuses the violations, and in any event that the statutory remedy is too harsh, given reliance on that advice.

This Court is bound by the law. The violations are clear.

In the course of the recount, Appellants demonstrated four distinct areas in which the Wisconsin election laws were violated:

1. In-person absentee votes cast without a separate application;
2. Incomplete absentee ballot certifications including those altered by the Clerks;
3. Abuse of Indefinitely Confined status; and
4. Prohibited "Democracy in the Park" events.

As to each, the factual findings in the Record are undisputed as to the events or actions having occurred. The canvassing boards, while acknowledging those facts, held the actions involved did not violate the law. As to identical matters raised before both boards, the legal conclusions were the same (the allegations concerning "Democracy in the Park" are unique to Dane County) and, having determined that there were no violations, had no occasion to address the remedy sought by Appellants.

A. Additional Discussion of Factual Background

President Donald J. Trump and Vice President Michael R. Pence filed a Verified Petition for Recount. The Wisconsin Election Commission ("WEC") found the Petition was legally sufficient, as the initial margin was 0.62%, and ordered a Recount of the results for President and Vice-President, as requested in Dane and Milwaukee Counties. Appellants deposited sufficient funds to reimburse the counties for their expenses. The Recount was completed on Sunday, November 29, 2020. Appellants filed A Petition for Leave to File an Original Action in the Supreme Court of Wisconsin. It was denied. *Trump v. Evers*, Dec. 3, 2020 Order, No. 2020AP1971-OA. Appellants filed a Notice of Appeal on December 3, 2020, pursuant to Wis. Stat. § 9.01(6).

While there were many objections made and irregularities found during the Recount, time limitations imposed by the rules related to choosing Presidential Electors required Appellants to narrow their

claims.[2] Additional facts related to the claims on which Appellants seek relief are stated within each category below.

B. Absentee Voting Violations

"[S]tatutory interpretation 'begins with the language of the statute. If the meaning of that language is plain, that ends the inquiry.'" *State ex rel. Kalal v. Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* (citation omitted). As more fully detailed throughout this Brief, the applicable statutes are plain on their face and unambiguous given the common ordinary and accepted meaning of their terms.

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[2] In Milwaukee County, several other irregularities include:
(a) ballots with no clerk's initials were allowed to be recounted [Milwaukee Cty. Trans. 11/24/20 at 65:21 – 66.21] in contravention of Wis. Stat. § 6.80(2)(d);
(b) after requesting access to written applications [Milwaukee Cty. Trans. 11/20/20 at 10:1 – 5] and being told the written applications were on site or being brought on site [Milwaukee Cty. Trans. 11/20/20 at 36:1 – 6], Appellants were refused access to any of the boxes of documents at the Recount site [Milwaukee Cty. Trans. 11/22/20 at 22:12 – 56:23];
(c) Milwaukee Ward 315 "found" 386 unopened certificate envelopes which, over Appellant's objections, were allowed to be counted.

In Dane County, officials and clerks routinely disregarded the elections laws during their processing of the votes:
(a) Clerk initials preprinted on envelopes (Dane Cty. Trans. 11/21/20 at 103:13);
(b) Clerk initials on ballots signed by unknown persons (Dane Cty. Trans. 11/25/20 at 19:1);
(c) Envelopes witnessed by unauthorized poll workers (Dane Cty. Trans. 11/27/20 at 20:25);
(d) No record of oath or bond required of poll workers (Dane Cty. Trans. 11/27/20 at 21:15);
(e) Incomplete clerk title and address on envelopes (Dane Cty.Trans. 11/25/20 at 62:16);
(f) Envelopes not properly marked as cast in person (Dane Cty. Trans. 11/21/20 at 81:17);
(g) Sealed envelopes opened by clerks and added to count after Election Day (Dane Cty. Trans. 11/28/20 at 47 at 7); and
(h) Ballots initialed in purple and green ink (21 ballots, Dane Cty. Trans. 11/27/20 at 62:8 – 64:21) (P. App. 220-265, 168).

When it comes to our elections, the process of the election and the laws that apply are never based on decisions made at the whim of a municipal or county clerk or, for that matter, by WEC. Indeed, particularly in election law, following the statutes avoids serious problems and the failure to do so would violate a host of fundamental rights. *Bush v. Gore*, 531 U.S. 98, 104-110, 121 S. Ct. 525 (2000). However laudable the goal of a municipal clerk or State agency—and the Appellees after the fact can invent many purported justifications for breaking the law—those who administer elections must follow the statutes. They must not, as they have done in this case, "make stuff up." *See Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶77, 390 Wis. 2d 266, 938 N.W.2d 493 ("It reminds me of the two rules Justice Neil Gorsuch tells his law clerks. The first rule is: Don't make stuff up. The second rule is: When people beg, and say, 'Oh the consequences are so important,' and when they say, 'You're a terrible, terrible person if you don't,' just refer back to Rule No. 1.") (Hagedorn, J., concurring).

The explicit difference between mandatory provisions, strictly construed and applied, for absentee voting, and discretionary provisions applied for non-absentee voting, has been accepted in this State for a very long time, and that difference remains a bedrock for understanding and applying the law where one is an absentee voter. *Gradinjan v. Boho,* 29 Wis. 2d 674, 684, 139 N.W.2d 557 (1966) ("Further, the ballots in question here are absentee ballots. Clearly, the legislature could determine that fraud and violation of the sanctity of the ballot could much more readily be perpetrated by use of an absentee ballot than under the safeguards

provided at a regular polling place. 'While the right of the citizen to vote in elections for public officers is inherent, it is a right nevertheless subject to reasonable regulation by the legislature.'" (citation omitted));[3] *Clapp v. Joint School Dist.*, 21 Wis. 2d 473, 480-81, 124 N.W.2d 678 (1963); *Sommerfeld v. Board of Canvassers*, 269 Wis. 299, 303, 69 N.W.2d 235 (1955); *see also Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020); *accord Lee v. Paulson,* 2001 WI App 19, ¶7, 241 Wis.2d 38, 623 N.W.2d 577 ("[s]ection 6.84(2)'s strict construction requirement, applicable to statutes relating to the absentee ballot process, is consistent with the guarded attitude with which the legislature views that process.").[4]

1. Municipal Clerks Failed to Obtain Applications Prior to Allowing In-Person Absentee Voters the Opportunity to Complete a Ballot.

Pursuant to Wis. Stat. § 6.86(1)(a), an eligible voter must apply to vote by absentee ballot by submitting a "written application to the municipal clerk" by one of six expressly prescribed methods, including by mail, email or facsimile, and in person at the municipal clerk's office. Wis. Stat. § 6.86(1)(a). In order to facilitate

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[3] *See Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform*, at 35–46 (Sept. 2005) (bipartisan Carter-Baker Commission's finding that absentee balloting has been a major source of specific types of fraud); *U.S. Dep't of Justice, Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28–29 (absentee ballots across the nation are particularly susceptible to fraud and abuse because they are marked and cast outside the presence of election officials and the structured environment of a polling place).

[4] The policy of giving effect to the will of the voter does not apply in absentee voting. Wis. Stat. §§ 5.01,6.84. Voting on election day is a right. *Id.* at § 6.05. Voting absentee is a privilege. *Id.* at § 6.84. Actions that do not impede the right to vote on election day do not disenfranchise voters or offend the equal protection clause. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807–09, 89 S. Ct. 1404, 1408–09, 22 L. Ed. 2d 739 (1969); *State ex rel. O'Neill v. Trask,* 135 Wis. 333, 337-38, 115 N.W. 823, 824-25 (1908).

that process, Form EL-121 is provided to the voters. WEC, EL-121 Absentee Ballot Application (rev. 2020-07), https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/EL-121%20Application%20for%20Absentee%20Ballot%20%28rev.%202020-06%29.pdf (P. App. 24-25).

a. In-Person Absentee Voting is NOT Exempt from the Application Requirement.

In-person absentee balloting is authorized by Wis. Stat. § 6.86(1)(b), which requires that:

> If application [for an absentee ballot] is made in person, the application shall be made no earlier than 14 days preceding the election and no later than the Sunday preceding the election. No application may be received on a legal holiday. A municipality shall specify the hours in the notice under s. 10.01 (2) (e). The municipal clerk or an election official shall witness the certificate for any in-person absentee ballot cast.

Wis. Stat. § 6.86(1)(b).

While statutes allow for the absentee process to occur in person, the Wisconsin Statutes expressly and unequivocally make clear that the elector must submit a written application *before* a ballot can be issued and municipal clerks are prohibited from issuing an absentee ballot to any elector unless that elector first submits a written application for the ballot:

> [T]he municipal clerk ***shall not issue an absentee ballot unless the clerk receives a written application therefor*** from a qualified elector of the municipality. The clerk shall retain each absentee ballot application . . . ***if a qualified elector applies for an absentee ballot in person*** at the clerk's office, the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification. ***The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application*** ...

Wis. Stat. § 6.86(1)(ar) (emphasis added).

The application form is simple and straightforward. Form EL-121, a WEC form available to all electors and to the clerks, expressly provides for its use when submitting a ballot during the in-person absentee voting period in two places: (1) a box to be checked by the clerk indicates it was completed for an "in-person voter" and (2) section 5 of the application titled "I PREFER TO RECEIVE MY ABSENTEE BALLOT BY" includes a box to check for "VOTE IN CLERK'S OFFICE." WEC, EL-121 Absentee Ballot Application (rev. 2020-07), https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/EL-121%20Application%20for%20Absentee%20Ballot%20%28rev.%202020-06%29.pdf (P. App. 24-25).

b. The Legislature Commands Strict Compliance With the Application Requirement by Expressly Commanding Absentee Procedures Are Mandatory.

Wisconsin law requires strict compliance with absentee ballot procedures, including those governing the in-person absentee balloting process:

> Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87 (3) to (7) and 9.01(1)(b) 2 and 4 shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

Wis. Stat. § 6.84(2); *accord Lee*, 2001 WI App 19, ¶¶11-12 (court excluded five absentee ballots from the certified election results because there was no corresponding written application; the removal of the five ballots changed the outcome of the election).

The application requirement is found in Wis. Stat. § 6.86(1)(ar), which is among the sections expressly listed in Wis. Stat. § 6.84(2). It is a "mandatory" provision. *Id.* at § 6.84(2).

c. The Municipal Clerks in Milwaukee and Dane Counties did NOT Require Electors to Submit Applications for In-Person Absentee Voting.

The record confirms that the clerks in Dane and Milwaukee Counties ***did not*** obtain an application prior to delivering a ballot to in-person absentee voters. *See e.g.,* Milwaukee Cty. Trans. 11/20/20 at 35:18-25; Milwaukee Cty. Trans. 11/24/20 at 15:16 - 16:14 (P. App. 33-35); Dane Cty. Trans. 11/22/20 at 58:19-21 (P. App. 54); Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12, Aff. Claire Woodall-Vogg dated 11/23/20 at ¶16 (P. App. 36-39). Absentee ballots totaling 108,947 were issued by municipalities within Milwaukee County and an additional 61,193 absentee ballots were issued by municipalities in Dane County during the "in-person absentee voting" period pursuant to Wis. Stat. § 6.86(1)(b) (the "In-Person Absentee Ballots"). Milwaukee Cty. Trans. 11/21/20 at 184:01-187:22 (P. App. 13-16); Dane Cty. Trans. 11/22/20 at 57:23-61:22 (P. App. 21-23); Dane Cty. Board Ex. 1. (P. App. 18).

None of the 170,140 In-Person Absentee Ballots issued in Milwaukee and Dane Counties during the in-person period under Wis. Stat. § 6.86(1)(b) had an associated written application. Instead, in both Dane and Milwaukee Counties, the canvassing boards during the Recount found that the Clerks' receipt of Form EL-122 (the "Envelope" in which the absentee ballot is placed by the elector), was

sufficient to satisfy the statutory written application requirement. *See e.g.,* Milwaukee Cty. Trans. 11/20/20 at 34:13-20 (P. App. 41); Dane Cty. Trans. 11/22/20 at 58:19-21 (P. App. 42); Dane Cty. Board Ex. 1. (P. App. 18); Milwaukee Cty. Trans. 11/20/20 at 57:1 – 66:2 (P. App. 43-52); Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12; Aff. Claire Woodall-Vogg ¶16 (P. App. 36-39). Indeed, in both Dane and Milwaukee Counties, Appellants were barred from reviewing any of the separate applications because, in the Boards' views, a review was entirely unnecessary given each Board's conclusion that the EL-122 ballot certification envelope was a sufficient written application. No evidence of any separate written application for any in-person voter was offered by any party during the recount.

The Dane and Milwaukee Counties' decision not to require a separate application for in-person absentee voters was not the procedure followed by other clerks. Municipalities, outside of Dane and Milwaukee County did comply with the statute by requiring a written application. Dane Cty. Trans. 11/28/20 at Trump Ex. 16, Aff. Lori Opitz ¶¶2-4 (P. App. 31-32).

The practices in Dane and Milwaukee County are plainly contrary to Wis. Stat. § 6.86(1)(a) ("[a]ny elector of a municipality who is registered to vote whenever required and who qualifies under §§ 6.20 and 6.85 as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods….") and Wis. Stat. § 6.86(1)(ar) ("the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality").

This principle, that all absentee voters, without regard to whether the ballot is mailed or delivered in person, are required to complete a separate written application, is confirmed in Wis. Stat. § 6.86(1)(b). That section notes that for the in-person absentee voting period, "the application shall be made." *Id.* Wisconsin Stat. § 6.86(1)(ar) leaves no doubt whatsoever that a written application is required to obtain any and every absentee ballot. "[T]he municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality" and the clerk is required to "retain each absentee ballot application." Wis. Stat. § 6.86(1)(ar).[5]

In an attempt to explain their conduct, the Dane and Milwaukee County Clerks took the position that Form EL-122 (the certificate envelope into which an absentee elector places the ballot) constitutes the application required by the Statute. *See e.g.,* Milwaukee Cty. Trans. 11/20/20 at 34:13-20 (P. App. 41); Dane Cty. Trans. 11/22/20 at 58:19-21 (P. App. 42); Dane Cty. Board Ex. 1. (P. App. 18); Milwaukee Cty. Trans. 11/20/20 at 57:1 – 66:2 (P. App. 43-52); Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12; Aff. Claire Woodall-Vogg ¶16 (P. App. 36-39). This is plainly wrong as it requires removing language from the Statute and requires one to ignore the structure imposed by the Statutes. It is even contradicted by WEC's own guidance.

[5] Form EL-121 can satisfy this requirement. (P. App. 24-25). It contains a specific box to be checked when it is submitted during the in-person voting period. *Id.*

Consider, for example, the statutory language expressly addressing in-person absentee voting. It begins by noting that "[i]f the application is made in person, the application shall be made no earlier than fourteen days preceding the election and no later than the Sunday preceding the election." Wis. Stat § 6.86(1)(b). The statute then, as a separate matter, requires that the clerk "enter his or her initials on the certificate envelope indicating that the absentee elector presented proof of identification to the clerk." Wis. Stat. § 6.86(1)(ar).

The "certificate envelope" (i.e., ballot envelope) and the "application" are distinctly different documents treated differently in the Statute. This reading of Wis. Stat. § 6.86 is confirmed even more emphatically if one considers the requirements related to the certificate envelope (EL-122) and the application. The municipal clerk is, by law, required to "retain each absentee ballot application." Wis. Stat. § 6.86(1)(ar). In contrast to the applications, the certificate envelopes are expressly *not* retained by the municipal clerk, but must, instead, be delivered to the county clerk on the night of the election. Wis. Stat. § 7.52(4)(i) ("… the municipal clerk shall transmit the used envelopes to the county clerk"). WEC even provides a form for the delivery of EL-122 envelopes to the county clerk and sets out post-election procedures describing that process. *See* WEC, Used Certificate Envelopes of Absentee Electors, https://elections.wi.gov/sites/elections.wi.gov/files/gab_forms/4/el_103_used_certificate_envelope_pdf_13716.pdf. WEC emphasizes the statutory requirement to forward the absentee ballot envelopes to the county clerk in its explicit advice to municipal clerks on how to conclude election reporting. *See* WEC, Election Day Manual for Wisconsin

Election Officials (Sept 2020), p. 140, https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Election%20Day%20Manual%20%282020-09%29.pdf. (P. App. 266-457).

One cannot square those two statutory provisions, or WEC's own forms and instructions, with the suggestions now made by the Dane and Milwaukee County Canvassing Boards. *Compare* Wis. Stat. §§ 6.86(1)(ar) and 7.52(4)(i) *with* WEC Forms EL-103, EL-122, and EL-123. If the ballot certificate envelopes are applications, then they must be kept at the municipal clerks' offices. Wis. Stat. § 6.86(1)(ar). However, the Statutes explicitly require that those ballot envelopes ***must*** be delivered to the county clerks. Wis. Stat. § 7.52(4)(i). If the application is a distinct, separate document from the certificate envelope (as the Statute clearly says it is), then the two statutory requirements for where the ballot envelopes and applications are kept (the county and municipality, respectively), as well as WEC's forms and instructions, are entirely consistent.

Interestingly, WEC's Recount Manual also confirms that the EL-122 is not the application required by the Statute. First, it, like the statutory language, recognizes that "the absentee ballot certificate envelopes" are a distinct document to be reviewed in order to determine the number of voters. WEC, Recount Manual November 2020,[6] at pp. 7-8 https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Recount%20Manual%20Final%20%2811-2020%29%20highlight.pdf. (P. App.

[6] A prior version of the Recount Manual, published in August 2018, contained identical information. WEC, Recount Manual August 2018, https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf.

460-496). Acknowledging that the absentee ballot certificate is a distinctly different document from the required application, the manual separately deals with the application in the immediately following section. There is no mention of them achieving the same purpose or being essentially the same thing—an application.

Moreover, in attempting to justify the situation in which the "separate application" is missing, WEC makes no mention whatsoever of the Certificate Envelope (Form EL-122), but instead simply explains other reasons to ignore the absence of the required absentee ballot application. If, as the canvassing boards now suggest, Form EL-122 is the application, then there would never be a need to look for a separate application, because, by law, every absentee ballot must be delivered in a sealed, ballot certificate envelope. Wis. Stat. § 6.87(4)(b)1.

Indeed, the actual WEC application form, EL-121, contains a specific box to be checked for in person absentee voters. (P. App. 24-25). Again, there would be no need for that box on the form if, as is now suggested, the certificate envelope was the application. Necessarily, all voters will complete a certificate envelope because there is no other legal way to submit an absentee ballot, whether they vote in person at the clerk's office or vote through the mail.

Certain practical aspects of the process also confirm the need for a separate application. The law expressly requires that "the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification. The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name

on the elector's application …" Wis. Stat. § 6.86(1)(ar). If the application and the certificate are one document, there would be no point making the comparison.

Moreover, the linear nature of time makes clear the envelope cannot be the application. An application must be received ***before*** the ballot is provided. Recall the language of the Statute, "the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality." *Id.* The envelope is not provided until the ballot has already been issued. If EL-122 is the application, then it would need to be completed and returned to the clerk before the ballot is provided. But Form EL-122 is not given to the clerk until after the elector has voted, the ballot is placed in the sealed certificate envelope, and only then is the certificate envelope given to the clerk. The clerk cannot receive a certificate envelope before a ballot has been issued as required by the statute. Wis. Stat. § 6.86(1)(ar).

d. Absentee Ballots Cast Without a Corresponding Application Must Be Excluded From the Final Vote Totals.

Pursuant to Wis. Stat. § 6.84(2), the requirements of § 6.86 are expressly mandatory. "Ballots cast in contravention of [§ 6.86] ***may not be counted***" and "***may not be included in the certified result of any election***." Wis. Stat. § 6.84(2) (emphasis added); a*ccord Lee*, 2001 WI App 19.

In *Lee*, a local county supervisor's race during the November 2000 general election went to a recount. 2001 WI App 19, ¶¶1-3. During the recount, the Polk County Board of Canvassers concluded that Walter Lee received 159 votes and that David Paulson received 161 votes, but during the recount the board found that five absentee

ballots did not have the required application. *Id.* ¶2. Nevertheless, the Board of Canvassers decided to include the absentee ballots without applications. *Id.* ¶3.

On review of the Board of Canvassers' results, the Court of Appeals held that any and all absentee ballots issued without a written application cannot be counted pursuant to Wis. Stat. §§ 6.84(1)-(2) & 6.86(1)(ar) and since all of the defective absentee ballots were cast for Mr. Paulson, five votes were deducted from his totals and Mr. Lee prevailed with 159 votes to Mr. Paulson's 156 votes. *Id.* ¶11.

This is not news to WEC. In a remarkably disingenuous section of its Recount Manual (discussed earlier in the context of the separate character of the application and certificate envelope), WEC suggests that the Boards of Canvassers should ignore both the Statutes and *Lee v. Paulson*, and instead should follow the informal opinion of WEC's staff attorney. *See* WEC, Recount Manual November 2020, at pp. 7-8, n. 5, https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf (stating that "[t]here should be a written application for each absentee ballot envelope except those issued in-person in the clerk's office," instructing canvassers to "not reject an absentee ballot if there is no separate written application," and noting *as contrary authority* for these instructions both Wis. Stat. § 6.84(2) and *Lee*, 2001 WI App 19). ***This is an express acknowledgement by WEC that it does not follow the law.*** Of course, WEC avoids any responsibility for this patently incorrect advice by explaining that the Boards of Canvassers must make their own legal decisions.

Id. at pp. 14-15 ("Despite advice provided by Commission staff when asked by a board of canvassers, ultimately that statutory body retains the authority and discretion to make decisions it deems appropriate.").

During the Recount, Appellants identified 170,140 In-Person Absentee Ballots that were issued and cast without the required written application in Milwaukee County and Dane County. Milwaukee Cty. Trans. 11/21/20 at 184:01-187:22 (P. App. 12-16); Dane Cty. Trans. 11/22/20 at 57:23-64:22 (P. App. 22-23); Dane Cty. Board Ex. 1 (P. App. 18). The Boards verified and agreed with those numbers. *Id.* The Boards then held that those ballots satisfied the statutory requirement for an application because the EL-122 Envelope constitutes a sufficient application. Dane Cty. Board Ex. 1 (P. App. 18); Milwaukee Cty. Trans. 11/20/20 at 34:13-20, 57:1 – 66:2 (P. App. 41, 43-52); Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12, Aff. Claire Woodall-Vogg dated 11/23/20 at ¶ 16) (P. App. 36-39). Appellants objected to counting any of those ballots and requested that they be excluded from the results. Milwaukee Cty. Trans. 11/22/20 at 4:20-24 (P. App. 17); Dane Cty. Trans. 11/20/20 at 15:9-18:14 (P. App. 20-21). The Boards overruled Appellants' objections and continued illegally counting such ballots as part of the Recount. Milwaukee Cty. Trans. 11/21/20 at 186:11 – 187:10 (P. App. 27-28); Dane Cty. Tran. 11/20/20 at 36:15 – 40:25 (P. App. 29-30).

The Biden parties did not dispute the total number of in-person ballots cast nor offer any contrary evidence. The Biden parties did not offer evidence of any in-person ballots with an application other than the EL-122 certification envelope.

Failing to grant the objection to absentee ballots cast without an application was legal error by the Boards of Canvassers. They "erroneously interpreted a provision of law." Wis. Stat. § 9.01(8)(d). A correct interpretation of the law requires that the decisions flowing from the legal error, the inclusion of those ballots in the election totals, must be reversed. *Id.* ("set aside . . . the determination of the board of canvassers").

2. Incomplete Ballot Envelopes Cannot Be Included In the Election Results and Selectively Altering Envelopes Cannot Correct the Omissions.

Absentee balloting must be witnessed, and the certification on the outside of the envelope provides a place where the witness must sign ***and provide his or her address***. Wis. Stat. § 6.87(2) (emphasis added). If the certification lacks the witness's address, it cannot be counted: "***If a certificate is missing the address of a witness, the ballot may not be counted.***" Wis. Stat. § 6.87(6d) (emphasis added). Lest there be any doubt about whether this is discretionary or mandatory, this provision falls within the scope of provisions that Wis. Stat. § 6.84(2) declares mandatory. As recently as 2015, the Wisconsin Legislature reaffirmed the essential requirement that the ballot envelope certificate must be fully and accurately completed by the voter and the witness. 2015 Wis. Act 261, § 78 (creating Wis. Stat. § 6.87(6d)).

The Legislature provided one, and only one, legal method for remedying an improperly completed absentee ballot certification (such as a certification lacking the witness's address), and that is to return it to the elector:

> If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot . . .

Wis. Stat. § 6.87(9).

Ignoring these express legislative commands, WEC provided advice to the clerks that they could alter the ballot certification envelopes to provide missing information. (P. App. 458-459). The advice is plainly contrary to the statutory language. They argue, in part, that there is no express prohibition on changing the envelopes. Again, this ignores the plain meaning of the statutory language—the ballot "may not be counted" if it is missing an address. Wis. Stat. 6.87(6d). Nothing permits a clerk to change anything: if it lacks an address, it is not to be counted. In effect, the clerks did what no canvassing board or court is allowed to do—ignore that the certification envelope is incomplete. A canvassing board or a court faced with an incomplete certification must not count the ballot. *Id.* Any contrary policy yields uneven results: if you are lucky enough to have a witness who is a friend of the clerk, then your certification gets corrected and your ballot is counted. If the clerk is not familiar with your witness, and, you made the exact same omission, your ballot will not be counted. Election law does not countenance such whimsy or luck. Such disparate treatment illustrates the nonsensical position advanced by WEC.

Moreover, if the ballot certification envelope can just be completed at will by the clerk, then Wis. Stat. § 6.87(9) has no legal effect. That provision allows correction only through the voter. WEC's suggestion that clerks ought to change

ballot certificate envelopes removes the protection against fraud, cronyism, undue influence and other feared behavior the Statutes are expressly worded to avoid. This allows an executive agency, WEC, to invade the province of the legislature and violates the separation of powers doctrine. *See* Wis. Const. art. IV, § 1; art. V, § 1, art. VII, §§ 2-3, 5.

Contrary to the law, both Dane and Milwaukee Counties held that incomplete and altered absentee envelopes were allowed. Dane Cty. Trans. 11/20/20 at 60:1 - 65:14 (P. App. 62-63); Milwaukee Cty. Trans. 11/20/20 at 115:11 - 128:17 (P. App. 64-77). Milwaukee County counted all those ballot envelopes falling within the category of altered (red-ink) absentee ballots and entered that number into the record through a series of tabulations. The total was 2,231. (*See* P. App. 203-213 citing to all such tabulations). In Dane, 2,238 envelopes were incomplete, with corrections on only some of those. Dane Cty. Trans. 11/24/20 at 20:23-22:20, Ballot No. A7619 (P. App. 144-147); 11/25/20 at 43:18-44:21, Ballot No. 738A (P. App. 148-150); Dane Cty. Trans. at 11/25/20 at 83:1-84:22, Ballot No. 1002A (P. App. 140-141, 143); 11/28/20 at 61:1-25, Ballot No. 372 (P. App. 138-139); Ballot No. 571A (P. App. 151).

No municipal or county clerk is authorized to alter an elector's certificate envelope. Yet for the 2020 Election, clerks in municipalities throughout Milwaukee and Dane Counties altered absentee ballot certifications rather than follow the correct procedure under Wis. Stat. § 6.87(9).

Milwaukee used red ink to signify that an address had been added or altered by the clerk's office. *See* Aff. Claire Woodall-Vogg dated 11/23/20 at ¶ 9 (P. App. 36-39); *see also* Youtube.com, Milwaukee Central Count Training Video (April 1, 2020), https://www.youtube.com/watch?v=hbm-pPaYIqk (last visited November 25, 2020) (City of Milwaukee training video indicating, from 10:40 to 11:15 of the video, that election officials may insert a missing witness address in "red ink," which is contrary to law). In other municipalities, the clerks initialed the certification next to the addresses they added. (P. App. 138-151).

Appellants objected to the counting of ballots that were submitted in incomplete or altered envelopes, including those without addresses and clerks' initials. *See* Dane Cty. Trans. 11/20/20 at 48:25 - 49:8 (P. App. 58); Milwaukee Cty. Trans. 11/23/20 at 25:19 - 27:21 (P. App. 59-61). During the Recount, it was uncontested that the objected to ballots were, either incomplete or altered. Having noted the existence of incomplete and altered envelopes, the Boards of both counties nonetheless allowed them to be counted. Dane Cty. Trans. 11/20/20 at 60:1 - 65:14 (P. App. 62-63); Milwaukee Cty. Trans. 11/20/20 at 115:11 - 128:17 (P. App. 64-77). Each overruled the objections on legal grounds that such incomplete and altered absentee envelopes were legal and they were counted. *Id.*

Failing to grant the objection is legal error by the Boards and should be reversed. The Boards "erroneously interpreted a provision of law and a correct interpretation compels" that the ballots not be counted or included in the certified results. Wis. Stat. §§ 6.84(2) and 9.01(8)(d).

3. COVID-19 is Not an Excuse to Change Absentee Voting.

The effect of the COVID-19 pandemic has been extraordinary. Businesses, courts, and government have tried to adapt, sometimes within Wisconsin's legal boundaries and sometimes beyond them. This was no different in our elections. Municipal clerks laudably adapted with plexiglass shields, masks, and social distancing on election day. Of course, however laudable the intentions (and good people can differ on the real motives and intentions), the election laws must be followed. In two substantial respects, Milwaukee and Dane counties took steps which clearly went beyond their legal authority.

a. The Abuse of Indefinitely Confined Status Caused the Improper Counting of Ballots.

Wisconsin statutory law expressly requires, with very limited exceptions, that all eligible electors must provide proof of identification in order to register to vote, and each time they vote. Wis. Stat. §§ 6.79(2)(a), (3), and 6.87(1). Photo identification is also required when requesting to vote by absentee ballot. Wis. Stat. §§ 6.86(1)(ac), (ar) and 6.87(1).

The exceptions include an exception if an elector certifies that he or she is "indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period." Wis. Stat. § 6.86(2)(a). In fact, in order to qualify for this exception, an elector must be "elderly, infirm or disabled ***and*** indefinitely confined." *Frank v. Walker*, 17 F. Supp. 3d 837, 844 (E.D. Wis. 2014) (emphasis added), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014). An elector who meets

the strict definition of "indefinitely confined" in Wis. Stat. § 6.86(2)(a) must sign a statement to that effect, and then "the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement . . . which contains the name and address of the elector and verifies that the name and address are correct." Wis. Stat. § 6.87(4)(b)2.

For the November election, the number of electors claiming "indefinitely confined" status and thereby obtaining an absentee ballot without the otherwise required photo identification increased dramatically. Milwaukee, for example, went from 6,000 absentee ballot applications from indefinitely confined electors at the beginning of 2020 to over 51,060 by November 2020. Milwaukee Cty. Trans. 11/24/20 at 15:16 – 16:12, Ex. 158, Aff. Claire Woodall-Vogg dated 11/23/20 at ¶¶13-15 (P. App. 36-39); Aff. Jordan Moskowitz dated 11/25/20 (P. App. 128-137).

The number of those claiming to be indefinitely confined in Dane and Milwaukee Counties particularly increased after the clerks of Dane and Milwaukee counties incorrectly advised voters that they could claim the status solely on the Governor's Safer at Home Order. Aff. Jordan Moskowitz dated 11/27/20 at ¶¶2-6, Ex. 1-4 (P. App. 87-96) (Ex. 3 & 4 attached graphically show the dates of applications and demonstrates that the numbers increased and never reduced); Aff. Jordan Moskowitz dated 11/25/20 at ¶¶1-4 (P. App. 128-137). This Court declared that such advice was incorrect. *See,* March 31, 2020 Order, *Jefferson v. Dane County*, No. 2020AP557-OA at 2 (P. App. 78-80) (explaining that the Dane County and Milwaukee County Clerks indicated that "all Dane [and Milwaukee] County

voters could declare themselves to be 'indefinitely confined' under Wis. Stat. § 6.86(2)" because of the Safer at Home Order "thereby avoiding the legal requirement to present or upload a copy of the voter's proof of identification when requesting an absentee ballot" and concluding that such "advice was legally incorrect"). What this Court could not have anticipated was the damage done to the election process and the willful neglect of municipal and county clerks in enforcing the statutes.

As the Recount demonstrated, the damage was prolific. People continued to apply for the status, did not provide identification, and ultimately voted. Aff. Jordan Moskowitz dated 11/27/20 at ¶¶2-6, Ex. 1-4 (P. App. 87-96) (Ex. 3 & 4 illustrating no reduction of applicants); Aff. Jordan Moskowitz dated 11/25/20 at ¶¶1-4 (P. App. 128-137). The clerks and the electors each had an obligation to act and each failed. Municipal clerks are expressly charged with the responsibility to review and expunge from the voter rolls those claiming to be Indefinitely Confined Voters when the clerk has "reliable information that [the] . . . elector no longer qualifies for the service." Wis. Stat. § 6.86(2)(b). Moreover, electors who claimed they were Indefinitely Confined, but were not physically ill, infirm, elderly, or disabled were obligated to take steps to remove themselves from that status prior to the November 3, 2020 election. Wis. Stat. § 6.86(2)(a) ("[i]f any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk"). The Dane County Clerk acknowledged this obligation. Aff. Jordan Moskowitz (11/27/20) ¶8, Ex. 6 (P. App.

87-96). The data proves no effective action was taken to fulfill the statutory obligation.

During the Recount, Appellants identified with specificity Indefinitely Confined Absentee Ballots that were issued after the improper March 25, 2020 statements by the Dane County and Milwaukee County Clerks. *See* Milwaukee Cty. Trans. 11/27/20 at 19:23 - 22:3 (P. App. 81-84); Dane Cty. Trans. 11/28/20 at 7:2 - 12:6 (P. App. 85-86); Aff. Jordan Moskowitz dated 11/27/20 at ¶¶2-6, Ex. 1-4 (P. App. 87-96) (8,907 identified in the category in Dane County); Aff. Jordan Moskowitz dated 11/25/20 at ¶¶1-4 (P. App. 128-137) (19,488 identified in the category in Milwaukee County). That identification was based on records provided to Appellants by the Boards during the recount and there was no objection or dispute about the accuracy of the number. *Id.* Appellants isolated only those claiming the status after March 25, 2020, (the date of the offending Facebook post discussed by the Supreme Court in *Jefferson v. Dane County*, No. 2020AP557-OA) who had no identification on file and who did not vote in specific locations where their identity would have been noted. Appellants objected to counting any of these ballots and requested that they be excluded from the results. Dane Cty. Trans. 11/28/20 at 7:12 – 17:11 (P. App. 85); Milwaukee Cty. Trans. 11/27/20 at 19:23 - 22:22 (P. App. 81-84); Milwaukee Cty. Trans. 11/25/20 at Ex. 261, Aff. Jordan Moskowitz dated 11/25/20 (P. App. 128-137). The Boards overruled the Appellants' objections, holding that the clerks had no obligation to review the rolls. Yet, as Appellants

demonstrated at the recount, identifying electors was straightforward – by date of the status and proof of identification. *Id.*

The Canvassing Boards of both counties overruled the objections related to 28,395 Indefinitely Confined Persons who obtained that status after March 25, 2020, (the date of the improper advice by the clerks to the public) and who voted without any identification. The Boards held that as a matter of law the clerks were not obligated to verify that individuals qualified for indefinitely confined status. Dane Cty. Trans. 11/28/20 at 7:12 – 17:11 (P. App. 85-86, 173); Milwaukee Cty. Trans. 11/27/20 at 19:23 - 22:22 (P. App. 81-84); Milwaukee Cty. Trans. 11/25/20 at Ex. 261, Aff. Jordan Moskowitz dated 11/25/20 (P. App. 128-137). Failing to grant the objection is a legal error by the Boards and should be reversed.

b. "Democracy in the Park" Was a Flagrant Violation of the Protections of Wisconsin Absentee Voting Statutes.

Wisconsin does not allow advance voting. Instead, it has created a system of carefully-tailored Statutes for absentee voting. Among the issues addressed in the Statutes are matters related to how a municipal clerk must act in advance of the election. For example, a municipal clerk must have only one place where ballots are received and if an alternate location is preferable, for in-person voting and the like, then the clerk must comply with very stringent rules described in Wis. Stat. § 6.855(1). That law comports with prior decisions of this Court, under a predecessor Statute, that excluded absentee ballots delivered to a location other than the

appropriate municipal clerk's office. *Olson v. Lindberg*, 2 Wis. 2d 229, 236, 85 N.W.2d 775 (1957).

Apparently to avoid numerous restrictions imposed by the Statutes, the City of Madison developed "Democracy in the Park." By this scheme, the City placed poll workers in 206 locations on September 26 and October 3, 2020 (Dane Cty. Trans. 11/24/20 at 52:16 - 56:15 (P. App. 99-100); Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at ¶¶3-6, Ex. B-E (P. App. 101-113); Dane Cty. Trans. 11/24/20 at Ex. 2, Aff. of Maribeth Witzel-Behl dated Nov. 23, 2020 (P. App. 122-134)), mimicked polling places by putting up signs identical to those for elections (Dane County Trans. 11/24/20 at 52:16 - 64:10 (P. App. 116-119); Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at ¶2, Ex. A (P. App. 101-113)), and then acted in every way as if it were an election, excepting only that they did not distribute ballots. *See* Dane Cty. Trans. 11/24/20 at 52:16 - 64:10 (P. App. 116-119).

While the audacity of the scheme might be lauded by the Biden campaign – it heavily promoted the scheme (Dane Cty. Trans. 11/24/20 at 57:11 - 58:16 (P. App. 114); Dane Cty. Trans. 11/28/20 at Ex. 18, Aff. Kyle J. Hudson dated 11/23/20 at ¶2, Ex. A (P. App. 101-113))—it flagrantly violated a host of election laws. If, for example, these locations are "extensions" of the Clerks' Offices, they are barred by prior rulings of this Court. *Olson*, 2 Wis. 2d at 236 (excluding absentee ballots delivered to a location other than the appropriate municipal clerk's office under a prior version of the statute).

Moreover, the "Democracy in Park" locations were not legally established alternate absentee ballot sites authorized by Wis. Stat. § 6.855(1) because they were not established by the City of Madison Common Council. Instead, they were "created by, planned by, staffed by, and paid for by the City Clerk's Office." City of Madison, Statement of Madison City Clerk Maribeth Witzel Behl Regarding Democracy in the Park (Sept. 25, 2020), https://www.cityofmadison.com/clerk/news/statement-of-madison-city-clerk-maribeth-witzel-behl-regarding-democracy-in-the-park. *See also* Dane Cty. Trans. 11/24/20 at Ex. 2, Aff. Maribeth Witzel-Behl dated 11/23/20 at ¶5 (P. App. 122-124). Alternate absentee ballot sites may only be established by the "governing body of a municipality" and, if such a site is designated by the governing body of a municipality, then "no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners." Wis. Stat. § 6.855(1). There can be only one such site, but here there were 206. Further, the single site must be "as near as practicable" to the original office – something that could not have been true of all 206 sites. *Id.* "Democracy in the Park" most certainly did not comply with Wis. Stat. § 6.855(1).

Democracy in the Park failed in other ways as well. For example, Wisconsin Statutes contemplate only limited ways in which an absentee ballot may be returned. It is either mailed or it is delivered in person to the clerk's office. Wis. Stat. § 6.87(4)(b). The dilemma for Madison was that these sites were either considered

additional clerks' offices, in which case they were barred by Wis. Stat. § 6.855(1), or they were not clerks' offices, in which case they ran afoul of the allowable methods for delivery of such ballots and rules barring ballot delivery at places other than the clerk's office. Wis. Stat. § 6.87(4)(b); *Olson,* 2 Wis. 2d at 236. Either way, the ballots received at "Democracy in the Park" violated the law and must not be counted.

The City of Madison, apparently recognizing the potential claim that might come after the election, commingled all the absentee ballots received at those events with other absentee ballots. The City itself presented undisputed facts that 17,271 ballots were received at those events while admitting it cannot identify them anymore. Dane Cty. Trans. 11/24/20 at 60:5 - 64:4 (P. App. 215-219).

Appellants objected to the counting of the ballots received during the "Democracy in the Park" events. Dane Cty. Trans. 11/24/20 at 52:3 - 56:15 (P. App. 99-100). The Board held, as a matter of law, that the events did not violate the Wisconsin election Statutes. Dane Cty. Trans. 11/24/20 at 72:21 – 73:16 (P. App. 120-121). The Board denied Appellants' objection. That was legal error by the Dane County Board of Canvassers and should be reversed by this Court.

C. Relief for the Statutory Violations Must Include a Drawdown of Votes.

The factual and legal conclusion that the Wisconsin Absentee Voting Statutes were violated by the actions of Dane and Milwaukee clerks is required by a fair reading of Wisconsin Statutes and the facts. Having found the violation, this Court will need to determine the appropriate remedy.

1. Absentee Voting Which Violates Wisconsin Statutes May Not Be Counted.

As noted earlier, the Legislature has directed that violations of the provisions related to absentee voting require that the ballots "may not be counted" and "may not be included in the certified results of any election." Wis. Stat. § 6.84(2). The Statute is clear and unequivocal. Moreover, the provisions of that Statute are, by law, "mandatory." Wis. Stat. § 6.84(2); *see Gradinjan,* 29 Wis. 2d at 684-85 (holding that absentee ballots without the name or initials of the town clerk must be excluded under the mandatory provision of predecessor statute); *Lee,* 2001 WI App 19, ¶¶11-12 (absentee ballots issued without a corresponding written application must be excluded).

The process for withdrawing already cast ballots is described in the Statutes and prior cases as a "drawdown." Wis. Stat. § 9.01(1)(b)4.b.-e. That is, having determined the number of ballot envelopes that are illegal, the voter roll for that municipality is then reduced by that total number. *Id.* This leads to an imbalance between ballots cast and number of eligible voters. *Id.* The ballots for that municipality are divided into absentee and non-absentee ballots, and as all the reductions would be from the absentee ballots, there is then a random drawdown of absentee ballots until the number of legal voters matches the number of ballots. *Id.* The tally for the Offices of President and Vice President will then be redetermined, and those new results will become the official tally to be certified by WEC. *Id.* That is the process required by Statute and requested by Appellants as the appropriate remedy for all unlawfully cast ballots.

It is also the remedy acknowledged by the Corporation Counsel for Milwaukee County:

> "MS. DAUN: I think, Mr. Chairman, you can simply take a vote to include those as part of the record evidence here, all of them. Therefore, a total can be obtained at any time by rereview once the court jurisdiction determines that those are voters whose votes should not count."

(11/21/20 at 170: 4 - 15.)[7]

2. As the Wisconsin Recount Statutes Provide The Exclusive Judicial Remedy for Absentee Voting Violations, Laches, and Other Equitable Defenses Do Not Apply.

"All parties seem to agree that Wis. Stat. § 9.01(2017-18) constitutes the 'exclusive judicial remedy' applicable to this claim. § 9.01(11)." *Trump v. Evers*, Dec. 3, 2020 Order, No. 2020AP1971-OA. Accordingly, it is not surprising that the Appellants have, in fact, merged all their various claims into this action. However, WEC and others now suggest Wis. Stat. § 9.01(1) is not the exclusive remedy. They come to this conclusion by arguing that WEC advice, whether correct or incorrect under the statutes, is, for every municipal clerk following it, a complete exoneration of otherwise illegal or unauthorized behavior. And, from this they conclude the Appellants were required, prior to the election, to seek definitive legal decisions on WEC's advice or be barred by laches. That position is categorically wrong for a number of reasons.

[7] It appears that several clerks (the clerk for the cities of Milwaukee and Wauwatosa in particular) violated the law by writing the voter number of all absentee voters in their wards on the ballots themselves, which is illegal under Chapter 12, and have opined that if this Court remands the case for a drawdown that they would once again ignore the law and instead identify specific ballots that can be tied to specific voters for exclusion (R. 11/23/20 at 30:19 - 31:15). Appellants request a drawdown, as that is the only legally available remedy. Wis. Stat. § 9.01(b)(4)(b)(e).

WEC's argument rests on an incorrect premise at the outset. The Appellants claims were complete and perfected with proof of individuals who cast ballots in a manner not allowed by a statute. That is it. Nothing more is required for each claim. Nothing in the Appellants' claims rests on the advice of WEC – right, wrong, or otherwise.

Instead, it is the canvassing boards' and Appellees' position that rests in whole or in part on: 1) either a direct affirmative defense that WEC's advice can be relied upon, or 2) its indirect counterpart that the Appellants were required to bring an action before the election to challenge the advice. It is the canvassing boards, not the Appellants, who must demonstrate that relying on WEC's advice is a defense recognized in the law. That they cannot do. Such advice is not law, and it cannot replace the law. This Court could not be more clear in describing what such advice means:

> They are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions. They simply "explain" statutes and rules, or they "provide guidance or advice" about how the executive branch is "likely to apply" a statute or rule. They impose no obligations, set no standards, and bind no one. They are communications *about* the law—**they are not the law itself**. They communicate intended applications of the law—they are not the actual execution of the law. Functionally, and as a matter of law, they are entirely inert. That is to say, they represent nothing more than the knowledge and intentions of their authors.

SEIU, Local 1 v. Vos, 2020 WI 67, ¶102, 393 Wis. 2d 38, 946 N.W.2d 35 (bold emphasis added, italics original).

If advice is as meaningless as described in *SEIU,* reliance upon it is not a defense to violating the statute. If the Appellants claim that certain actions violated explicit absentee voting statutes, WEC's advice is no defense. WEC's advice does

not replace the laws of this State. Of course, WEC itself recognizes this, acknowledging as it does that the canvassing boards must obtain their own independent advice. *See* WEC, Recount Manual at pp. 33-34, *available at* https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Recount%20Manual%20Final%20%2811-2020%29%20highlight.pdf (stating that, "Despite advice provided by [WEC] . . . ultimately [the Board of Canvassers] retains the authority and discretion to make decisions it deems appropriate.") (P. App. 460-496).

To be clear WEC can, and does, change its advice.[8] *Id.* at pp. 7-8, n. 5; *see also* Recount Manual August 2018, *available at* https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf (P. App. 501-533). WEC's guidance can be changed, enhanced, revoked, or ignored at any time as evidenced by the limitless number of advisories, letters, opinions, booklets, etc. that it generates constantly. *See* Elections Day Manual, (Sep. 2020) (P. App. 266-457); WEC forms EL-100-401 (300 different forms created by WEC). *See*

[8] In fact, at the meeting held by WEC only hours after the President filed his Recount Petition and paid the $3 million Recount fee, WEC changed the Recount Manual. In addition to several non-substantive changes made related to COVID protocols, WEC staff attempted to remove from the manual all of the language related to the Board of Canvassers' duty to review the absentee ballot applications. Thankfully, those changes were not made due to a 3-3 tie vote among the Commissioners. In any event, the fact that WEC attempted to change the rules of election procedure, after scrutiny of election irregularties had begun and with a specific focus on the President's princple argument, demonstrates exactly why laches is a poor fit for this case. *See* WEC Notice, WEC Orders Presidential Election Recount (Nov. 19, 2020), *available at* https://elections.wi.gov/node/7250.

https://elections.wi.gov/forms/. And WEC, as noted throughout this Brief, does not feel duty-bound to follow the law.[9]

Perhaps recognizing the futility of relying on WEC's advice as a defense, the Appellees construct a corollary: Appellants, they argue, were required to challenge the advice prior to the election, or be barred from any challenge related to it. That is nonsense. If the advice itself has no meaning and no force whatsoever, then one cannot be required to challenge it. Moreover, the advice can be properly ignored, as we know in the case of separate applications being required for in-person voters elsewhere in the state. *See* Dane Cty. Trans. 11/28/20 at 6:7-25 (P. App. 170), Ex. 16, Aff. Lori Opitz dated 11/20/20 (P. App. 31-32).

A claim brought on such a matter, where there is no certainty of application and the advice given is contrary to the statute itself, would not survive a simple motion based on ripeness. *Texas v. United States,* 523 U.S. 296, 300 (1968) (A claim is not ripe for adjudication if it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal citation omitted). If

[9] In the trial court, Appellees suggested that if Appellants contested the guidance provided by WEC, they must do so through Wis. Stat. § 227.40(1), which requires a declaratory judgment action before the election. That is inaccurate for a number of reasons. First, Appellants are not challenging WEC's mistaken guidance, they are challenging the already-cast unlawful ballots and the wrongul actions of the clerks based on WEC's guidance. Second, *SEIU, supra,* makes such an action a waste of time as the WEC guidance has no force of law. As anyone can choose to follow it or not, a legal action would not be ripe for adjudication before the election took place. Third, Appellees' reading – that the sole action an unsuccessful candidate can take when guidance/advice is involved is a declaratory action – would read out of existence Wis. Stat. § 9.01(11) as the exclusive judicial path in a recount. Finally, Wis. Stat. §227.40(3) expressly allows a party to challenge the invalidity of a guidance document when the guidance is raised as a defense. If the guidance is contrary to the statutes, it is most certainly invalid.

a claim may not be ripe (or is even reasonably believed not to be ripe), failing to bring that action cannot be barred by laches. *What-A-Burger of VA., Inc. v Whataburger, Inc.,* 357 F.3d 441, 449-50 (4th Cir. 2004) (quoting 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §31: 19(4th ed. 2003). ("[o]ne cannot be guilty of laches until his right ripens into one entitled to protection. For only then can his torpor be deemed inexcusable.")

The implications of the Appellees' arguments on future elections are extraordinary. Candidates for office do not expect to lose. They expect to win. As such, they do not engage in game-theory analysis of 'what-ifs' for how a clerk might violate the law. If the election is not close, the candidate would have no reason to raise any matter. But, under Appellees' theory, he must nonetheless bring an action because 'maybe' the election will be close, and the difference 'could' be that behavior which the candidate thinks might be questionable. By the Appellees' logic, every candidate must bring every challenge to illegal behavior of the clerks in every election, no matter how remote the possibility it would affect the outcome and no matter that the clerk could, in fact, decide to follow the law. This is contrary to Wisconsin law, which requires that challenges to irregular or improper conduct in an election be brought after the election. *See Clifford v. Sch. Dist.*, 143 Wis. 2d 581, 587, 421 N.W.2d 852, 854 (Ct. App. 1988) (citing Wis. Stat. § 9.01).

In any event, no matter how the Appellees frame laches and the related equitable arguments, such as estoppel or unclean hands, there would need to be evidence of the knowledge and intent of the candidate against whom laches is

asserted. There must be, at a minimum, proof of a conscious decision by the candidate not to bring an action of which he is aware and he knows will be critical to the outcome. But here, the Appellees can point to no evidence that the Appellants knew about, or considered the implications of, the behaviors occurring before November 3 after which all actions merged into the recount. Wis. Stat. § 9.01(11). The Appellees introduce no evidence about the Appellants' pre-election knowledge or strategy. Absent evidence, the suggestion they make is nothing more than speculation and would apply to every candidate in every election. The implication itself demonstrates the plain lack of merit in the assertions about laches.

Of course, applying the doctrine of laches is particularly inappropriate in matters of public interest. *Carlson v. Oconto Cty. Bd. of Canvassers*, 2001 WI App 20, 240 Wis. 2d 438, 443-44, 623 N.W.2d 195, 197-98 (citing *State ex rel. Pelishek v. Washburn*, 223 Wis. 595, 600, 270 N.W. 541 (1936)) (the public policy of the election statutes is that substantial violations of the election law should operate to vacate an election); *McNally v. Tollander*, 100 Wis. 2d 490, 507 (Wis. Sup. Ct. 1981) (after forty percent of the electorate were issued the wrong ballot by their clerks, Court found "the processes of the law [were] so infected as to require nullification of the election"); *see also Jenkins v. Williamson-Butler*, 883 So.2d 537 (4th Cir. La. Ct. of App. 2004) (court set aside an election after mass irregularities deprived more than twenty percent of the electorate their right to vote due to no fault of their own); N.Y. Code § 3-108(1) (codifying a twenty-five percent statutory voter participation minimum).

Even perhaps more important than the general public policy problems the Appellees' position would cause, such an application of laches to this case would also place an intolerable burden on the exercise of a First Amendment right – the right of a citizen to run for public office by seeking to persuade other citizens to cast their votes for him or her by forcing candidates, in the midst of an election, to continuously monitor ever-shifting election procedures and guess at which ones may impact the result and which procedure in a post-election challenge might be deemed barred under the doctrine of *laches*. The cloud of confusion, uncertainty, and ambiguity this regime would cast over all candidates in all elections would impose a massive burden on the First Amendment right to engage in election advocacy. *See e.g. Arizona Free Enterprise Club PAC v. Bennett*, 564 U.S. 721, 735-40 (2011); *Randall v. Sorrell*, 584 U.S. 230, 261-63 (2006); *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 834-42 (7th Cir. 2014). Appellees' argument would also violate the void-for-vagueness due process doctrine, a well-established aspect of due process jurisprudence. *See* e.g., *FCC v. Fox TV Stations, Inc.,* 567 U.S. 239, 253-54 (2012); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 478-79 (7th Cir. 2012).

VII. CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court's decision affirming the holdings of the Dane County and Milwaukee County Boards of Canvassers. So holding, the Court should direct a remedy

consistent with the Statutes within sufficient time to determine the correct outcome for the Presidential election in Wisconsin.

Dated this 11th day of December, 2020.

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CERTIFICATION

I hereby certify that this memorandum conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this memorandum is 11,101 words, exclusive of the caption, Table of Contents and Authorities, Statement of Issues, signature page, and the Certification.

Dated this 11th day of December, 2020.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

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